

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT COURT OF MASSACHUSETTS
BOSTON DIVISION**

STUDENTS FOR FAIR ADMISSIONS, INC,

Plaintiff,

v.

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE (HARVARD
CORPORATION),

Defendant.

Civil Action No. 1:14-cv-14176-ADB

MOTION OF *STUDENT AMICI CURIAE* TO PARTICIPATE IN TRIAL

Pursuant to the Court's Order on June 15, 2015, welcoming *Students* to file a motion to participate in the proceedings should this case proceed to trial, *Students* respectfully request that they may participate in trial. (Dkt. 52.) *Students* would like to participate by making opening and closing statements (to the extent the Court allows the parties to do so), presenting student declarant testimony, and cross-examining SFFA's expert witness Dr. Arcidiacono.

In the Court's Order denying *Students'* motion to intervene, the Court granted *Students* leave to participate in this action as *amici curiae*, including by (1) submitting a brief or memorandum of law on any dispositive motion in this case; (2) participating in oral argument on any dispositive motion in this case; and (3) submitting personal declarations or affidavits in support of their memorandum of law, which may be accorded evidentiary weight if otherwise proper. (*Id.* at 23.) The Court further stated "[s]hould this case proceed to trial, *amici curiae*

may file a motion to participate in the proceedings, and the Court will consider the appropriate scope of participation at that time.” (*Id.*)

Students are a racially and ethnically diverse group that includes prospective students, current students, and alumni of Harvard, all of whom are intimately impacted by Harvard’s race-conscious policies. *Students* represent a broad cross-section of ethno-racial groups, identifying as Asian-American, Black, Latino, Native American, and Pacific Islander. *Students* believe that their participation in trial would benefit the Court because *Students* would provide a distinct perspective.

Absent the participation of *Students*, there will be no students at trial testifying in support of Harvard’s consideration of race in admissions as Harvard did not identify any students as part of its Rule 26 disclosures.

Students are situated differently than both SFFA and Harvard in this litigation in light of their lived experiences as ethno-racial minorities who have a personal stake in and insight into racial diversity at Harvard. *Students* uniformly believe that Harvard’s continued right to consider race to promote diversity is integral to their ability to access and thrive at one of our nation’s most elite training grounds for educational opportunities and future leadership. Further, *Students* believe that their own race and ethnicity shaped their experiences before, during, and after college. Given the salience of race in their lives, *Students* contend that any individualized assessment must allow students to share information about their race and allow the university to consider it. A system that willfully ignored race would fail to fully appreciate their accomplishments, perspectives, and potential contributions. The outright ban proposed by SFFA would deeply undermine their dignity by censoring their voices and their experiences as individuals of color living in country that still reckons with its racist past and present. Moreover,

students can testify to how Harvard's race-conscious admissions program has benefitted them both inside and outside of the classroom.

In addition to providing a distinct student perspective on race-conscious admissions, *Students* also depart from both parties with regard to SFFA's intentional discrimination claim. Unlike Harvard, *Students* note the data in the record that suggests special category preferences disadvantage Asian Americans in the admissions process (as well as other ethno-racial groups) *vis a vis* whites but concur with Harvard that SFFA has not demonstrated intentional discrimination. *Students* condemn any discrimination that is proven at trial, but fundamentally disagree with the remedy SFFA seeks: a blanket ban on "any use of race or ethnicity in the educational setting" in a manner that "does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission." (Dkt. 1 at 119.) *Students* also have raised arguments challenging the analysis and conclusions of Plaintiff's expert Dr. Arcidiacono that are different than that of Harvard, and, consistent with that, would raise unique issues on cross-examination.

SFFA has acknowledged that *Students* are differentially situated than other *amici* in this case, because *Students* moved to intervene over three years ago and filed their initial declarations during discovery, which permitted the parties, to the extent necessary, to address the significance of *Students'* declarations. (Dkt. 479 at 4-5.) In similar fashion, *Students* believe that their participation in trial would benefit the Court and not prejudice either party. *Students* file this motion now to provide ample notice of the limited role *Students* request to play at trial. *Students* also provide below the individual *Students* who wish to testify at trial, within the discretion of the Court.

Students request direct examination of individual *Students* who previously submitted declarations, with a cumulative direct examination time of no more than six hours. *Students* are providing witness disclosures below so that any opposition to this motion by the parties would be due on the same day that the parties are responding to each other's witness disclosures. Thus, the pre-trial schedule is not compromised in any way by this Motion.

Students witness list is as follows:

1. **Sally Chen**, who identifies as Chinese American and is a senior at Harvard, is prepared to provide testimony on: (a) How both her race and class intimately impacted her educational and extracurricular experiences prior to college; (b) How her ethno-racial identity was an integral part of both her application and interview for Harvard; (c) How her review of her application file indicated Harvard appreciated her perspective as a low-income Chinese American; (d) How her SAT scores and grades did not fully capture her potential; (e) How ethno-racial diversity on Harvard's campus has benefitted her by providing a foundation for her student activism to secure an Ethnic Studies program that includes Asian American Studies; and (f) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color, including Asian Americans. (*See* Dkt. 440, Ex. 1.6.)
2. **Thang Diep**, who identifies as Vietnamese American and is a senior at Harvard, is prepared to provide testimony on: (a) How his experience as a Vietnamese immigrant in California intimately impacted his experiences prior to college; (b) How his ethno-racial identity was an integral part of both his application and interview for Harvard; (c) How his review of his application file indicated Harvard appreciated his perspective as a Vietnamese immigrant experiencing language barriers; (d) How his

SAT scores and grades did not fully capture his potential; (e) How there is a need for greater intra-racial diversity at Harvard of Asian Americans since lower-income Asian subgroups (such as Vietnamese students) have notably lower representation on campus; (f) How ethno-racial diversity at Harvard has greatly broadened his understanding around critical academic and social issues; (g) How all students of color have benefited from the advocacy of individual affinity groups, such as Black student groups on campus; and (h) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color, including Asian Americans. (See Dkt. 440, Ex. 1.8.)

3. **Itzel Libertad Vasquez-Rodriguez**, who identifies as an indigenous Mexican-American or “Xicana” and graduated from Harvard in 2017, is prepared to provide testimony on: (a) How her experience as an indigenous Mexican-American shaped her perspective and experiences both prior, during, and after college as she has endured stereotypes and also derived strength from her ethno-racial identity; (b) How in choosing colleges, it was important to her that Harvard considered ethno-racial identity as part of the admissions process and had an ethnically diverse campus; (c) How the representation of students of color on campus reduced her sense of racial isolation, allowed her to thrive, and expanded her ability to understand and solve issues both academically and socially; (d) How diversity and intra-racial diversity at Harvard helped counteract assumptions and prejudice, although combatting stereotypes is tiring work; (e) How she desired greater levels of racial diversity on campus to reduce her sense of isolation; (f) How she experienced socioeconomic differences among peers differently than racial diversity; and (g) How Harvard’s

ethno-racial identity better prepared her to work in a diverse, global workforce. (*See* Dkt. 440, Ex. 1.12.)

4. **Jang Lee**, who was born in Korea and is a senior at Harvard, is prepared to provide testimony on: (a) How his experience as a Korean immigrant in a predominantly white Texas suburb intimately impacted his experiences prior to college where he grappled with stereotypes about Asians as academic overachievers; (b) How his ethno-racial identity was integral to his application and interview for Harvard; (c) How Harvard presented his first opportunity to live and learn alongside peers of diverse ethno-racial backgrounds after growing up in a predominantly white suburb; (d) How Harvard's social justice initiatives and organizations are substantially driven by students of color; (e) How Harvard's ethno-racial diversity has enhanced his academic studies in psychology which considers issues of racism, prejudice, and social hierarchies; and (f) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color, including Asian Americans. (*See* Dkt. 440, Ex. 1.4.)
5. **Daniel Lu**, who identifies as Chinese American and is a junior at Harvard, is prepared to provide testimony on: (a) How both his race and class intimately impacted his educational and extracurricular experiences prior to college; (b) How the model minority myth essentializes Asians and obscures the discrimination that underrepresented Asian ethnic groups experience; (c) How his ethno-racial identity was an integral part of both his application and interview for Harvard; (d) How ethno-racial diversity on Harvard's campus has benefitted him by enhancing learning opportunities through extracurricular activities driven by students of color and

motivated him to be more interested in activism; and (e) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color, including Asian Americans. (*See* Dkt. 440, Ex. 1.3.)

6. **Caroline Zheng**, who identifies as Chinese American and is a senior at Harvard, is prepared to provide testimony on: (a) How Harvard presented her an opportunity to live and learn alongside peers of diverse ethno-racial backgrounds after growing up in a predominantly white suburb; (b) How ethno-racial diversity on Harvard's campus benefitted her by exposing her to different viewpoints and provided meaningful opportunities for her to confront her own prejudices and privilege; (c) How holistic admissions creates a more enriching educational environment for all students by admitting students who may not have had the resources to invest in test prep classes and extracurricular activities but who are equally, if not more, qualified to be at Harvard; and (d) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color, including Asian Americans. (*See* Dkt. 440, Ex. 1.9.)
7. **Sarah Cole**, who identifies as a Black American and graduated from Harvard College in 2016 and Harvard Graduate School of Education in 2017, is prepared to provide testimony on: (a) How her experience as a Black American shaped her perspective and experiences both prior, during, and after college as she has endured stereotypes and also derived strength from her ethno-racial identity; (b) How in choosing colleges, it was important to her that Harvard considered ethno-racial identity as part of the admissions process and had an ethnically diverse campus; (c) How challenging an environment can be in which students of color feel isolated and marginalized; (d)

How ethno-racial diversity at Harvard sharpens students' critical thinking, develops their capacity for empathy and regard for others, and prepares them to be change agents; and (e) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color. (*See* Dkt. 440, Ex. 1.10.)

8. **Fadhil Moore**, who identifies as African-American and graduated from Harvard in 2015, is prepared to provide testimony on: (a) How both his race and class intimately impacted his experiences prior to college and the race-based barriers he faced both in and out of school; (b) How his SAT scores and grades did not fully capture his potential; (c) How the representation of students of color on campus reduced his sense of racial isolation, allowed him to thrive, and expanded his ability to understand and solve issues both academically and socially; (d) How extracurricular activities driven by students of color created vital spaces to express every part of his cultural and intellectual identity; (e) How ethno-racial diversity at Harvard has greatly broadened his understanding around critical academic and social issues; and (f) How greater racial diversity is needed at Harvard to improve the racial climate for all students of color. (*See* Dkt. 440, Ex. 1.11.)¹

Students have conferred with the parties. SFFA opposed this Motion. To the extent that *Students* seek to participate in the trial by proffering some of their student or alumni witnesses, Harvard supports this Motion.

¹ If *Students* are allowed to participate at trial, *Students'* only exhibits would be the applications of the *Students* who testify and the exhibit at Dkt. 509, Ex. 1. *Students* are willing to provide these documents to the parties if they agree to keep them confidential unless and until they are used by *Students* at trial.

Wherefore, *Students* respectfully request that the Court grant them the limited role in trial to make opening and closing statements, present student declarant testimony, and cross-examine SFFA's expert witness Dr. Arcidiacono.

Respectfully Submitted,

/s/ Oren M. Sellstrom

Oren M. Sellstrom (BBO #569045)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
AND ECONOMIC JUSTICE
61 Batterymarch Street, Fifth Floor
Boston, MA 02110
Tel: 617-988-0608
osellstrom@lawyerscom.org

/s/ Genevieve Bonadies Torres

Genevieve Bonadies Torres (*pro hac vice*)
Kristen Clarke
Jon M. Greenbaum (*pro hac vice*)
Brenda Shum (*pro hac vice*)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW
1500 K Street, NW
Washington, DC 20005
Tel: (202) 662-8600
gbonadies@lawyerscommittee.org

/s/ Nicole K. Ochi

Nicole K. Ochi (*pro hac vice*)
ASIAN AMERICANS ADVANCING JUSTICE
1145 Wilshire Boulevards
Los Angeles, CA 90017
Tel: (213) 241-0211
nochi@advancingjustice-la.org

/s/ Lawrence Culleen

Lawrence Culleen (*pro hac vice*)
Nancy Perkins (*pro hac vice*)
Steven Mayer (*pro hac vice*)
Emma Dinan (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001

Tel: (202) 942-5477
Lawrence.Culleen@arnoldporter.com

Dated: August 31, 2018

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.2(b), I hereby certify that this document filed through the ECF system on August 31, 2018 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Lawrence Cullen
Lawrence Cullen