

# Confronting Misinformation through Social Science Research: *SFFA v. Harvard*

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*In the ongoing case of Students for Fair Admissions v. Harvard, Edward Blum is attempting once again to use Students for Fair Admissions (SFFA), his anti-affirmative action organization, to further limit the use of race as one factor in holistic admissions processes. But this time, Blum purports to be acting on behalf of a group of anonymous Asian Americans. This strategy, designed to dismantle all affirmative action policies in selective college admissions, is an attempt to drive divisions between Asian Americans and other people of color to increase white access and entitlement to highly selective universities. SFFA falsely claims that Asian Americans are discriminated against in Harvard's admissions process, basing its claims on misleading information and launching a deceptive media campaign against affirmative action.*

*In the summer of 2018, 531 social scientists with expertise on Asian Americans, race and equity, or college admissions, filed an amicus curiae brief with the US District Court for the District of Massachusetts in support of Harvard University's holistic admissions process. The brief details the myriad ways in which the plaintiff's claims are false and misleading and provides evidence that Asian Americans in fact benefit from holistic review. In this article, the authors of the brief provide background information on the case itself, the legal and social context of the case, as well as the importance of social scientists' participation in producing research relevant to the topic at hand. Following the preface, the brief is printed in full as originally filed, and edited only to comport with the format of this journal. Trial proceedings in the case concluded in early 2019. As of the publishing date of this article, the case remains pending before the district court.*

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## INTRODUCTION

In the spring of 2018, the US District Court in Massachusetts received requests by both parties to *Students for Fair Admissions v. Harvard* to consider ruling on the case in their favor without going to trial. *SFFA v. Harvard* involves a challenge to Harvard College’s race-conscious admissions policies and practices. The lawsuit (along with another against the University of North Carolina, Chapel Hill, *Students for Fair Admissions v. University of North Carolina et al.*) was filed on November 17, 2014, by Students for Fair Admissions (SFFA), an organization created by Edward Blum. Blum began to recruit Asian American members of SFFA right before he lost the last major challenge against affirmative action before the US Supreme Court in *Fisher v. University of Texas at Austin* (2013, 2016).<sup>1</sup> The case will establish an important record as it potentially makes its way to the US Supreme Court and could have important implications for all universities, public and private.

As social scientists concerned about the implications of the case for race-conscious policies in postsecondary education, we believed it was vitally important that the lower federal court base its decision on the rigorous body of research that supports Harvard’s policy. With this important interest in mind, a small group of us from across the country with expertise on issues related to the case, with the assistance of our pro-bono attorney, drafted an *amicus curiae* brief on behalf of social science experts on Asian Americans, race, or college access. The *amicus* brief, reprinted in full here, was filed by 531 social scientists with doctoral degrees who have extensively studied education issues related to Asian Americans, college access, and race in post-secondary institutions and society. To our knowledge, no other case has involved this many social scientists at such early stages of a case. In this preface, we provide a short background about the case, outline the reasons motivating the *amicus* brief, and discuss important issues to consider moving forward.

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1. See *Fisher v. Uni. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013); *Fisher v. Uni. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

## I. CASE BACKGROUND

*SFFA v. Harvard* represents the latest challenge against race-conscious admissions policies in postsecondary education. The case dates back to 2014, when Edward Blum created an organization called Students for Fair Admissions to intentionally recruit, via websites, Asian Americans willing to serve as the face of his ongoing legal challenges to affirmative action. As Blum openly shared in public remarks at a Chinese American community event in Houston in 2015, he “needed Asian plaintiffs” to continue his legal attacks on affirmative action.<sup>2</sup> Via websites launched in April 2014, Blum specifically sought out Asian American plaintiffs to launch high-profile lawsuits against the University of Wisconsin-Madison, the University of North Carolina-Chapel Hill, and Harvard University, the institution that provided a model for race-conscious admissions that the Court embraced in *Regents of the University of California v. Bakke*.<sup>3</sup>

Unlike prior challenges involving public colleges or universities under the Equal Protection Clause (EPC) of the Fourteenth Amendment to the US Constitution, the lawsuit against Harvard is based on Title VI of the Civil Rights Act of 1964.<sup>4</sup> In interpreting the requirements of Title VI, courts have generally applied an analytic framework that is similar to one that has been used to interpret the requirements of the EPC under the Fourteenth Amendment. That framework applies the legal test of strict scrutiny, in which the court first determines whether the race-conscious policy furthers a “compelling interest”; and if so, whether the policy (i.e., the consideration of race in admissions) is “narrowly tailored” to achieve that interest. The Court applied this strict scrutiny framework to address the constitutionality of affirmative action in post-secondary admissions for the first time in *Bakke*<sup>5</sup> and subsequently applied it in *Grutter v. Bollinger*,<sup>6</sup> *Gratz v. Bollinger*,<sup>7</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>8</sup> and most recently in *Fisher v. University of Texas at Austin*.<sup>9</sup> In these past cases,

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2. OiYan Poon, *Edward Blum: “I needed Asian plaintiffs,”* YOUTUBE (July 30, 2018), <https://www.youtube.com/watch?v=DiBvo-05JRg> [<https://perma.cc/4ZPW-7N3A>].

3. Julianne Hing, *Wanted: Disgruntled Asian-Americans to Attack Affirmative Action*, COLORLINES (Apr. 25, 2014), <https://www.colorlines.com/articles/wanted-disgruntled-asian-americans-attack-affirmative-action> [<https://perma.cc/B2JQ-UFLU>]; see 438 U.S. 265 (1978).

4. 42 U.S.C. § 2000d (2012). As a private institution, Harvard is not governed by the Equal Protection Clause (EPC) of the Fourteenth Amendment, but is subject to the requirements of Title VI. Title VI applies to private institutions that receive federal funding, as Harvard does, and prohibits institutions from intentionally discriminating on the basis of race. Specifically, Title VI prohibits intentional discrimination based on “race, color, or national origin . . . under any program or activity receiving federal financial assistance.” *Id.* The basic purpose is to ensure that public funds are not used in a way that subsidizes or results in discrimination on these bases.

5. See Lilianna M. Garces, *Aligning Diversity, Quality, and Equity: The Implications of Legal and Public Policy Developments for Promoting Racial Diversity in Graduate Studies*, 120 AM. J. EDUC. 457, 459–463 (2014) (explaining significant shift in the Court’s jurisprudence). See also *Bakke*, *supra* note 3.

6. 539 U.S. 306 (2003).

7. 539 U.S. 244 (2003).

8. 551 U.S. 701 (2007).

9. *Fisher I*, 570 U.S. at 303; *Fisher II*, 136 S. Ct. at 2208. All these cases involved public

the Court ruled that limited consideration of race in admissions, as one factor among many, is constitutional.

In the complaint against Harvard, SFFA lists anonymous Asian Americans as its members and advances many of the same arguments advanced (and rejected) in prior challenges to race-conscious admissions, including that Harvard's race-conscious admissions policy does not satisfy strict scrutiny and, as argued in past cases like *Grutter* and *Fisher*, that *Bakke* should be overruled. In this respect, as Garces and Poon recently argued, these attacks on race-conscious policies are not new, as they build on a history of challenges against affirmative action in postsecondary admissions that have played out in legal and policy arenas for over half a century.<sup>10</sup>

However, the intentional use of Asian American challengers in the case against Harvard continues—and expands upon—a prior line of attack that began in the 1980s, where affirmative action opponents strategically use the argument of discrimination against a non-white group, Asian Americans, to challenge the policy.<sup>11</sup> This strategy seeks to split interracial coalitions that support the policy and capitalizes on misinformation about the case that

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institutions. As such, the courts have not directly addressed whether these requirements apply in the same way to private institutions when considering a discrimination claim under Title VI. In its legal filings Harvard argues that they may not, given that as a private institution, it has a “weighty academic freedom interest, protected by the First Amendment, in choosing its students, and in determining how they are educated (including through the judgment about the educational benefits following from a diverse student body).” Memorandum in Support of Defendant’s Motion for Summary Judgment at 16 n.12, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176 (D. Mass. June 15, 2018).

10. LILIANA M. GARCES & OIYAN POON, *ASIAN AMERICANS AND RACE-CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION’S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION* 5 (2018).

11. In the 1980s, Asian American applicants accused a number of highly selective higher education institutions of discrimination against Asian Americans in their admissions processes. Of these cases, the Department of Justice investigated three institutions: Harvard University, UCLA, and UC Berkeley. In 1990, Harvard University was not found to have actively discriminated against Asian Americans because the discrepancy in its admissions rates could be described by other factors. *Id.* at 8–9. UCLA was ordered to admit some Asian American applicants who had previously been denied admission, and UC Berkeley was not found to have discriminated against Asian Americans but did publicly apologize for favoring white applicants in its admissions process. DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* 9, 33–38 (1992). Denying admission to Asian American applicants who would have otherwise been admitted were they white is known as *negative action*. See also 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). Although negative action is different from affirmative action, public discourse around affirmative action has and continues to obfuscate the discrepancies between these two key concepts. While negative action is discrimination against Asian Americans because they are not white, affirmative action considers race as a factor within a factor in admissions that is necessary for institutions to achieve diverse student bodies. Black, Latinx, Native American, and sometimes Asian American students can benefit from affirmative action, while only white students can benefit from negative action. Today’s debate about affirmative action is reminiscent of the debate of the 1980s and 90s in some ways, although the legal and social contexts have changed. The scope of the use of race in holistic admissions was narrowed dramatically in *Grutter* and later upheld in *Fisher II*. *Fisher II* upheld the use of race as a factor within a factor, and held that the only legally permissible rationale for the use of race in holistic admissions was so that institutions could admit diverse student bodies, thereby benefitting *all* students. 136 S. Ct. at 2210–11. However, despite shifts in the legal landscape, many Asian Americans remain skeptical that discrimination persists in selective admissions.

media accounts have facilitated.<sup>12</sup>

## II. POLITICS OF RACIAL DIVISION AND WIDESPREAD MISINFORMATION

The *SFFA v. Harvard* case represents a renewed effort in the legal strategy to end race-conscious admissions. While past cases have relied on white plaintiffs, the *SFFA v. Harvard* challengers are non-white and Asian American. Hence, the claim is not one of “reverse discrimination,” but rather that race-conscious admissions policies intentionally discriminate against a non-white group. Asian Americans are enrolled in highly-selective colleges and universities at numbers far above their representation in the population. These statistics add a twist to the current legal controversy, which argues that a non-white group that is overrepresented relative to its numbers in the population is disadvantaged by policies designed to increase the representation of other non-white groups that are underrepresented. In order to prevail, SFFA must prove that that disadvantage is caused by intentional race-based discrimination.

Opponents of affirmative action place Asian Americans at the heart of today’s debate.<sup>13</sup> As people of color who experience racial discrimination, Asian Americans are uniquely positioned by conservative white interests as unfairly discriminated against by a policy designed to increase racial diversity on college campuses. At the same time, resistance to this narrative is also apparent. One of the hallmarks of the *SFFA v. Harvard* case is the range of competing views advanced by different Asian American stakeholders. A significant proportion of signatories on our brief consisted of scholars of Asian American Studies who identify as Asian American. As the United States becomes more racially diverse and as people of color become more polarized in terms of access to education and other social resources, these intra-minority and within-group conflicts will surely continue.

Proponents of race-conscious admissions argue that misinformation fuels these conflicts. After SFFA issued a press release announcing that they had filed a motion for summary judgment against Harvard in mid-June of 2018, media coverage of the SFFA’s pleadings almost uniformly focused on statistical analysis conducted by Dr. Peter Arcidiacono, SFFA’s expert, related to the personal ratings that are part of the admissions process. Much of that coverage emphasized the plaintiff’s charge of racial discrimination against Asian Americans, focusing on Dr. Arcidiacono’s statistical analysis that purportedly showed that even after accounting for certain other characteristics and admissions factors, Asian Americans exhibited lower scores on overall personal ratings than white applicants. Major news outlets

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12. GARCES & POON, *supra* note 10, at 5.

13. *Id.* at 2; Michele S. Moses et al., *Racial Politics, Resentment, and Affirmative Action: Asian Americans as “Model” College Applicants*, 90 J. OF HIGHER EDUC. 1 (2019).

covering the story used the term “personality” to convey SFFA’s charges related to the personal ratings. For example, a *New York Times* headline claimed that “Harvard Rated Asian-American Applicants Lower on Personality Traits . . . .”<sup>14</sup> A headline for *The Hill* claimed “Harvard gives Asian-Americans lower personality ratings than other races, lawsuit claims.”<sup>15</sup>

In the brief, we directly refute the erroneous characterization of Harvard’s personal rating as a “personality” score and confront other misconceptions that can be challenged with social science findings. Media reports mischaracterizing one aspect of Harvard’s admissions as a “personality rating”<sup>16</sup> have ignited concerns that Harvard’s process is unfair to Asian Americans because it is based on negative judgments about their personalities. But when we look at what Harvard actually considers (which it calls a “personal rating”), it is part of a larger process that considers each applicant’s achievements, talents, and experiences, including the role that race may have played in their life and educational journey.

### III. OUR INTERESTS AS SOCIAL SCIENTISTS

As researchers with expertise on the topics of Asian Americans and race-conscious admissions in higher education, we became increasingly concerned about the plaintiff’s arguments in this case and the mischaracterization of the issues in the media. We thus came together during these early stages of the litigation to present the evidence to the court. We believe it is critical for the court to base its decision on facts and social science research that, based on our review—and that of the many nationally renowned scholars who signed the brief—support the legality of Harvard’s policy.

Overall, the brief addresses three interrelated areas: (1) the benefits of race-conscious admissions for Asian Americans; (2) Plaintiff’s misguided emphasis on standardized test scores; and (3) Plaintiff’s reliance on racial stereotypes. We address these briefly here.

#### A. *The Benefits of Race-Conscious Admissions for Asian Americans*

Despite not being the legal issue in the case, one of the persistent concerns we hear from many Asian Americans who support race-conscious admissions is the belief that, implicitly, anti-Asian attitudes among admission readers and committees could be working against Asian

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14. Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html> [<https://perma.cc/9YLU-YEC7>].

15. Justin Wise, *Harvard gives Asian-Americans lower personality ratings than other races, lawsuit claims*, THE HILL (June 15, 2018), <https://thehill.com/homenews/392478-harvard-gives-asian-americans-lower-personality-traits-than-other-races-lawsuit> [<https://perma.cc/9VW4-VY97>].

16. Hartocollis, *supra* note 14.

Americans in race-conscious holistic review.<sup>17</sup> To date, however, there is no empirical evidence supporting this possibility. Instead, research suggests that holistic review processes that provide more comprehensive information about Asian American applicants in selective institutions may actually increase their rates of admission.<sup>18</sup> This process allows Harvard to bring together a diverse class along many dimensions, including race, where students can challenge and learn from one another. That goal of institutional diversity, and of the process to attain it through race-conscious admissions, is one that Asian Americans and research consistently support.<sup>19</sup>

### B. *Misguided Emphasis on Standardized Test Scores*

At the heart of most of the arguments against Harvard is that the university rejected more Asian Americans than white applicants who have near perfect standardized test scores and high school grades. Why would Harvard reject such perfect applicants, if not for racial discrimination? What underlies the argument is the belief—contradicted by research—that such high achievement is a sign of innate ability and intelligence rooted in either biology or an amorphous idea about “Asian culture.” Numerous studies have shown that individuals with more economic resources have higher scores on these tests.<sup>20</sup> That is not because of their inherent intelligence, but because of their financial and family resources. There are many reasons thousands of applicants to Harvard, including many with perfect scores, get rejected every year. From the many academically qualified who apply, what matters to Harvard is building a community of students who can learn from one another and challenge each other. That process requires considering the life experiences students bring to the classroom, including their experience with racial discrimination. And that process is one that the Supreme Court has upheld as lawful in legal cases that date back forty years.

### C. *Racial Stereotypes*

What is particularly troubling about the undue emphasis on standardized test scores and grades, however, is that it plays on subtle, oftentimes unconscious, racial stereotypes about achievement. Studies have

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17. See Stacey J. Lee & Kevin K. Kumashiro, *Bias against Asian-American students is real. Affirmative action isn't the problem*, VOX (June 27, 2018), <https://www.vox.com/the-big-idea/2018/6/27/17509140/admissions-bias-personalities-harvard-affirmative-action> [<https://perma.cc/E577-K9RE>] (noting that explicit or implicit anti-Asian bias is not the same as affirmative action).

18. See Michael N. Bastedo et al., *Information Dashboards and Selective College Admissions: A Field Experiment* 3–4 (2017).

19. See Janelle Wong et al., *Asian American Attitudes toward Affirmative Action: Framing Matters*, AAPI DATA (Oct. 1, 2018), <http://aapidata.com/blog/aa-attitudes-affirmative-action> [<https://perma.cc/S7EQ-TZ6X>].

20. See Krista Mattern et al., *ACT Composite Score by Family Income*, ACT RES. & POL'Y (2016), <https://www.act.org/content/dam/act/unsecured/documents/R1604-ACT-Composite-Score-by-Family-Income.pdf> [<https://perma.cc/SH7E-HNSM>].

shown, for example, that white students view Asian American students as more competent and “hard-working” than they do Black and Latino students.<sup>21</sup> In the same way, SFFA’s overemphasis on test scores assumes that high standardized test scores and grades among the Asian American challengers are the result of their unique individual effort, implying that lower scores for other racial minorities are not. It is important not to buy into these racial stereotypes about achievement, nor presume that Blum has in mind the interest of the Asian American community. Not all Asian American students represent the ultra-high-achieving individual who would be admitted on test scores alone.

#### IV. LOOKING TO THE FUTURE

We are heartened to see the broad level of support and engagement from the social science community, as reflected in the hundreds of individuals who joined as friends-of-the-court in this case. We hope the court considers the evidence and rejects the overdue emphasis on test scores, misinformation, and racial stereotypes underlying SFFA’s arguments in this case.

In addition to informing the legal deliberations in the case, we also note that the brief’s impact extended beyond those directly involved in legal decision-making. On the day the brief was submitted, the Department of Justice (DOJ), led by Attorney General Jeff Sessions, filed a statement of interest in support of the plaintiff. This action by the DOJ was widely covered by the press. In these stories, the social scientists brief was also cited to illustrate alternative perspectives on the issue. This took place in several stories featured by national news outlets, including *The New York Times*, *CNN*, and *National Public Radio (NPR)*.<sup>22</sup> In addition, signatories on the brief circulated it on social media. In this respect, the research cited and the points highlighted in the brief helped to inform the larger public about the value of race-conscious admissions practices. The circulation of the brief through major media outlets was especially critical given that media coverage of the case often reinforced misconceptions about the admissions process and the effects of Harvard’s policies on Asian American applicants.

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21. Jerry Z. Park et al., *Exceptional Outgroup Stereotypes and White Racial Inequality Attitudes toward Asian Americans*, 78 SOC. PSYCHOL. Q. 399, 404 (2015); Doris F. Chang & Amy Demyan, *Teachers’ Stereotypes of Asian, Black, and White Students*, 22 SOC. PSYCHOL. Q. 91, 93 (2007); Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority Than for European American Students? A Meta-Analysis*, 99 J. OF EDUC. PSYCHOL. 253 (2007).

22. Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html> [<https://perma.cc/LEM5-ACDV>]; David Shortell, *Justice Department Sides with Asian-Americans Suing Harvard over Admissions Policy*, CNN (Aug. 30, 2018), <https://www.cnn.com/2018/08/30/politics/harvard-justice-department-affirmative-action-asian-americans-lawsuit/index.html> [<https://perma.cc/UN77-8LBQ>]; Merrit Kennedy, *Justice Department Sides Against Harvard In Racial Discrimination Lawsuit*, NPR (Aug. 30, 2018), <https://www.npr.org/2018/08/30/643307030/justice-department-sides-against-harvard-in-racial-discrimination-lawsuit> [<https://perma.cc/9WJM-9JKN>].

The landscape of the public debate around race-conscious admissions has changed considerably over the past decade. Although Asian Americans have long been part of the debate over race-conscious admissions,<sup>23</sup> the role of Asian Americans has intensified in part because of changes in immigration law after 1965, and 1990 in particular, which encouraged hyper-selectivity of highly educated immigrants from Asia. While these policies facilitated the recruitment of highly educated immigrants from a range of Asian countries, including the Philippines and South Korea, the majority of specialty occupation visas have been granted to immigrants from India and China. The class and educational background of the latter group, along with the development of ethnic-specific communication platforms where misinformation about race-conscious admissions flourishes, helps to explain a new political agenda, which is laser-focused on admissions to highly selective universities.<sup>24</sup> Perhaps most critically, some members of this group have fueled an effective political movement to oppose the use of race as a factor in elite colleges. Activism among a highly educated, well-organized cohort of Chinese immigrants helps to amplify existing opposition to race-conscious admissions embodied by groups like SFFA. For those who seek to preserve race-conscious admissions policies, engaging with the media and public education to dispel popular misconceptions must be part of any public strategy.<sup>25</sup> As we emphasize in the brief, social science research is a unique and critical resource for these efforts.

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23. TAKAGI, *supra* note 11, at 21–24.

24. GARCES & POON, *supra* note 10, at 6, 20–23 (providing detailed examples of changes in U.S. immigration policy and Chinese migration policy that facilitated the influx of highly skilled, professional-class immigrants).

25. *Id.* at 24–25. *See also* Liliana M. Garces, Patricia Marin & Catherine L. Horn, *Arguing Race in Higher Education Admissions: Examining Amici’s Use of Extra-Legal Sources in Fisher*, J. OF DIVERSITY IN HIGHER EDUC. (forthcoming 2019) (manuscript at 8) (on file with authors) (finding that *amici* opposing race-conscious admissions strategically relied on media sources to support arguments in legal briefs).