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When Claims Collide: Students for Fair Admissions v. Harvard and the Meaning of Discrimination

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When Claims Collide: *Students for Fair Admissions v. Harvard* and the Meaning of Discrimination

Cara McClellan*

This term, the Supreme Court will decide Students for Fair Admissions v. President and Fellows of Harvard College (SFFA v. Harvard), a challenge to Harvard College’s race-conscious admissions program. While litigation challenging the use of race in higher education admissions spans over five decades,¹ previous attacks on race-conscious admissions systems were brought by white plaintiffs alleging “reverse discrimination”² based on the theory that a university discriminated against them by assigning a plus factor to underrepresented minority applicants. SFFA v. Harvard³ is distinct from these cases because the plaintiff organization, SFFA, brought a claim alleging that Harvard engages in intentional discrimination by penalizing Asian American applicants despite their status as people of color.⁴ SFFA alleges

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1. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978) (holding that a medical school admissions plan with a quota for students admitted from minority groups violates the Equal Protection Clause of the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003) (holding that the use of race as a factor in law school admissions did not violate the Equal Protection Clause of the Fourteen Amendment or Title VI of the Civil Rights Act of 1964); *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 301–03 (2013) (finding that use of race in the admissions process must be evaluated under strict scrutiny); *Fisher v. Univ. of Tex. at Austin* (Fisher II), 579 U.S. 365, 369 (2016) (finding that use of race as a factor in holistic review of undergraduate applications survived strict scrutiny review as it was narrowly tailored to serve a compelling state interest).

2. *Reverse Discrimination*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“A type of discrimination in which majority groups are purportedly discriminated against in favor of minority groups . . .”).

3. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)* (SFFA v. Harvard), 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d sub nom.*; SFFA v. Harvard, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

4. The Supreme Court consolidated SFFA v. Harvard and *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (2021), *cert. granted and consolidated*, SFFA v. Harvard, 142

that Asian American applicants are discriminated against in the college admissions process because Harvard undervalues standardized test scores and other “objective” factors on which Asian American students in the aggregate outperform other applicants. Yet, at the same time that a Massachusetts district court considered SFFA’s claims, on the other side of the country, a coalition of students of color, including Asian American students, brought *Smith v. Regents of University of California*, a lawsuit arguing that standardized test scores were racially biased against them and that reliance on standardized test scores was itself discriminatory. The claims in these cases provide an entry point for considering what I call “mirror” claims of discrimination, in which allegations of discrimination are brought challenging both sides of an issue or policy decision, in this case the use of standardized test scores in the college admissions process. This Article argues that without a contextual analysis that is grounded in white supremacy,⁵ discrimination claims lose their meaning and could be actionable on competing sides of many issues and policy decisions. Instead, courts have a duty to provide guidance about when liability exists by considering how racial disparities in power and resources operate in the context of a particular claim. First, I argue that one way of distinguishing between what appear to be mirror discrimination claims is to ask whether there is a strong basis in evidence to believe that a policy or decision would entail liability for disparate impact discrimination. If so, avoiding disparate impact liability provides a defense against a claim of intentional discrimination and a basis for distinguishing the reverse action. Next, I consider how to analyze mirror claims that involve intragroup variation within a protected group, such as in the *Smith* and *SFFA* cases where there are contested arguments about how different

S. Ct. 895 (2022). Subsequent to the appointment of Justice Ketanji Brown Jackson, who was recused from hearing the Harvard lawsuit, the Court ordered that the cases no longer be consolidated. See Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (Jul. 22, 2022, 6:43 PM), <https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case> [<https://perma.cc/4C4Y-L78H>] (noting that Justice Jackson recently completed a term on Harvard’s board of overseers as the basis for her recusal). This Article focuses primarily on the litigation against Harvard because it includes a claim of discrimination against Asian American applicants, while the Supreme Court’s review of UNC’s policy considers only whether race-conscious admissions is constitutional and whether UNC properly rejected a race-neutral alternative. *But see* Complaint at 2–4, 17, *SFFA v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954) (alleging discrimination against Asian American and white applicants).

5. I am drawing on the definition of “white supremacy” developed by Frances L. Ansley, and adopted by critical race theorists, such as Professor Cheryl Harris. See Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) (defining white supremacy as “[a] political, economic and cultural system in which whites overwhelmingly control power and material resources . . . and [in which] white dominance and non-white subordination [exist] across a broad array of institutions and social settings”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 n.10 (1993) (adopting Ansley’s aforementioned definition of white supremacy).

subgroups of Asian American applicants are impacted. I argue that for an intentional discrimination claim to succeed, it should address, rather than ignore, how intragroup differences contribute to experiences of subordination. Finally, I argue that, as Harvard students testified, diversity within diversity can challenge stereotyping and essentialism and provide a pathway to combat subordination.

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INTRODUCTION

On October 31, 2022, the Supreme Court heard arguments in *Students for Fair Admissions (SFFA) v. Harvard*,⁶ a challenge to Harvard College’s race-conscious admissions program. With a new conservative majority of the Supreme Court that has already demonstrated a willingness to overturn precedent in other contexts,⁷ many commentators have speculated that the Court is poised to overturn over forty years of case law⁸ upholding a university’s ability to consider race as one of many factors in admissions in order to serve a compelling interest in the educational benefits of diversity.⁹ Indeed, in their opinions in the *Fisher v. Texas*

6. 142 S. Ct. 895 (2022).

7. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning *Roe v. Wade*, 93 S. Ct. 704 (1973) and *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) both of which provided constitutional protection for abortion).

8. See, e.g., Edwin Rios, *Supreme Court Could Strike Blow against Affirmative Action in Harvard Case Ruling*, *GUARDIAN* (Aug. 2, 2022), <https://www.theguardian.com/us-news/2022/aug/02/supreme-court-affirmative-action-harvard> [<https://perma.cc/4NPX-E76K>] (quoting Yale University Law School professor Justin Driver) (“Republican-appointed justices have ‘repeatedly resisted whatever temptation they have to impose constitutional colorblindness’ in college admissions.”).

9. See cases cited *supra* note 1.

decisions, Justice Thomas and Justice Alito previewed that they would rule that race-conscious admissions is unconstitutional and that they believe race-conscious admissions discriminates against Asian American applicants, even though that issue was not a question before the Court or part of the record presented in the *Fisher* case.¹⁰

After her unsuccessful challenge to affirmative action in *Fisher*, the named plaintiff, Abigail Fisher, took up the concerns that Justices Alito and Thomas highlighted in *Fisher I* and *Fisher II*, and collaborated with Edward Blum, the architect behind multiple challenges to race-conscious policies in different areas of the law,¹¹ to found Students for Fair Admissions.¹² SFFA created websites entitled Harvardnotfair.org and UNCnotfair.org to recruit Asian American applicants to join SFFA and challenge race-conscious admissions through litigation.¹³ Ultimately, SFFA filed lawsuits challenging race-conscious admissions at the University of

10. *Fisher I*, 570 U.S. 297, 331 (2013) (Thomas, J., concurring) (“There can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race.”); *Fisher II*, 579 U.S. 365, 410 (2016) (Alito, J., dissenting) (“[T]he UT plan discriminates *against* Asian-American students.”). During oral argument in *Fisher I*, Justice Alito questioned the attorney for the University of Texas as to whether Asian Americans were treated fairly in the admission process, and in particular whether subgroups of Asian American applicants were considered. Transcript of Oral Argument at 52:07–20, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345). Justice Alito wrote even more forcefully in his opinion dissenting from the Court’s decision to reaffirm race-conscious admissions in *Fisher II* that the University of Texas could not establish a compelling interest in diversity because it discriminated against Asian Americans. *Fisher II*, 579 U.S. at 410 n.4 (internal citations omitted) (“Given a ‘limited number of spaces,’ providing a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission.”). Stephanie Mencimer, *Affirmative Action Won, but Now It Faces a Far Bigger Threat*, MOTHER JONES (June 24, 2016), <https://www.motherjones.com/politics/2016/06/samuel-alito-fisher-v-texas-affirmative-action/> [<https://perma.cc/4TRD-72LQ>].

11. See Stephanie Mencimer, *Meet the Brains behind the Effort to Get the Supreme Court to Re-think Civil Rights*, MOTHER JONES (Mar./Apr. 2016), <https://www.motherjones.com/politics/2016/04/edward-blum-supreme-court-affirmative-action-civil-rights/> [<https://perma.cc/WP7H-D94U>] (noting how Edward Blum, a former stockbroker, has successfully sought plaintiffs to file lawsuits attacking race-based protections in cases such as college admissions and voting rights); Stephanie Mencimer, *Here’s the Next Sleeper Challenger to Affirmative Action*, MOTHER JONES (July 19, 2016), <https://www.motherjones.com/politics/2016/07/abigail-fisher-going-stay-mad/> [<https://perma.cc/YQ6M-SSUR>] (discussing Edward Blum); Joan Biskupic, *Special Report: Behind U.S. Race Cases, a Little Known Recruiter*, REUTERS (Dec. 4, 2012, 1:50 PM), <http://www.reuters.com/article/us-usa-court-casemaker-idUSBRE8B30V220121204> [<https://perma.cc/J3ES-C6G3>] (discussing Edward Blum).

12. *SFFA v. Harvard*, 980 F.3d 157, 164 (1st Cir. 2020) (“SFFA was incorporated on July 30, 2014. Its original board of directors had three self-appointed members: Edward Blum, President, Abigail Fisher, Secretary, and Richard Fisher, Treasurer.”).

13. See also PROJECT ON FAIR REPRESENTATION, <https://utnotfair.org/> [<https://perma.cc/6ASC-MDA9>] (last visited Mar. 24, 2023) (arguing that use of race in the University of Texas is unfair to everyone). In meetings with Asian American groups, Blum unabashedly proclaimed: “I need[] Asian plaintiffs.” Houston Chinese Alliance, *Edward Blum: “I Needed Asian Plaintiffs”*, YOUTUBE (July 30, 2018), <https://www.youtube.com/watch?v=DiBvo-05JRg> [<https://perma.cc/7D6L-RE9M>] (quoting Edward Blum speaking at a seminar hosted by the Houston Chinese Alliance on Apr. 25, 2015).

Texas, Harvard University, the University of North Carolina at Chapel Hill, and Yale University.¹⁴ In doing so, Abigail Fisher and Edward Blum reframed the legal challenge to affirmative action policies in which plaintiffs since *Bakke*¹⁵ had alleged reverse discrimination as a claim of discrimination against Asian American applicants.¹⁶

This Article begins by examining the allegations of intentional discrimination in the *SFFA v. Harvard* lawsuit, which rely primarily on racial disparities in the standardized test scores of applicants to Harvard. I then contrast SFFA's allegations of discrimination with those presented in *Smith v. Regents of the University of California*, a case in which a coalition of students, including Asian American students, flipped the claims in *SFFA* on their head by arguing that the use of the SAT and ACT¹⁷ constitutes discrimination because of barriers that underprivileged students face that disadvantage them on standardized tests.

I then argue that one way of distinguishing between what appear to be mirror discrimination claims is to ask whether there is a strong basis in evidence to believe that a policy or decision would entail liability for disparate impact discrimination. If so, avoiding disparate impact liability provides a defense that should shield the actor against a mirror claim of intentional discrimination by establishing that there is not a substantial

14. See Complaint at 1–2, *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin* (SFFA v. Univ. of Tex. at Austin), No. 1:20-cv-763 (W.D. Tex. July 20, 2020) (arguing the race-based admissions program at the University of Texas at Austin violates the Equal Protection Clause); Complaint at 1, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176) (arguing the undergraduate admissions program at Harvard College is racially and ethnically discriminatory and violates Title VI); Complaint at 2, *SFFA v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (1:14-cv-00954) (arguing the undergraduate admission policies at the University of North Carolina Chapel Hill are racially and ethnically discriminatory); Complaint at 1, *Students for Fair Admissions, Inc. v. Yale Univ.*, No. 3:21-cv-00241, 2021 WL 736917 (D. Conn. 2021) (alleging racial discrimination in administration of Yale's undergraduate admissions).

15. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277–78 (1978).

16. Anemona Hartocollis & Stephanie Saul, *Asians Become Focus of Battle on Admissions*, N.Y. TIMES, Aug. 3, 2017, at A1. For a discussion of other cases in which Justice Alito has provided a blueprint for the future challenges to existing precedent based on a theory not currently before the Court, see Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 102 (2020).

17. The Scholastic Aptitude Test (SAT) and American College Test (ACT) are standardized exams that seek to measure a high school student's college readiness. The SAT is administered by the College Board. The ACT is administered by ACT, Inc. However, these test scores are only weak indicators of performance in institutions with selective admissions and are highly correlated with race. See, e.g., Saul Geiser, *The Growing Correlation Between Race and SAT Scores: New Findings from California*, UC BERKELEY: CTR. FOR STUD. IN HIGHER EDUC., Oct. 2015, at 1 (“The UC data show that socioeconomic background factors—family income, parental education, and race/ethnicity—account for a large and growing share of the variance in students' SAT scores over the past twenty years. . . . Of those factors, moreover, race has become the strongest predictor.”); Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106, 126, 128 (2010) (questioning the validity of SAT verbal scores due to cultural bias built into questions).

legitimate justification for the reverse action in the face of the disproportionate adverse effect on members of a protected group.

Drawing on critical race theory scholarship, I next discuss how an intersectional frame informed by disaggregated data can help to analyze racial power and understand mirror discrimination claims contextually. I argue that for an intentional discrimination claim to succeed it should address, rather than ignore, intragroup variation in impact that contribute to subordination.

In the final section, I draw on the testimony that Harvard students and alumni presented during the *SFFA v. Harvard* trial. Asian American students and alumni at Harvard who testified at trial described how race-conscious admissions did not constitute intentional discrimination, but instead fostered diversity along multiple dimensions within the Asian American community, combatting tokenism and essentialist ideas about Asian American identity on campus.¹⁸ Ironically, while SFFA argues that Asian Americans are discriminated against because they are labeled model minorities,¹⁹ the framing of SFFA's claims reinforces stereotypical notions.

I. CLAIMS OF DISCRIMINATION IN *STUDENTS FOR FAIR ADMISSIONS V. HARVARD*

At the outset, it is important to distinguish between the different claims that were brought by SFFA²⁰ before focusing on SFFA's intentional discrimination claim, which is the primary subject of this Article.²¹ As others have argued, SFFA's claim that the consideration of race leads to discrimination against Asian Americans conflates affirmative action with negative action. Scholars have used the term "causation fallacy," coined by now California Supreme Court Justice Goodwin Liu, to explain why

18. See generally Transcript of Record at 112, 157–58, 210, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019).

19. The term "model minority" is traced back to an article by sociologist William Petersen in which he argued that Japanese cultural traits allowed Japanese people in America to overcome discrimination and succeed economically and educationally. William Petersen, *Success Story, Japanese American Style*, N.Y. TIMES (Jan. 9, 1966), http://inside.sfuhs.org/dept/history/US_History_reader/Chapter14/modelminority.pdf [<https://perma.cc/655Q-YT7B>].

20. After the Supreme Court issued its ruling in *Fisher II*, on June 23, 2016, the district court dismissed two of SFFA's original claims on the pleadings: (1) its claim that Harvard uses race to fill more than just the last few places in its class; and (2) its claim that Harvard considers race in its admissions process generally. *SFFA v. Harvard*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019).

21. See also Jeena Shah, *Affirming Affirmative Action by Affirming White Privilege: SFFA v. Harvard*, 108 GEO. L.J. ONLINE 134, 135 (2020) (explaining that because SFFA's claims challenging race-conscious admissions are legally distinct from the intentional discrimination claim, the correct legal analysis would separate the race-neutral components of Harvard's admissions program that produced "disparate outcomes as between whites and Asian Americans" from the race-based affirmative action component of the program, which are irrelevant to the inquiry).

race-conscious admissions do not lead to a disfavoring of Asian American applicants, and thus the two issues should not be equated.²²

In its claims challenging affirmative action, SFFA alleges that Harvard's race-conscious admissions violates Title VI of the Civil Rights Act of 1964.²³ Under controlling Supreme Court precedent, a university may consider race as part of its admissions process so long as it can survive strict scrutiny (i.e., is narrowly tailored to serve a compelling interest).²⁴ In *Grutter v. Bollinger*, the Supreme Court explained that narrow tailoring requires a "highly individualized, holistic review of each applicant's file" such that "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."²⁵ A narrowly tailored, race-conscious admissions program must

22. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1064 (2002). This concept was later confirmed as a matter of mathematics. See Sherick Hughes et al., *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 EDUC. POL'Y 63, 64 (2015) (finding that the admissions of African American and Latinx students make up such a small proportion of admissions at many selective universities that the elimination of all African American and Latinx applicants from the applicant pool would have little impact on the likelihood of admissions for white and Asian American applicants); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 606 (2006) (critiquing the argument that Asian Pacific Americans would benefit from eliminating affirmative action); Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUM. RES. 435, 448–50 (2012) (finding that affirmative action bans had little impact on Asian student enrollment at selective institutions). Building on this work, Professor Kimberly West-Faulcon argues that the notion that affirmative action for African American students causes universities to racially discriminate against Asian Americans is a fallacy because there are not enough African American applicants to significantly impact the admission rate of Asian American applicants. Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 590 (2017). Importantly, SFFA admits that "[p]references for African-American and Hispanic applicants could not explain the disproportionately negative effect Harvard's admission system has on Asian Americans," implicitly admitting the causation fallacy. Plaintiff's Memorandum in Support of Its Motion for Summary Judgment at 13, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176). As Professor Jonathan P. Feingold has explained, a responsive remedy for SFFA's discrimination claims "would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA's discrimination claim." Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Privilege*, 107 CALIF. L. REV. 707, 732 (2019). In 1996, Professor Jerry Kang famously coined the term "negative action" to distinguish a policy that disfavors Asian American applicants vis-à-vis white students from the use of race-conscious admission. 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). For Professor Kang, the critical question is whether the treatment of Asian American applicants conveys an objective social meaning of stigma by communicating prejudice, which occurs when Asian American applicants are disfavored as compared to white applicants, but not through the use of affirmative action. *Id.* at 30.

23. 42 U.S.C. § 2000d et seq.

24. *Grutter v. Bollinger*, 539 U.S. 315, 335–36, 343 (2003) (holding that the narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause).

25. *Id.* at 337–38. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 311–12,

use race “in a flexible, nonmechanical way” and “only as a plus [factor].”²⁶ SFFA argues that Harvard’s program is not narrowly tailored because: (1) Harvard engages in racial balancing; (2) Harvard uses race as more than a plus factor; and (3) Harvard fails to consider and use race-neutral alternatives.²⁷ In addition to challenging Harvard’s race-conscious admissions system based on the facts, SFFA brought a claim arguing that the Supreme Court should overturn existing precedent and hold that race-conscious admissions in higher education is not permissible as a matter of law.²⁸

Distinct from the first category of claims SFFA brought, SFFA also alleges that Harvard discriminates against Asian American applicants by disfavoring Asian American applicants.²⁹ SFFA’s main argument is that Harvard’s admissions data reveals different treatment among similarly qualified applicants of different racial backgrounds.³⁰ In support of this

316–17 (1978) (approvingly citing Harvard’s admissions process as a holistic review that satisfied narrow tailoring in plurality opinion).

26. *Grutter*, 539 U.S. at 334, 339. In *Fisher I*, the Court further clarified that while universities receive judicial deference in defining the pursuit of diversity as part of their educational missions, they receive no deference when courts review narrow tailoring. *Fisher I*, 570 U.S. 297, 311 (2013). Narrow tailoring requires a university to give good faith consideration to race-neutral alternatives and determine that there is no workable race-neutral alternative that would achieve the educational benefits of diversity. *Fisher II*, 579 U.S. 365, 377 (2016).

27. Complaint at 2, 4–5, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176), 2014 WL 6241935.

28. Complaint at 108, 115–16, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (1:14-cv-14176). This renewed claim is central to SFFA’s briefing before the Supreme Court. Brief For Petitioner at 49–65, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (Nos. 20-1199 & 21-707).

29. Plaintiffs’ discrimination claim is brought under Title VI because Harvard is a private university. Title VI bars federally funded entities from discriminating based on race or ethnicity. The legal standard for establishing a violation under Title VI generally mirrors the equal protection standard. *See Guardians Ass’n v. Civ. Serv. Comm’n*, 463 U.S. 582, 584 (1983); *Gratz v. Bollinger*, 539 U.S. 244, 305 n.23 (2003) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001)) (“[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”). But for an argument that the ability for actors to adopt amelioratory policies is broader under Title VI, see Olatunde C. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1304–1306 (2014). But “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” “[n]or does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Grutter*, 539 U.S. at 339.

30. *See SFFA v. Harvard*, 980 F.3d 157, 202 (1st Cir. 2020) (“On average, an Asian American student has a .34% lower chance of admission to Harvard than a similarly situated white student . . .”). In addition, SFFA points to circumstantial evidence, including the history of Harvard’s admissions system discriminating against Jewish applicants by establishing quotas that limit the amount of admitted Jewish students. Complaint ¶¶ 162–67, *SFFA*, 397 F. Supp. (No. 14-14176), and a prior investigation by the Office of Civil Rights in the 1980s. *Id.* ¶¶ 164–67. That investigation ultimately concluded there was no discrimination against Asian Americans in admissions. *Id.* ¶¶ 166. SFFA also notes that admissions officers left in the margins of six Asian American students’ applications describing them as “quiet/shy . . . [and] extraordinarily gifted in math . . .”

allegation, SFFA's expert, Dr. Peter Arcidiacono, divided applicants to Harvard into ten deciles based on standardized test scores and high school GPAs.³¹ Arcidiacono then ran a regression analysis showing that students of different racial backgrounds in the same deciles had different admission rates.³² According to SFFA, this analysis shows that some Asian American applicants in the highest deciles were not admitted while students of other racial backgrounds in the same deciles were.³³

Importantly, this regression analysis is based only on standardized tests and grades and omits any other factors that Harvard considers in the admissions process.³⁴ As part of its admissions process, Harvard assigns applicants four ratings. First, the academic rating, which includes, among other factors, grades and standardized test scores, the applicant's high school's characteristics and curriculum, academic prizes, letters of recommendation, and Harvard faculty members' appraisals of the student's work.³⁵ Next, applicants are assigned an extracurricular rating based on activities outside of classes, and the likelihood of contributing to Harvard's extracurriculars.³⁶ Third, applicants receive an athletic rating, based on involvement in sports and recruitment to join a team once at Harvard.³⁷ Fourth, admissions officers assign a personal rating, which considers the strength of each teacher and guidance counselor recommendation submitted on behalf of an applicant, other recommendation letters, alumni interviews, and the student's personal statement.³⁸

In addition to its analysis of admissions rates based on the grades and standardized test scores of applicants, SFFA asserts that Asian American applicants are assigned lower average personal ratings³⁹ when compared to other applicants with similar standardized tests scores and grades.⁴⁰

Id. ¶¶ 246–48. However, evidence presented at trial demonstrated that applicants of other backgrounds received similar comments. *See SFFA*, 397 F. Supp. 3d at 157 (“The docket binder that contains notes to the effect that several Asian American applicants were ‘quiet’ or ‘flat’ also includes notes for white, African American, and Hispanic applicants who were also described as ‘quiet,’ ‘shy,’ or ‘understated.’”). Finally, SFFA cites to subsequent changes Harvard made to provide more explicit guidance to admissions officers to not consider race with respect to the personal rating. *Id.* at 141.

31. Expert Report of Peter S. Arcidiacono at 40, *SFFA*, 397 F. Supp.

32. *SFFA*, 397 F. Supp. 3d at 162–63.

33. *Id.* at 163 (“Asian Americans in the top academic deciles are receiving strong personal and overall ratings at lower rates than applicants from other racial groups with similar academic qualifications.”).

34. *Id.* at 165.

35. *Id.* at 140.

36. *Id.*

37. *SFFA*, 397 F. Supp. 3d at 140–41.

38. *Id.* at 141.

39. Brief for Petitioner at 25–26, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (Nos. 20-1199 & 21-707).

40. *Id.* at 26.

As will be discussed later, SFFA does not provide a basis for its assumption that students' scores in the personal category should be correlated with their standardized test scores and grades.⁴¹ The difference between the average personal rating of Asian American applicants and white applicants overall is .05, which is not statically significant.⁴² SFFA argues that Asian American applicants' personal ratings are lower because "many admissions officers believe in stereotypes that work against Asian-American[s],"⁴³ including that Asian Americans are "model minorities," but does not provide evidence to support this allegation.⁴⁴

On October 1, 2019, District Judge Allison Burroughs issued a decision in *SFFA v. Harvard* holding that Harvard's race-conscious admissions program satisfied strict scrutiny because it was narrowly tailored to serve a compelling interest in diversity, and rejecting SFFA's claim of intentional discrimination.⁴⁵ At the outset of her analysis, Judge Burroughs recognized that "given SFFA's heavy reliance on the data to make out its claims . . . statistical evidence is perhaps the most important evidence in reaching a resolution of this case."⁴⁶ The court noted that because the parties' experts reached different conclusions as to whether Asian Americans are discriminated against in the Harvard admissions process due to their inclusion of different applicants and use of different control variables, "decisions by the Court as to which applicants and control variables belong in the admission outcome model are pivotal."⁴⁷

Although both experts had access to the same admissions data for more than 150,000 domestic applicants to Harvard,⁴⁸ the analyses of Harvard's expert, Dr. David Card, and SFFA's expert, Dr. Arcidiacono, are based on regression models that differ in important ways.⁴⁹ SFFA's expert, Dr. Arcidiacono, removed the personal rating from the model entirely, despite the fact that this does not accurately reflect Harvard's admissions

41. *See infra* notes 124–127.

42. Jennifer Lee, *Asian Americans, Affirmative Action & the Rise in Anti-Asian Hate*, 150 *DAEDALUS* 180, 187 (Spring 2021).

43. *Id.* (alteration in original).

44. *Id.* at 63.

45. *SFFA*, 397 F. Supp. 3d at 126, 195. In resolving SFFA's claims that Harvard's use of race-conscious admissions is not narrowly tailored, the court found that Harvard does not use quotas or try to assemble a class with any particular racial composition as is shown by how much the racial composition of each class has varied year to year. *Id.* at 196. The court also found that Harvard does not use race as more than a plus factor and credited testimony that race is only a factor. *Id.* at 199. Finally, the court concluded that none of the race-neutral alternatives that the plaintiffs presented would be able to similarly foster the benefits of diversity. *Id.* at 200.

46. *Id.* at 158.

47. *Id.* at 159.

48. *Id.*

49. *Id.* at 173.

process.⁵⁰ According to SFFA’s expert, this factor was removed because Asian American applicants had lower personal ratings overall and therefore he claimed the personal rating must be racially biased.⁵¹ In addition, Arcidiacono’s model excludes applicants who were recruited athletes, children of Harvard College or Radcliffe alumni, children of Harvard faculty or staff members, and individuals on the dean’s or director’s interest lists (ALDCs),⁵² a category of applicants that collectively make up approximately 30 percent of Harvard’s admitted class.⁵³ Dr. Arcidiacono states that he excluded these applicants from his analysis because they receive a “tip” based on their ALDC status and therefore are treated differently than other applicants.⁵⁴

The court found Dr. Card’s analysis to be the more reliable model because of its inclusion of variables that reflect actual process, including the consideration of ALDC applicants and the personal rating.⁵⁵ In contrast with Dr. Arcidiacono, who found a slight negative correlation between Asian American identity and likelihood of admission, Dr. Card concluded that there was no statistically significant difference in the probability of admissions of Asian American applicants.⁵⁶ To the contrary, he found that “certain statistics can be interpreted to suggest that Harvard’s admissions process unintentionally favored some subsets of Asian Americans”⁵⁷

The district court concluded that Harvard’s admissions process appropriately considered race in a manner that was narrowly tailored to serve a compelling government interest.⁵⁸ The court also concluded there was no evidence of intentional discrimination.⁵⁹ The court was persuaded that SFFA did not identify a particular admissions file that evinced discrimination and no individual Asian American testified throughout the litigation that they were discriminated against by Harvard. The court also found “no evidence of discrimination in the personal ratings save for the slight numerical disparity itself” which could be “at least partially explained by a variety of factors including race-correlated inputs to the rating,” in which case the actors engaged in biased decision-making were not actually affiliated with Harvard.⁶⁰ In reaching this conclusion, Judge

50. SFFA v. Harvard, 980 F.3d at 157, 165 (1st Cir. 2020).

51. SFFA, 397 F. Supp. 3d at 166, 173.

52. *Id.* at 138.

53. *Id.* at 159.

54. *Id.* at 159–60.

55. *Id.* at 160.

56. SFFA, 397 F. Supp. 3d at 175.

57. *Id.* at 194.

58. *Id.* at 195.

59. *Id.* at 198.

60. *Id.* at 194.

Burroughs relied on Dr. Card's report, suggesting that Asian Americans had lower personal rating scores because of the external factors, such as teacher and guidance counselor recommendations.⁶¹ As Judge Burroughs put it: “[T]o the extent that disparities in the personal ratings are explained by teacher and guidance counselor recommendation letters, Harvard’s admissions officers are not responsible for any race-related or race-correlated impact that those letters may have.”⁶²

The First Circuit affirmed the district court’s decision on appeal.⁶³ The First Circuit held that under governing Supreme Court precedent, Harvard’s race-conscious admissions program does not violate Title VI.⁶⁴ With regard to the discrimination claim, the First Circuit also agreed with the district court that the appropriate statistical model for evaluating SFFA’s intentional discrimination claim must include the personal rating and that the model conclusively showed no discrimination against Asian Americans.⁶⁵ Instead, it showed that Asian American identity has a statistically insignificant effect on an applicant’s chance of admissions.⁶⁶ SFFA then sought certiorari to the Supreme Court. On January 24, 2022, the Supreme Court granted the case, and arguments were heard on October 31, 2022.⁶⁷

II. CLAIMS OF DISCRIMINATION IN *SMITH V. REGENTS OF THE UNIVERSITY*

61. See Report of David Card, Ph.D. ¶ 71, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) (“[T]he fact that the difference in admissions rates disappears by controlling for just these factors raises serious questions about SFFA’s allegations of bias.”).

62. *SFFA*, 397 F. Supp. 3d at 170.

63. See *SFFA v. Harvard*, 980 F.3d 157, 188–94 (1st Cir. 2020) (holding that the district court did not err in any of its findings).

64. *Id.* at 195–96.

65. *Id.* at 183. See also *id.* at 195 n.34 (declining to determine the appropriate standard of review and concluding that Harvard prevails irrespective of the burden of proof).

SFFA argues . . . that, under strict scrutiny, Harvard bears the burden of disproving SFFA’s intentional discrimination claim. Harvard argues that SFFA’s intentional discrimination claim does not get the benefit of strict scrutiny until SFFA has established that Harvard has discriminated against Asian Americans and acted with racial animus against them.

Id. The Department of Justice under President Trump filed a brief arguing that in order for an affirmative action program to satisfy strict scrutiny, it cannot penalize any group and that the racial disparity in personal scores demonstrated a penalty. Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal at 23–34, *SFFA v. Harvard*, 980 F.3d 157 (No. 19-2005). But see *Equal Protection—Affirmative Action—First Circuit Holds That Harvard’s Admissions Program Does Not Violate the Civil Rights Act—Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), 134 HARV. L. REV. 2630, 2634 (“Such a shift is explained neither by the doctrine nor the purpose of strict scrutiny.”).

66. *SFFA v. Harvard*, 980 F.3d 157, 183 (1st Cir. 2020).

67. Docket, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (No. 20-1199), <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1199.html> [<https://perma.cc/RU8L-CA5D>].

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At the same time that the district court in Massachusetts considered SFFA's claims, on the other side of the country, a coalition of students of color—including Asian American students—brought *Smith v. Regents of the University of California*.⁶⁸ In *Smith*, plaintiffs argued that standardized test scores were racially biased *against* them and that reliance on standardized test scores was itself discriminatory.⁶⁹ Thus, in contrast to SFFA's argument, the *Smith* plaintiffs asserted that some Asian American applicants were harmed by the emphasis on standardized test scores in the college admissions process.⁷⁰

The *Smith* plaintiffs filed a lawsuit against the University of California in the Superior Court of the State of California on December 10, 2019, alleging that the university's use of standardized tests discriminated against students of color (including Asian American students), English language learners, and students with disabilities.⁷¹ According to the complaint, the University of California's reliance on standardized test scores in the admissions process discriminated against the plaintiffs because SAT and ACT scores strongly correlated with the income and education of the applicant's parents or guardians⁷² and the applicant's race.⁷³ According to the plaintiffs, "[t]he use of these exams is an unlawful practice in violation of the California Constitution's equal protection clause and numerous State anti-discrimination statutes, and it is barring our clients

68. See generally *Smith v. Regents of the Univ. of Calif.*, No. RG19046222, 2020 WL 6481672 (Cal. Super. Ct. Aug. 31, 2020).

69. Amended Complaint for Declaratory and Injunctive Relief at 6, *Smith*, No. RG19046222, 2020 WL 6481672 (Cal. Super. Ct. Aug. 31, 2020).

70. *Id.* at 40.

71. Demand Letter to Regents of the Univ. of Calif. (Oct. 29, 2019), <https://www.documentcloud.org/documents/6531854-SAT-Demand-Letter-to-UC-20191029.html> [<https://perma.cc/AB6K-SA2U>]. On that same date, the Compton Unified School District (CUSD) and plaintiff Micah Ali initiated a similar lawsuit. See *Smith v. Regents of the Univ. of Calif.*, No. RG19046222, 2020 WL 6481672 (Cal. Super. Ct. Aug. 31, 2020) (consolidating Case No. RG19046343 with No. RG19046222).

72. See Jay Rosner, *Disparate Outcomes by Design: University Admissions Tests*, 12 BERKELEY LA RAZA L.J. 377, 383–84 (2001) (noting a factor contributing to the gap in test scores is high-quality preparation courses that affect low-income students by the high cost of the course); Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 490–91 (2007) (internal citations omitted) ("Simply put, poor students, among who black and Hispanics are overrepresented, average lower test scores than their wealthy and nonminority counterparts because they are significantly more likely to attend underperforming, resource-poor schools.").

73. Even after controlling for parents' education and family income, "race has a large, independent, and growing statistical effect on applicants' SAT and ACT scores." Amended Complaint for Declaratory and Injunctive Relief at 53, *Smith*, No. RG19046222, 2020 WL 6481672 (quoting Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California*, UC BERKELEY: CTR. FOR STUD. IN HIGHER EDUC., Dec. 2017, at 3.

from equal access to higher education.”⁷⁴

To support these allegations, the plaintiffs cited research—including research conducted by faculty within the University of California (UC) system—showing that test questions are biased against underrepresented minority students.⁷⁵ The *Smith* plaintiffs also relied on research showing that the SAT is unreliable due to racial bias that undervalues the performance of students of color, in part due to test makers validating test questions by using white test takers as the norm.⁷⁶

To further support their discrimination claim, the plaintiffs relied on an expert analysis that divides students into different deciles based upon high school GPA.⁷⁷ According to the plaintiffs, the analysis illustrates how consideration of SAT and ACT scores “displaces high-performing underrepresented minority applicants from the top [deciles].”⁷⁸ In other words, for these students, having high grades is not as closely correlated with having a high SAT or ACT score as it is for students of other racial backgrounds.⁷⁹ Plaintiffs allege that:

[w]hen ranked by high school grades, underrepresented minority students comprised 12 percent of applicants in the top decile [, but] [w]hen ranked by SAT and ACT scores, however, the representation of underrepresented minority students fell to only 5 percent. Conversely, ranking applicants by SAT and ACT scores resulted in underrepresented minority students comprising 60 percent of the bottom decile, as opposed to only 39 percent when ranked by high school grades.⁸⁰

The complaint concludes that because “[u]nderrepresented minority applicants are less than half as likely to rise to the top of the pool” when ranked by SAT and ACT scores, rather than by high school GPA, standardized tests are a barrier to their admission.⁸¹

In contrast with *SFFA*, the *Smith* plaintiffs argue that there are disparities in acceptance rates for some Asian American populations. Grouping

74. Demand Letter to the Regents of Univ. of Calif., *supra* note 71.

75. See, e.g., CLAUDE S. FISCHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* 46 (1996) (“Therefore, we cannot read a gap in test scores as if it reflected an edge that the admission process gives to some students at the expense of others. In part, it reflects the disadvantages that suppress the measured achievement of some groups, especially blacks and Latinos.”); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 16 (2d ed. 2000) (“The most obvious approach, comparing average SAT scores of black and white students, is seriously flawed and should not be used *for this purpose*.”).

76. Amended Complaint for Declaratory and Injunctive Relief at 65–67, *Smith*, No. RG19046222, 2020 WL 6481672.

77. Amended Complaint for Declaratory and Injunctive Relief at 115, 125, *Smith*, No. RG19046222, 2020 WL 6481672.

78. *Id.* at 115.

79. *Id.*

80. *Id.*

81. *Id.* at 116 (alteration in original) (citing *GEISER*, *supra* note 73).

Asian American applicants together masks the reality that many Southeast Asian students face educational disparities comparable to Black, Latinx, and Native American students.⁸² For example, while the acceptance rate was 15.06 percent for Asian American applicants, disaggregating data on Asian applicants reveals disparities between different subgroups.⁸³ Korean and Taiwanese applicants had acceptance rates of 19.18 percent and 18.40 percent, respectively, but Filipinx and Hmong applicants had acceptance rates of 12.35 percent and 9.55 percent, respectively.⁸⁴

One organizational plaintiff in the lawsuit, Chinese for Affirmative Action, further describes how the SAT and ACT unfairly prevent Chinese American students who are English language learners and who lack the resources for expensive test prep tutoring from being admitted to the UC programs.⁸⁵ The group alleges that standardized tests underestimate the ability of English language learners to succeed in college by failing to provide for accommodations or to contextualize scores.⁸⁶ Another organizational plaintiff, Little Manila After School Program, alleges that the SAT and ACT unfairly disadvantage Filipinx students in the admissions process due to racial bias and the inaccessibility of expensive test preparation tutoring.⁸⁷ The complaint explains how test scores are largely impacted by whether students can access test preparation materials and whether families can purchase coaches or counselors for several thousand more dollars to work with students on tailor-made preparation to game the test.⁸⁸

Plaintiffs next argue that standardized test scores are not reliable indicators of a student's potential to succeed in college, and that high school GPA is a more accurate predictor of college outcomes than SAT scores.⁸⁹ Indeed, in May 2019, the College Board admitted that the SAT was not entirely reliable without additional contextual information about a test taker's background.⁹⁰ It introduced what it termed an "adversity score"

82. See ACT CTR. FOR EQUITY IN LEARNING, THE RACIAL HETEROGENEITY PROJECT: IMPLICATIONS FOR EDUCATIONAL RESEARCH, PRACTICE, AND POLICY 20–21 (2017) (explaining the ways in which overly-broad aggregation of data on AAPI students obscures researchers' understanding of Asian Americans' educational experiences).

83. Amended Complaint for Declaratory and Injunctive Relief at 116, *Smith*, No. RG19046222, 2020 WL 6481672.

84. *Id.* at 117.

85. *Id.* at 23–25.

86. *Id.*

87. *Id.* at 40–42.

88. *Id.*

89. Amended Complaint for Declaratory and Injunctive Relief at 5–6, *Smith*, No. RG19046222, 2020 WL 6481672.

90. Bobby Allyn, *SAT to Score Students' 'Disadvantages' to Try to Even the Playing Field*, NPR

to aid college admissions officers in interpreting results.⁹¹ According to the College Board's CEO, without such information on socioeconomic background characteristics, SAT scores might not be properly interpreted.⁹²

Finally, the *Smith* suit alleges that the University of California has long been aware of the consistent and longstanding racial and socioeconomic bias baked into the exams,⁹³ but continued to rely on both exams, despite knowing that the SAT and ACT are biased and not reliable indicators of students' ability to succeed.⁹⁴ In fact, in 1962, UC decided not to use the SAT because the "scores add little or nothing to the precision with which existing admissions requirements are predictive of success in the University,"⁹⁵ but later reinstated its use.⁹⁶ More recently, UC convened a Standardized Testing Task Force which recognized that exam results were biased by the reality that students from more affluent backgrounds have access to additional resources, including private test preparation courses and coaches.⁹⁷

Plaintiffs argue that the prior knowledge the UC system possessed about the racially disparate impact and unreliability of the tests is relevant to their discrimination claim under the state constitution's equal protection clause.⁹⁸ Their analysis parallels the federal *Arlington Heights* test

(May 16, 2019, 5:59 PM ET), <https://www.npr.org/2019/05/16/724048022/sat-to-score-students-disadvantages-to-try-to-even-the-playing-field> [<https://perma.cc/F4JC-36GY>].

91. Anemona Hartocollis, *SAT's New 'Adversity Score' Will Take Students' Hardships into Account*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/sat-score.html> [<https://perma.cc/9WUR-LRVQ>].

92. See Allyn, *supra* note 90 ("[Such information] enables colleges to witness the strength of students in a huge swath of America who would otherwise be overlooked.").

93. See William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case* 39 J.C. & U.L. 53, 95 (2013) (noting the pattern in the average SAT scores by race/ethnicity from 1994 to 2009 at UCLA and how it changed little after Prop. 209 took effect). The College Board, which creates the SAT, has acknowledged the disparities. See JENNIFER L. KOBRIN ET AL., THE COLLEGE BOARD, A HISTORICAL VIEW OF SUBGROUP PERFORMANCE DIFFERENCES ON THE SAT REASONING TEST 19 (2007) (noting that the score gaps between different racial groups have "remained generally consistent" for 20 years).

94. Amended Complaint for Declaratory and Injunctive Relief at 3, *Smith*, No. RG19046222, 2020 WL 6481672 (Cal. Super. Ct. Aug. 31, 2020).

95. *Id.* at 5 (quoting JOHN A. DOUGLASS, THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY, AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES 90 (2007)).

96. See John Aubrey Douglass, *The University of California Versus the SAT: A Brief History and Contemporary Critique*, BERKELEY CTR. FOR STUD. IN HIGHER EDUC., 2020, at 1 (discussing the history of the SAT in the University of California admissions process).

97. EDDIE COMEAUX & HENRY SÁNCHEZ, REPORT OF THE UC ACADEMIC COUNCIL STANDARDIZED TESTING TASK FORCE (2020), https://senate.universityofcalifornia.edu/_files/committees/sttf/sttf-report.pdf [<https://perma.cc/8K6P-CNTH>].

98. Amended Complaint for Declaratory and Injunctive Relief at 4, 127, *Smith*, No. RG19046222, 2020 WL 6481672.

for establishing intentional discrimination.⁹⁹ Under this test, when a decision-making body persists in employing a criterion that it knows to have a disparate impact without a legitimate justification, this can constitute evidence of discrimination.¹⁰⁰ Plaintiffs also argue that the historical background of decision-making is relevant because the Regents have understood for decades that the SAT and ACT have only minimal predictive validity and operate to disproportionately exclude low-income and underrepresented minority students from the University—yet they have repeatedly chosen to continue requiring the tests.¹⁰¹ By ignoring studies showing that the exams are not reliable, plaintiffs allege that the UC Regents have departed from their own policies on testing principles.¹⁰² Moreover, contemporaneous statements by President Janet Napolitano acknowledging the bias associated with the tests provide evidence that the University’s leaders recognized that the SAT and ACT unfairly disadvantage students based upon race, socioeconomic, and disability status.¹⁰³

On September 1, 2020, the state court issued a preliminary injunction requiring the UC system to cease the use of the test scores during the litigation.¹⁰⁴ The court focused its legal analysis on the plaintiffs’ disability claims under California law as well as the current pandemic conditions, and considered whether a person’s inability to exercise the test option due to a disability is a denial of meaningful access to an opportunity or benefit.¹⁰⁵ Although the court’s decision did not reach the plaintiffs’ equal protection claim under the California Constitution,¹⁰⁶ central to its analysis was the question of whether standardized tests are “a valid method of measuring academic achievement”¹⁰⁷ Regarding the college entrance exams, the court wrote that “the evidence shows that the

99. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (outlining factors for determining whether discriminatory purpose motivated an actor, such as: statistics demonstrating a “clear pattern, unexplainable on grounds other than” discrimination; “the historical background of the decision”; “[t]he specific sequence of events leading up to the challenged decision”; the defendant’s departures from its normal procedures or substantive conclusions; and the relevant “legislative or administrative history”).

100. *Id.*

101. Amended Complaint for Declaratory and Injunctive Relief at 120, *Smith*, No. RG19046222, 2020 WL 6481672.

102. *Id.*

103. *Id.* at 119–20.

104. Order Granting Preliminary Injunction, *Smith*, No. RG19046222, 2020 WL 6481672.

105. *Id.* at 8–11.

106. The court recognized that the ADA (Americans with Disabilities Act) provides a broader basis for liability than California’s equal protection clause, and “eschews reliance solely on traditional or adverse impact labels.” *Id.* at 9. Instead, the ADA “extends to . . . a range of conduct, including conduct that creates an adverse impact” *Id.*

107. *Id.* at 11–12.

efficacy of the tests is at best minimal.”¹⁰⁸ It then concluded that the plaintiffs had made a substantial case and were likely to succeed on the merits.¹⁰⁹ Subsequently, the parties reached a settlement, under which the UC system would remain test-free through fall 2025.¹¹⁰ The settlement agreement also provides that “if the [University] chooses a new exam for use in undergraduate admissions in the future, it will consider access for students with disabilities in the design and implementation of any such exam.”¹¹¹

III. THE NEED FOR A CONTEXTUAL ANALYSIS OF DISCRIMINATION CLAIMS

In this Part, I consider a framework for analyzing claims of discrimination brought on both sides of an issue, such as in these cases challenging universities’ use of standardized tests. I refer to such cases as “mirror” discrimination claims. I argue that without a contextual analysis of intentional discrimination claims, universities and other actors could be subject to conflicting liability, such as in the *Smith* and *SFFA* litigation, where claims of intentional discrimination could simultaneously be brought challenging admissions practices that rely too much on standardized test scores *and* those that do not rely enough. Indeed, one could imagine applicants bringing a claim of intentional discrimination against Harvard College that replicates the claims brought by the *Smith* plaintiffs against UC. One could even imagine a group of plaintiffs intervening in the *SFFA v. Harvard* litigation to bring a crossclaim of discrimination by asserting that Harvard’s reliance on standardized tests discriminates against them. Such a counterclaim was not explicitly brought in the *SFFA v. Harvard* litigation, but students and alumni in support of race-conscious admissions did present evidence that reliance on standardized test scores had a discriminatory effect on students of color who apply to Harvard, including some Asian American applicants.¹¹²

108. *Id.* at 11.

109. *Id.*

110. Settlement Agreement and Release of All Claims at 2, *Smith*, No. RG19046222, 2020 WL 6481672.

111. *Id.* at 3.

112. As discussed by student amici, standardized test scores undervalue the potential of applicants of color due to the racial bias embedded in the SAT. Brief for 25 Harvard Student & Alumni Orgs. as Amici Curiae Supporting Respondents at 11, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (No. 20-1199); Brief of NAACP Legal Defense & Educational Fund on Behalf of 25 Harvard Student and Alumni Organizations at 11–13, *SFFA v. Harvard*, 980 F.3d 157, 165 (1st Cir. 2020) (No. 19-2005); Motion of Additional Harvard Student & Alumni Organizations to Participate as Amici Curiae at 6, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176) (“Despite using a holistic, whole-person admissions model, Harvard still gives tremendous weight to standardized test scores. [Amici] argue that such test scores are tainted by racial bias, and underpredict

In the Sections that follow, I consider whether disparate impact liability can help us distinguish between what appear to be mirror intentional discrimination claims by scrutinizing the justification for the policy given its disproportionate adverse impact. I then consider how to interpret variation in the impact of a policy on a protected group when faced with mirror claims of intentional discrimination.

A. The Compelling Interest in Avoiding Disparate Impact Liability in Mirror Discrimination Claims

Both the *SFFA* and the *Smith* plaintiffs allege discrimination based on the over or under reliance on standardized test scores in college admissions. The plaintiff groups rely on data showing racial disparities in standardized tests scores, but they reach two different conclusions about the significance of this data. One way of distinguishing between their claims is to consider whether a college's decision not to rely on standardized test scores could be defended based on a compelling interest in avoiding disparate impact liability.¹¹³

As Kimberly West-Faulcon has argued, universities that rely on admissions criteria like the SAT in a manner that unjustifiably decreases the admissions chances of minority applicants could be in violation of Title VI disparate impact regulations.¹¹⁴ Although the Supreme Court has determined there is no private right of action for disparate impact

the potential of many talented and qualified students of color.”); *see also* Memorandum in Support of Proposed Defendant-Intervenors’ Motion to Intervene at 13–14, *SFFA*, 397 F. Supp. 3d 126 (No. 14-cv-14176) (“[Amici] have the quite different goal of enhancing access to Harvard for Native American, African American, and Latino students and increasing student body diversity. . . . [Amici] will be the only party to argue that one justification for considering race and ethnicity in college admissions is to remedy the adverse impact that legacy preferences, Early Action, and the SAT have on the diversity profile of the admitted class.”).

113. The Supreme Court has recognized that it is permissible to consider race when “there is a strong basis in evidence” that a facially neutral policy would otherwise entail liability for disparate impact discrimination. *Ricci v. DeStefano*, 557 U.S. 582 (2009) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (citing *Richmond v. J.A. Croson*, 488 U.S. 469 (1989)). In *Ricci v. DeStefano*, Justice Kennedy’s majority decision was based on Title VII and did not express a holding as to whether “the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.” *Id.* at 584. *Ricci* involved a challenge to the city of New Haven’s use of a promotional examination in the city’s fire department. *Id.* at 562–63. The city decided not to use the test results for promotion within the department after finding that none of the African American and only two of the Hispanic firefighters scored highly enough to be promoted, raising a concern for the city that its use of the exam would create liability under Title VII’s disparate-impact provision. *Id.* at 612–18. The Court ultimately held that the city could not retroactively change its promotion policy by failing to certify the results after administering the exam, but it recognized that a strong-basis-in-evidence standard governs employers’ “discretion in making race-based decisions” regarding a policy or practice. *Id.* at 583–84.

114. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1098 (2009).

discrimination under Title VI,¹¹⁵ disparate impact discrimination is still recognized and proscribed by agencies implementing Title VI.¹¹⁶ A prima facie case of disparate impact liability can be established when a policy or practice has an adverse effect that disproportionately impacts members of a protected group.¹¹⁷ The burden then shifts to the defendant to demonstrate the existence of a substantial legitimate justification for the policy or practice.¹¹⁸ This explanation may be rebutted by demonstrating that an alternative would achieve the same legitimate objective but with less of a discriminatory effect.¹¹⁹

In its brief, Harvard admits that because standardized test scores undervalue the potential of students of color, consideration of race is necessary for it to contextually evaluate applicants.¹²⁰ In other words, Harvard admits the first element for establishing a prima facie case of disparate impact discrimination: that its use of standardized test scores has a disproportionate adverse effect on students of color.¹²¹ While Harvard could try to defend its policy as serving a substantial justification (selecting qualified applicants), the research challenging the validity of standardized tests that was used in the UC case could rebut this explanation. Finally, Harvard's policy of flexibly considering other admissions factors

115. See *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (stating that only intentional discrimination is prohibited under Title VI § 601).

116. See 28 C.F.R. § 42.104(b)(2) (2023) (“A recipient, in determining . . . may not . . . utilize criteria . . . which have the effect of . . . defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin”); CIVIL RIGHTS DIV., U.S. DEP’T JUST., TITLE VI LEGAL MANUAL § 7, at 3 (2017), <https://www.justice.gov/crt/case-document/file/934826/download> [<https://perma.cc/57RX-48BH>] (outlining how to prove a violation of the disparate impact standard).

117. CIVIL RIGHTS DIV., *supra* note 116, at 6.

118. *Id.*

119. *Id.* See also 42 U.S.C. § 2000e-2(k) (2018) (recognizing the disparate impact cause of action under Title VII).

120. See Harvard’s Response to SFFA’s Proposed Findings of Fact and Conclusions of Law at 19, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176) (citation omitted) (“There is wide variation by race in the number and proportion of applicants who fall within a given decile, reflecting (for example) the fact that African-American and Hispanic applicants disproportionately face challenges of educational opportunity that may limit the degree to which grades and test scores reflect their true academic potential.”). Moreover, Harvard has suspended the consideration of standardized tests in admissions cycles impacted by the pandemic and for at least another four years. See Vivi E. Lu, *Harvard College Suspends Standardized Testing Requirement for Next Four Years*, HARV. CRIMSON (Dec. 17, 2021) (discussing Harvard College’s decision to suspend its standardized testing requirement).

121. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that requiring job applicants to have a high-school diploma and score satisfactorily on an aptitude constituted discrimination where the requirements have a racially disparate impact and are related to job performance or business necessity); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (holding that the burden shifts to the defendant to establish a legitimate purpose once a prima facie case of disparate impact discrimination is established).

demonstrates that there are other admissions criteria that Harvard officials believe serve the objective of selectively admitting qualified students while producing a less discriminatory effect. In short, one could establish the basic elements for disparate impact liability: that Harvard's use of standardized test scores has an avoidable racially disparate impact.

To be clear, avoiding disparate impact discrimination was not raised as an affirmative defense in the *Harvard* litigation and thus is not at issue in that case. My point is simply that disparate impact discrimination can help us distinguish between competing claims of discrimination. Strong evidence that greater emphasis on standardized tests would give rise to disparate impact liability provides a defense that distinguishes SFFA's claims of intentional discrimination from the *Smith* plaintiffs' claims. There is no substantial legitimate justification for relying more heavily on standardized tests in the face of their racially disparate impact given their unreliability. In contrast, there is a justification for a policy of relying less on standardized testing. The claims aren't mirror images after all.

More fundamentally, the evidence of racial bias in standardized testing undermines SFFA's argument that standardized test scores are a reliable baseline for assessing discrimination. SFFA claims that standardized test scores are objective indicators of being qualified for admission to Harvard, but as discussed in the prior section, social research on the SAT and ACT shows that racial bias is embedded throughout the test and test scores have limited predictive value for determining which students are likely to succeed in college.¹²² SFFA ignores that these tests have been shown to be biased against Black, Latinx, Native American, and Southeast Asian students and privilege white and wealthy students, undermining the legitimacy of the test and the justification of colleges relying on test scores at all.

In addition, SFFA provides no explanation for arguing that a student's test score should be correlated with a student's personal rating. SFFA's central argument is that the disparity in personal ratings between Asian American and other people of color is so much larger than the disparity between Asian American and white applicants that it demonstrates that Harvard is providing undeserved tips in the personal rating to Black and Latinx applicants as part of its race-conscious admissions process.¹²³ To

122. See generally Santelices & Wilson, *supra* note 17; Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1, 28–29 (2003) (explaining that Black and Latinx examinees outperformed white examinees on questions which use vocabulary taught at school, white examinees outperformed Black and Latinx examinees on questions with varying colloquial meanings). For a deeper discussion of why so-called objective indicators of merit are in fact racially biased, and the overreliance on standardized tests, see generally LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY* (2015).

123. Brief for Petitioner, *supra* note 39, at 31.

the contrary, as Professor West-Faulcon explains, it is unsurprising that the admitted students from the groups that have lower average test scores must score higher when it comes to other admission criteria in order to gain admission.¹²⁴ SFFA relies on “the average-test-score-of-admitted-students fallacy,” which points to a difference in the numerical average of the SAT test scores of all Black and Asian American (or white) students admitted as proof that a university is racially discriminatory in applying its SAT test score standard.¹²⁵ But the difference in average test scores does not amount to proof that a university has a policy of applying a lower standard to the individual applicants belonging to the racial group with the lower group test score average. Harvard’s admissions policy is not the cause of the numerical difference in the group average of the test scores; a similar numerical difference exists throughout the country, including within UC’s admission system, despite the fact that UC is prohibited from considering race as the result of Proposition 209.¹²⁶ From this standpoint, SFFA’s expert’s decision to exclude the personal rating as a factor in modeling the impact of race on an applicant’s likelihood of admission is important because it removes some of the other key considerations on which applicants with lower test scores may distinguish themselves.¹²⁷

Perhaps most telling, SFFA’s argument presumes that racial disparities in test scores are legitimate and should not be questioned, but that racial disparities in the personal rating are not legitimate and should be questioned.¹²⁸ SFFA does not provide a reason for treating these factors differently. Instead, SFFA assumes that when Asian American and white students receive the highest scores on tests, the testing system must be objective and fair, but when Black and Latinx students receive higher personal scores, the system of rating applicants must be biased or illegitimate. This reveals a disturbing underlying assumption about the inherent abilities and performance of students of different racial groups that reinforces unfounded beliefs about race-based differences in intellect and academic superiority.

124. West-Faulcon, *supra* note 22, at 595 n.16.

125. *Id.* at 594.

126. CAL. CONST. art. I, § 31(a).

127. See *SFFA v. Harvard*, 397 F. Supp. 3d at 173–74 (D. Mass. 2019) (expressing approval of Dr. Card’s methodology which recognized that the personal rating captures relevant characteristics that are considered by Harvard’s admissions officers and therefore should be included in a regression analysis evaluating the impact of race).

128. See Memorandum in Support of Defendant’s Motion for Summary Judgment on All Remaining Counts at 43–44, *SFFA*, 397 F. Supp. 3d 126 (No. 1:14-cv-14176) (“According to Dr. Arcidicono, then, statistical variances that favor Asian Americans should be dismissed as the result of ‘unobservable characteristics,’ but statistical variances that disfavor Asian Americans are attributed to alleged bias.”).

Although SFFA's original complaint outlines a claim of discrimination based on different treatment of Asian American applicants vis-à-vis white applicants,¹²⁹ SFFA repeatedly relies on data comparing Asian American applicants' likelihood of admission to other students of color.¹³⁰ A closer consideration reveals some of the practical reasons why other students of color are not an appropriate comparator for determining whether Asian Americans experience negative action in Harvard's admissions process. SFFA argues that Asian Americans experience implicit bias due to how they are assessed by their high schools, but extensive research demonstrates that Black, Latinx, and Native American students experience pervasive implicit bias, too.¹³¹ Studies have found that the (sometimes unconscious) racial bias of educators fundamentally shapes the educational opportunities of students of color,¹³² as exhibited in expectations of students, assignment to advanced coursework, student evaluations, student discipline, and college counseling.¹³³ This well-

129. See Brief for Petitioner at 30, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (Nos. 20-1199 & 21-707) ("Harvard admits Asian Americans at similar or lower rates than whites, even though Asian Americans receive higher academic scores, higher extracurricular scores, and higher alumni-interview scores."); Plaintiff's Memorandum in Support of Its Motion for Summary Judgment at 10, *SFFA*, 397 F. Supp. 3d 126 (No. 14-cv-14176) ("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.").

130. See *SFFA v. Harvard*, 980 F.3d 157, 185 n.23 (1st Cir. 2020) ("It is not entirely clear how SFFA's arguments about Harvard's use of race to benefit African American and Hispanic applicants relate to SFFA's central allegation that Harvard discriminates against Asian American applicants in favor of white applicants. We understand SFFA's arguments as attacking the use of race to admit African American and Hispanic candidates, to the detriment of Asian American and white applicants.").

131. The Implicit Association Test (IAT), a widely used measure of implicit social cognition, finds that over 70 percent of the over one million individuals who have completed the *Race IAT* show some degree of an implicit preference for white Americans over Black Americans, even when such a preference is denied in explicit attitudes and values. Brian A. Nosek et al. *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 49 (2007); see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias, Scientific Foundations*, 94 CALIF. L. REV. 945, 955-57 (2006) (detailing the differences between IAT measurements of advantaged and disadvantaged groups); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995) (detailing the "indirect, unconscious, or implicit mode of operation for [a person's] attitudes and stereotypes").

132. See, e.g., Nicole Scialabba, *How Implicit Bias Impacts Our Children in Education*, A.B.A. (Oct. 2, 2017), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2017/fall2017-how-implicit-bias-impacts-our-children-in-education/> [<https://perma.cc/A3AX-XEG6>] (explaining that Black and Latinx schoolchildren are less likely to be screened for the gifted program); NAACP LEGAL DEF. & EDUC. FUND, THURGOOD MARSHALL INST., LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE (2018), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf [<https://perma.cc/JGZ8-NRJ4>].

133. See, e.g., Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers' Expectations Different for Racial Minority Than for European American Students? A Meta-Analysis*, 99 J. EDUC. PSYCH.

established research is especially important in light of the district court's conclusion that racial disparities in the personal rating are most likely caused by factors outside of Harvard's admissions process that almost certainly disadvantage other applicants of color as well.¹³⁴

*B. The Importance of an Intersectional Frame in Analyzing Mirror
Discrimination Claims*

The previous section considered how disparate impact liability can help us distinguish between mirror discrimination claims. This section will consider how to analyze mirror claims that involve intragroup variation, such as in *Smith* and *SFFA*, where there are contested arguments about how different subgroups of Asian American applicants are treated.

As previously discussed, SFFA brought a series of cases challenging college admissions programs as discriminatory against Asian American applicants. The case against Yale University is particularly notable because it takes the remarkable step of redefining who qualifies as Asian American for the purpose of the lawsuit.¹³⁵ The complaint declares that “references to Asian applicants exclude . . . Asian applicants who identify, at least in part, as from a favored Asian-American subgroup, such as

253, 271 (2007) (finding that educators were less likely to offer encouragement and pose questions to Black and Latinx students than white students); RUSSELL J. SKIBA & NATASHA T. WILLIAMS, THE EQUITY PROJECT AT IND. UNIV., ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR: A SUMMARY OF THE LITERATURE 4 (2014), https://indrc.indiana.edu/tools-resources/pdf-disciplineseries/african_american_differential_behavior_031214.pdf [<https://perma.cc/NY7M-QV9S>] (“The fact that race remains a significant predictor of discipline after controlling for a range of disciplinary infractions strongly suggest that factors related to student behavior are not sufficient to account for racial/ethnic disparities in discipline.”); DANIEL SOLORZANO & ARMIDA ORNELAS, A CRITICAL RACE ANALYSIS OF LATINA/O AND AFRICAN AMERICAN ADVANCED PLACEMENT ENROLLMENT IN PUBLIC HIGH SCHOOLS 15 (2004) (analyzing the availability of Advanced Placement courses for Latinx and Black students and how these courses impact education); JORDAN G. STARCK ET AL., TEACHERS ARE PEOPLE TOO: EXAMINING THE RACIAL BIAS OF TEACHERS COMPARED TO OTHER AMERICAN ADULTS 273 (2020) (reviewing data regarding teachers’ explicit and implicit racial biases relative to other adults).

134. *SFFA*, 397 F. Supp. 3d at 170 n.48; *see also id.* at 162. The court recognized that “[a]t least a partial cause of the disparity in the personal ratings between Asian American and white applicants appears to be teacher and guidance counselor recommendations, with white applicants tending to score slightly stronger than Asian Americans on the school support ratings.” *Id.*

135. The Department of Justice (DOJ) under President Trump originally brought the case alleging that Yale University discriminated against white and Asian American applicants in its admissions process by not relying more heavily on standardized test scores. Amelia Davidson, *Students for Fair Admissions Sues Yale, Petitions to Escalate Harvard Case to Supreme Court*, YALE DAILY NEWS (Feb. 25, 2021, 11:58 PM), <https://yaledailynews.com/blog/2021/02/25/students-for-fair-admissions-sues-yale-petitions-to-escalate-harvard-case-to-supreme-court/> [<https://perma.cc/KYZ2-9MPQ>]. After the DOJ under President Biden withdrew the lawsuit against Yale, SFFA refiled this same lawsuit. *Id.* SFFA also filed a challenge against Yale University after the Biden administration’s Justice Department dropped its investigation of Yale and SFFA’s motion to intervene was denied. *Id.*; *see United States v. Yale Univ.*, 337 F.R.D. 35, 41 (D. Conn. 2021) (denying motion to intervene after finding United States capable of adequately representing SFFA’s interest in case).

applicants who identify as Cambodian, Hmong, Laotian, or Vietnamese.”¹³⁶

Why does SFFA exclude these subgroups from its definition of Asian American? A closer examination of the data reveals that because these subgroups of Asian American students have lower average SAT scores and grades than other groups of Asian American students, they did not fit SFFA’s claim of intentional discrimination.

Although the group of Asian Americans who apply to elite universities tend to have higher average standardized test scores and grades than other racial groups, the high academic performance of this group of students does not reflect all Asian American ethnic groups,¹³⁷ in particular Southeast Asian Americans.¹³⁸ While it is true that Asian ethnic groups, such as Chinese, Japanese, and Korean Americans, in the aggregate, have achieved higher education levels and incomes, relying on educational and economic data in the aggregate conceals the gaps between different Asian

136. Complaint ¶ 50, *United States v. Yale Univ.*, 3:20-cv-01534 (D. Conn. Oct. 8, 2020).

137. Nicole Gon Ochi & Oiyen Poon, *Asian Americans and Affirmative Action—UNC Amicus Brief*, 24 UCLA ASIAN PAC. AM. L.J. 29, 33 n.16 (2020).

138. See Deepa Shivaram, *Southeast Asians are Underrepresented in STEM. The Label ‘Asian’ Boxes Them Out More*, NPR (Dec. 12, 2021, 7:00 AM) (“Hmong, Vietnamese, Filipino, Laotian, and Cambodian Americans all fall under the broad category of Asian, but their experiences in the U.S. when it comes to things like education levels can vary greatly from other Asian groups such as Chinese, Korean, Indian and Japanese.”); DOUGLAS H. LEE, COLO. STATE UNIV., RACE & INTERSECTIONAL STUD. IN EDUC. EQUITY, ELIMINATING STANDARDIZED TESTING TO INCREASE ACCESS: SOUTHEAST ASIAN AMERICANS AND THE UNIVERSITY OF CALIFORNIA SYSTEM 2–7 (2020), https://www.chhs.colostate.edu/rise/wp-content/uploads/sites/23/2020/05/RISEREport_SATIi-UCSystem-SEAsians_final.pdf [<https://perma.cc/3X8A5K2B>] (reviewing trends in UC student admissions by race); see also Nancy Leong, *Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 90, 94 (2016) (“Cambodian, Vietnamese, Thai, Lao, Burmese, Filipino, Native Hawaiian, and Pacific Islander students, among others, are underrepresented at many or most colleges and universities.”); SOUTHEAST ASIA RES. ACTION CTR., SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES 23 (2020), https://www.searac.org/wp-content/uploads/2020/02/SEARAC_NationalSnapshot_PrinterFriendly.pdf [<https://perma.cc/D4X8-ETCM>] (“The percentage of Cambodian Americans who hold a bachelor’s degree or higher is half the percentage of Cambodian Americans who did not complete high school”); THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSIONS AND CAMPUS LIFE 95 (2010) (“Asian applicants were typically stronger than white applicants on most standardized tests and other measures of academic performance (with the exception of the SAT verbal test) and that white applicants were rated higher on such nonacademic indicators as athletics and personal qualifications”); ANTHONY CARNEVALE & MICHAEL C. QUINN, GEORGETOWN UNIV. MCCOURT SCH. PUB. POL’Y, CTR. ON EDUC. & WORKFORCE, SELECTIVE BIAS: ASIAN AMERICANS, TEST SCORES, AND HOLISTIC ADMISSIONS 8 (2021), <https://1gyhoq479ufd3yna29x7ubjnwengine.netdna-ssl.com/wp-content/uploads/cew-selective-bias-fr.pdf> [<https://perma.cc/6LZK-X2S6>] (comparing the accepted ACT and SAT scores at public and private institutions between races); *Hmong in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-hmong-in-the-u-s/#educational-attainment-of-hmong-population-in-the-u-s--2019> [<https://perma.cc/RL5G-CFQU>] (presenting statistics regarding the Hmong population in the United States).

American subgroups.¹³⁹ This reality has led many scholars and advocates to call for more disaggregated data to understand the educational experiences of Asian American students and to expose the fallacy of the “model minority” myth,¹⁴⁰ which serves to hide the discrimination and bias that some Asian Americans face.¹⁴¹

Because the data associated with Southeast Asian applicants cannot support SFFA’s theory of discrimination, the Complaint defines this subgroup of Asian American students as “favored”¹⁴² and not discriminated against.¹⁴³ In other words, faced with the gap in performance on standardized tests between different subgroups of Asian American students, SFFA determined that rather than address these differences within its theory, it would just redefine Asian American for the purposes of this case. Ironically, in doing so, SFFA removes the subgroups that are most likely to have their educational opportunity disadvantaged within the protected class of Asian Americans.¹⁴⁴

SFFA v. Yale raises a concern that comes up more generally in the context of discrimination cases where there is variation in how a protected class is impacted by a particular policy, which is how courts should determine which subgroups to recognize. For example, in a disparate

139. CATHERINE BITNEY, PH.D., ASIAN AM. PSYCH. ASSOC., ASIAN AMERICAN FIRST-GENERATION COLLEGE STUDENTS 2, https://aapaonline.org/wp-content/uploads/2014/06/AsAm-FirstGen_factsheet_web-Bitney.pdf [<https://perma.cc/8HRS-4B6G>] (demonstrating lower educational attainment and income for Native Hawaiian and Pacific Islander, Vietnamese, Laotian, Cambodian, and Hmong Americans compared to other Asian American sub-groups); Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> [<https://perma.cc/AD2U-KE9>] (discussing trends of income inequality among Asians in the United States); STACEY LEE & KEVIN KUMASHIRO, NAT’L EDUC. ASSOC., A REPORT ON THE STATUS OF ASIAN AMERICANS AND PACIFIC ISLANDERS IN EDUCATION: BEYOND THE “MODEL MINORITY” STEREOTYPE xi (2005) <https://files.eric.ed.gov/fulltext/ED569217.pdf> [<https://perma.cc/UD89-S7QN>] (noting that Asian American and Pacific Islander students are subject to reductive stereotypes in academic settings).

140. See generally Educ. Testing Serv. and the Nat’l Comm’n on Asian Am. and Pac. Islander Rsch. in Educ., ICOUNT: A DATA QUALITY MOVEMENT FOR ASIAN AMERICANS AND PACIFIC ISLANDERS IN HIGHER EDUCATION (2013), <https://aapip.org/publication/icount-a-data-quality-movement-for-asian-americans-and-pacific-islanders-in-higher/> [<https://perma.cc/DU74-LGLB>] (explaining that Filipinx American and Hmong American students can be at significant disadvantage on the SAT compared to other Asian American groups).

141. See, e.g., Melody Manchi Chao et al., *The Model Minority as a Shared Reality and Its Implication for Interracial Perceptions*, 4 ASIAN AM. J. PSYCH. 84, 85 (2013) (explaining that the model minority myth fails to recognize diverse backgrounds within Asian Americans).

142. Complaint ¶ 49, *Students for Fair Admissions, Inc. v. Yale Univ.*, No. 3:20-cv-01534 (D. Conn. Oct. 8, 2020).

143. *Id.* ¶ 1.

144. See, e.g., ASIAN AM. ADVANCING JUST., INSIDE THE NUMBERS: HOW IMMIGRATION SHAPES ASIAN AMERICAN AND PACIFIC ISLANDER COMMUNITIES 15–16 (2021), <https://www.ajsocal.org/wp-content/uploads/2021/06/Inside-The-Numbers-High-Res.pdf> [<https://perma.cc/LU7S-Z2FX>] (explaining the educational disparities among Asian American sub-groups).

impact case brought under the Age Discrimination in Employment Act (ADEA), the Eighth Circuit expressed concern that if there were no limit to how disparate-impact subgroups could be defined,¹⁴⁵ there would be a risk of plaintiffs “gerrymander[ing] evidence” by manipulating statistical evidence to show a disparate impact on that particular subgroup.¹⁴⁶ SFFA’s strategic erasure of data showing educational disadvantage within the Asian American community is a highly concerning form of gerrymandering evidence because it ignores marginalized members of a protected group.

To be clear, I do not mean to suggest that all members of a protected class must be similarly impacted by the challenged policy in order for there to be a cognizable claim of discrimination. To the contrary, systems of bias often impact members of a protected group differently. Race is, after all, just one dimension of group identity. As Professor Kimberlé Crenshaw famously theorized when she coined the term *intersectionality*, multiple identities can overlap to create a distinct status for people who share some aspects of their identities.¹⁴⁷ Collectively, separate categories of identity can intersect to cause a particular experience of subordination. Thus, intragroup differences can contribute to overall patterns of subordination between groups. Indeed, an intersectional frame helps to ensure that generalizations about groups in the aggregate do not overshadow the more specific experiences of subgroups, including experiences of discrimination that might otherwise be overlooked.¹⁴⁸

Although not as explicit as in the Yale litigation, SFFA’s approach to the Harvard litigation lacks an intersectional frame for considering how an Asian American applicant’s identity may interact with their status with regard to other group identities. SFFA does not acknowledge differences between subgroups at all, including those who are disadvantaged by increased reliance on standardized testing. The lack of an intersectional frame for considering the status of Asian Americans who identify as Hmong or Filipinx or Cambodian results in overlooking the bias these groups face. In contrast, the *Smith* plaintiffs’ use of disaggregated data reveals that Asian American students at the intersections of different

145. EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950–51 (8th Cir. 1999).

146. For further discussion, see Marc Chase McAllister, *Subgroup Analysis in Disparate Impact Age Discrimination Cases: Striking the Appropriate Balance through Age Cutoffs*, 70 ALA. L. REV. 1073, 1082–83 (2019) (observing that courts are split regarding how to interpret which subgroups may claim disparate impact discrimination under the ADEA).

147. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*, 1989 U. CHI. L. FORUM 139, 140 (1989), <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8> [<https://perma.cc/EA69-B5XQ>].

148. TED, *The Urgency of Intersectionality: Kimberlé Crenshaw*, YOUTUBE (Dec. 7, 2016), https://www.youtube.com/watch?v=akOe5-UsQ2o&ab_channel=TED [<https://perma.cc/4BMJ-355A>].

identities experience educational barriers that impact their scores on standardized tests.¹⁴⁹ By failing to apply an intersectional frame, SFFA ignores that there are people with intersecting identities within the Asian American community and masks the challenges some Asian American subgroups face.

Because SFFA brought an intentional discrimination claim against Harvard, the variation in how Harvard's admission policy impacted Asian American subgroups was an issue the district court struggled with in reviewing SFFA's discrimination claim. SFFA admitted that Harvard's admissions policy does not negatively impact some groups of Asian American applicants, and the district court found it improbable that Harvard would discriminate against some groups, but not other groups of Asian American applicants.¹⁵⁰ For example, Harvard's expert, Dr. Card, modeled admissions outcomes for two subgroups of Asian American applicants: females and applicants from California.¹⁵¹ He found that Asian American identity within these subgroups returned positive coefficients.¹⁵² Based on these models, the court reasoned that to the extent biases influenced the admissions process, those biases were not uniform across the Asian American applicant population.¹⁵³ The court also did not find it credible that Harvard only discriminated against non-ALDC Asian Americans,¹⁵⁴ reasoning that "it does not seem likely that Harvard would discriminate against non-ALDC Asian Americans, but not discriminate against ALDC Asian American applicants or that there would be a race-related explanation for treating the two groups differently."¹⁵⁵ In other words, the district court was not willing to accept SFFA's claims that discrimination would only affect certain groups of Asian American applicants.

The more narrow the impacted group, the more suspicious courts may be that the impact is the result of a discriminatory purpose¹⁵⁶ because

149. For further discussion, see Brief of Asian American Legal Defense and Education Fund et al. as Amici Curiae Supporting Defendant-Appellee at 11, *SFFA v. Harvard*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005).

150. *SFFA*, 397 F. Supp. at 174 (No. 14-cv-14176).

151. Rebuttal Report of David Card, Ph.D. ¶ 113, *SFFA*, 397 F. Supp. at 126 (No. 14-cv-14176).

152. *Id.* ¶ 14.

153. *SFFA*, 397 F. Supp. 3d at 173 (No. 14-cv-14176).

154. See *id.* at 138 (defining "ALDCs" as Athletes, Legacy Applicants, Dean's Interest List Applicants, and Children of Faculty or Staff).

155. *Id.* at 174.

156. The legal standard for proving a violation of the Equal Protection Clause requires that plaintiffs prove both racially discriminatory effect and purpose. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); see also *Washington v. Davis*, 426 U.S. 229, 240-41 (1976)

they may question why the defendant targeted some members of the group, but not the group more generally.¹⁵⁷ But a claim of discrimination against a subgroup that shares protected status should succeed when plaintiffs are able to establish that the subgroup is subject to different treatment based at least in part on their protected group status. Courts have recognized that intentional discrimination can be directed toward a subgroup of a protected class, for example, where the subgroup is subject to different treatment based in part of their protected group status, even when the overall protected group is not disproportionately disadvantaged in the aggregate.¹⁵⁸ This is true even when protected status is not the sole cause of discrimination, or where the decisionmaker was not aware of their bias,¹⁵⁹ so long as protected status was a factor that led to different treatment.¹⁶⁰ But plaintiffs bringing an intentional discrimination claim on behalf of a subgroup must offer a theory that they experienced intentional discrimination based on their protected status, in ways that are different from members of the protected group who were impacted differently.

SFFA failed to provide a meaningful theory for how intentional discrimination operated in the context of its claims,¹⁶¹ and ignored the ways that the complex and intersecting identities of Asian American college applicants impact lived experiences. Ironically, although SFFA argues that Asian Americans are discriminated against because they are

(imposing the burden of proving prima facie elements of discriminatory purpose and effect on equal protection plaintiffs, then shifting the burden to the state to rebut these presumptions).

157. See Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 727 (2015) (“[C]ourt opinions that acknowledged, much less discussed, intersectionality were few and far between.”).

158. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (holding that a hiring policy refusing to hire women with preschool age children violated the Civil Rights Act of 1964); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (citations omitted) (“In sum, Johnson Controls’ policy does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person’s sex would be different.”). For further discussion, see Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1371–72 (2017) (distinguishing aggregate performance as not the standard in a disparate treatment case alleging variation in how sub protected groups are treated).

159. See Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism about Equal Protection*, 66 ALA. L. REV. 627, 628–30 (2015) (describing how attitudes, biases, and stereotypes influence interactions and discrimination based on race as part of an empirical study examining predictive validity of implicit biases).

160. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282–83, 282 n.10 (1976) (discussing the need for a former employee to establish pretext).

161. See Amici Curiae Students Proposed Findings of Fact and Conclusions of Law at 49, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176) (“SFFA’s primary argument . . . appears to be that Harvard is acting with an unconscious bias against Asian American students,” but SFFA “did not bring forth any witness to explain what an unconscious bias is, how it operates, or how the evidence here demonstrates that Harvard is acting with an unconscious bias that favors white applicants to the detriment of Asian American applicants.”).

stereotyped as model minorities, by failing to disaggregate data and acknowledge intragroup differences, the framing of SFFA's theory of discrimination reinforces stereotypical notions that misunderstand the diversity within Asian American identity.¹⁶²

*C. Recognition of Diversity Along Multiple Axes Can Challenge
Subordination & Essentialism*

While no individual injured plaintiffs appeared during the *SFFA v. Harvard* trial, eight current Harvard students and alumni testified as amici in support of race-conscious admissions, including three Asian American Harvard students.¹⁶³ In their testimony, these three students discussed how they believed they benefited from having their ethno-racial identities recognized rather than being harmed by Harvard's holistic admissions policy.¹⁶⁴

First, students testified that some Asian American students would be excluded if Harvard's admissions process inflexibly relied on standardized test scores. For example, Thang Diep, a Vietnamese American who immigrated to the United States at age eight, explained how he believed his personal statement describing his experiences as an immigrant and English learner helped contextualize his SAT score when Harvard admissions officers reviewed his application.¹⁶⁵ He explained that he "believe[s] that [he] benefited from affirmative action . . . [because] it allows [his] immigration history to be taken into account."¹⁶⁶ Indeed, although a Harvard admissions officer noted on his application that his SAT score was on the lower end of the Harvard average, the admissions committee considered his other academic achievements in light of the discrimination and challenges he faced as a Vietnamese immigrant.¹⁶⁷

162. See Brief of the Asian Am. Legal Defense & Educ. Fund as Amici Curiae Supporting Respondents at 4, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (Nos. 20-1199 & 21-707) ("SFFA's arguments fail to account for the diversity within the Asian American community. Instead, they perpetuate the 'model minority' stereotype . . .").

163. The Lawyers Committee for Civil Right and Asian Americans Advancing Justice represented four current Harvard students and alumni; The NAACP Legal Defense and Educational Fund represented twenty-six Harvard student and alumni organizations as amici plus. See Memorandum and Order on Proposed Defendant-Intervenors' Motion to Intervene, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) (granting amicus status); Memorandum and Order Regarding Motions to Participate in Trial Proceedings Filed by Amici Curiae, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (No. 1:14-cv-14176) (granting permission to participate in trial); see also Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 342 (2008) ("Often, the court will allow a party who is unable to intervene to participate in a case as an 'amicus plus,' with a greater role than simply filing a single brief."). In addition to filing briefs, eight amici students and organizations testified during trial. *SFFA*, 397 F. Supp. 3d at 6.

164. Transcript of Record at 112, 157–58, 210, *SFFA*, 397 F. Supp. (No. 1:14-cv-14176).

165. *Id.* at 157–58.

166. *Id.* at 158.

167. *Id.* at 146–48.

Another student testified as to how she would personally be penalized if she could not discuss her ethnic and racial background in her application.¹⁶⁸ Sally Chen, a Chinese American student, testified that without race-conscious admissions, she doesn't think she would have been admitted to Harvard.¹⁶⁹ In her essay, she "wrote very directly about how being the daughter of Chinese immigrants and being a kind of translator and advocate for them across barriers of cultural and linguistic difference . . . shaped [her] views on social responsibility . . ."¹⁷⁰ In her application file, the admissions officer noted her description of "the significance of growing up in a culturally Chinese home . . ."¹⁷¹ Sally testified that Harvard's holistic admissions program considered her ethno-racial background, which was essential to describing who she is.¹⁷²

Students also testified that without a holistic admissions process that considers race, as well as diversity along other axes, there would be less diversity within the Asian American community at Harvard.¹⁷³ As explained in the Asian American Legal Defense and Educational Fund brief: "Individualized admissions policies are best equipped to recognize the vast diversity within the Asian community, including the stark differences in socioeconomic and education attainment among different ethnic subgroups."¹⁷⁴ Student Catherine Ho observed that as a Southeast Asian American, diversity within diversity or diverse representation of Asian American identity on campus truly mattered. It was important to her that there was diverse representation of Asian Americans within organizations on campus so that students "realize how diverse the Asian-American experience is."¹⁷⁵

The students who testified also described how, contrary to SFFA's argument, race-conscious admissions is not discriminatory, but instead fosters the kind of diversity that challenges stereotypes about Asian

168. For a discussion of how the injunction SFFA seeks would harm applicants of color, including Asian Americans, see Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1162–64 (2008) (describing the challenges for "race-positive" college applicants who wish to make race salient in explaining who they are without discussing race). See generally Elise Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64 (2016); Feingold, *supra* note 22, at 730–31.

169. Transcript of Record at 210–11, *SFFA*, 397 F. Supp. (No. 1:14-cv-14176).

170. *Id.* at 200.

171. *Id.* at 202.

172. *Id.*

173. See also Brief for Lawyers' Comm. for C.R. and Asian Am. Advancing Justice as Amici Curiae Supporting Respondent at 9, *SFFA v. Harvard*, 142 S. Ct. 895 (2022) (No. 20-1199) ("Indeed, Harvard's race-conscious policy not only cultivates diversity across racial groups, but also within racial groups ('intra-racial' diversity), including among Asian American students who vary widely in their ethnic, cultural, linguistic, socioeconomic, political, and religious backgrounds.").

174. Brief of Asian Am. Legal Def. and Educ. Fund et al. as Amici Curiae Supporting Defendant-Appellee at 11, *SFFA v. Harvard*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005).

175. Transcript of Record at 94, *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019).

Americans by exposing students on campus to a diversity of Asian American experiences instead of narrowly focusing on admitting students with the highest test scores.¹⁷⁶ Sally Chen testified that she felt it was important to “have an Asian American population that is also racially and ethnically diverse as well as socioeconomically diverse to really dispel these kinds of overarching myths about what it means to be Asian American.”¹⁷⁷ Sally emphasized that to “meet [other] Asian Americans who are different” pushed her to reflect on her own identity and challenged assumptions she had about others.¹⁷⁸

Diversity within diversity requires both a critical mass of students from different racial backgrounds and attention to how multiple identities overlap and intersect. By allowing the flexibility to consider many factors, including race, but also socioeconomic status, gender, sexual orientation, disability status, and religion, amongst other kinds of group status, holistic admissions offers the potential to foster diversity within the group of admitted students who share a common racial background. There are of course, distinctions between different subgroups within the Black, Latinx and Native American communities, just as there are within the Asian American community, and there is a real need for disaggregated data within all of these groups to recognize and understand intragroup differences.¹⁷⁹ College admissions committees should consider identity among multiple matrices to pursue a compelling interest in diversity and to protect against tokenism, and the wrong (but common) assumption that an individual student can represent the experience of an entire racial group. The importance of diversity within diversity, and the need for an intersectional frame to consider intersecting identities, exists for students of all racial backgrounds, during the application process and beyond.

In sum, the students who testified in *SFFA v. Harvard* described how, as the Supreme Court recognized in *Grutter v. Bollinger*, race-conscious admissions does not lead to discrimination, but fosters a critical mass of minority students and combats racial stereotypes as students experience diversity at the intersection of different overlapping identities on campus.¹⁸⁰ At the same time, Sally Chen shared a story that especially

176. *Id.* at 204, 210–11.

177. *Id.*

178. *Id.*

179. See, e.g., Chrystal A. George Mwangi, *Complicating Blackness: Black Immigrants & Racial Positioning in U.S. Higher Education*, 3 J. CRITICAL THOUGHT & PRAXIS (2014), at 14, 17 (emphasizing the need for disaggregated data among Black college students); Marcela Cuellar, *Understanding Latinx College Student Diversity and Why It Matters*, HIGHER ED. TODAY (Jan. 29, 2018), <https://www.higheredtoday.org/2018/01/29/understanding-latinx-college-student-diversity-matters/> [<https://perma.cc/RB47-PFA2>] (emphasizing the need for disaggregated data among Latinx college students).

180. *Grutter v. Bollinger*, 539 U.S. 309, 319–20, 331–33 (2003).

underscores the urgent need to further combat stereotyping of Asian American students on campus, which is worth recounting in full and in her own words:

I was studying in a student space called Ticknor Lounge when a staff person approached me and said, “Tourists aren’t allowed here. This is a space for students only.” And she essentially told me to leave, which in that moment I don’t think I even processed what was happening. I pulled out my ID and I said, “I go here.” She was unfazed. . . . [I]t made me feel like I didn’t belong there. It made me feel foreign. And it really, I think, triggered a kind of internal critique of myself.¹⁸¹

As Sally’s story illustrates, there remains a deep-seated assumption by many in American society that elite universities are spaces exclusively for white students. Although Sally describes a process of self-critique, it is evident from the circumstances of the story that the guard’s assumption that she did not belong was rooted in stereotypes about Asian Americans as foreign tourists and not based on anything she had personally done to suggest she was not actually a Harvard student.

Despite the fact that Asian Americans are stereotyped as model minorities, the assumption that they do not belong in elite settings remains prevalent in American society, just as a presumption of not belonging persists for other students of color for whom assumptions and stereotypes cut in other (sometimes opposite) ways.¹⁸² Indeed, similar stories of being stopped by guards and asked for identification on campus, ejected, or otherwise experiencing hostility and exclusion are prevalent among Black, Latinx, and Native American students at Harvard and elsewhere.¹⁸³ These stories emphasize that despite the unique ways that discrimination manifests for students of color from different backgrounds, racial bias remains a common feature of their experiences in elite white schools that undermines their sense of belonging, regardless of the assumptions others make about their test scores and qualifications. While race-conscious admissions policies can help to challenge race-based stereotypes and essentialism by increasing diversity on campus, they will not on their own end deeply entrenched white supremacy. The roots of racial bias and subordination go far deeper than that.

181. *Id.* at 204–05.

182. *See, e.g.,* Fisher I, 570 U.S. 297, 333 (2013) (Thomas, J., concurring) (alterations in original) (arguing that affirmative action “stamp[s] [blacks and Hispanics] with a badge of inferiority”). As Sally’s story makes clear, the badge of inferiority that non-white students wear is persistent irrespective of whether they are assumed to have lower test scores.

183. *See I Too Am Harvard*, TUMBLR, <https://itooamharvard.tumblr.com/> [<https://perma.cc/V246-4JBE>] (last visited March 26, 2023) (documenting the experiences of students of color with racial hostility and microaggressions on Harvard’s campus).

CONCLUSION

Without an analysis of racial disparities in access to power and resources, discrimination allegations lose meaning, and mirror claims could give rise to liability on both sides of an issue. The question of how to resolve mirror discrimination claims is not merely hypothetical, as a series of cases have recently alleged that universities and school districts are intentionally discriminating against some students, including students of color, where they take action to address racially disparate admissions practices.¹⁸⁴ I have argued that one way of distinguishing between what appear to be mirror discrimination claims is to ask whether there is a strong basis in evidence to believe that a policy or decision would entail liability for disparate impact discrimination. If so, avoiding disparate impact liability provides a defense and establishes that there is not a substantial legitimate justification for the reverse action in the face of the disproportionate adverse effect on members of a protected group. In addition, I have argued that an intentional discrimination claim should not ignore intragroup variation that leads to different experiences of marginalization within a protected class.

If the Supreme Court rules that race-conscious admissions is unconstitutional, it will likely reject an anti-subordination approach to understanding intentional discrimination.¹⁸⁵ This would lead to deep retrenchment of existing racial disparities and barriers college access.¹⁸⁶ The reality is that many admissions policies that may appear to be “race-neutral” on their face, in fact unfairly advantage white students. As discussed, colleges and universities have a duty to address the ways that admissions policies may unjustifiably, disproportionately exclude students of color—a duty that exists regardless of whether race-conscious admissions is deemed constitutional.¹⁸⁷ Indeed, if the Supreme Court holds that race-conscious admission is unconstitutional, addressing racially disparate impacts perpetuated through other college admissions policies will become even more critical to ensuring that pathways to college remain open to students of all racial backgrounds. Universities should consider whether reliance

184. See Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 761 (2022) (discussing legal challenges to higher admission policies and challenges to admissions at New York City’s Specialized High School Admissions Test and Thomas Jefferson High School for Science and Technology (Fairfax, Virginia)’s admissions policies).

185. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1009, n. 17 (1986) (“Anti-subordination advocates argue that legal rules can be used affirmatively as a means of ending historical patterns of patriarchy and white supremacy.”).

186. See, e.g., Neil Gotanda, *A Critique of Our Constitution Is Color-Blind*, STAN. L. REV. 44, 1–68 (1991) (arguing that an ideology of color-blindness served to maintain white supremacy by entrenching existing racial disparities).

187. 28 C.F.R. § 42.104(b)(2).

on the SAT or ACT unjustifiably decreases the admissions chances of minority applicants in violation of Title VI, in light of the well-established research showing that the SAT and ACT are not reliable indicators of a student's potential to succeed in college.¹⁸⁸ Universities should also carefully review legacy admissions policies that have the effect of disadvantaging students whose families lacked access to institutions of higher education in previous generations, and thus disproportionately favor white and wealthy applicants who were not historically excluded.¹⁸⁹ Finally, the need for colleges and universities to ensure a safe and inclusive climate will be even more urgent if the Supreme Court's pending decision results in a significant drop in the number of underrepresented minority students in higher education, limiting diversity within diversity, and increasing racial isolation and tokenism on campuses.

188. See *infra* Part III.A.

189. See Kathryn Ladewski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577 (2010) (arguing that legacy preferences are prohibited by Title VI because they have a discriminatory effect on minority college applicants and have not been shown to promote a legitimate university purpose).