No. _____

In The
Supreme Court of the United States

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

Petitioner,

v.

THE SCHOOL COMMITTEE FOR THE CITY
OF BOSTON; ALEXANDRA OLIVER-DÁVILA;
MICHAEL O'NEILL; HARDIN COLEMAN;
LORNA RIVERA; JERI ROBINSON; QUOC TRAN;
ERNANI DEARAUJO; BRENDA CASSELLIUS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Boston School Committee overhauled the criteria for admission to its three competitive "Exam Schools" for the 2021–22 school year. The School Committee replaced the traditional standardized test with a zip code quota that reserved seats for students with the highest GPA in each Boston neighborhood. The number of seats allocated to each neighborhood was based on the neighborhood's population of school-aged children. Members of the School Committee spoke openly of their intent to racially balance the Exam Schools at the expense of Asian American and white students. Three of the seven members who voted to enact the quota ultimately resigned in disgrace for racially-charged actions. The district court found that these members "harbored . . . racial animus" and that "the race-neutral criteria were chosen precisely because of their effect on racial demographics." Yet the First Circuit held the School Committee had not violated the Equal Protection Clause because Asian American and white applicants continued to earn seats at the Exam Schools at a rate above the groups' share of the applicant pool.

The question presented is whether an equal protection challenge to facially race-neutral admission criteria is barred simply because members of the racial groups targeted for decline still receive a balanced share of admissions offers commensurate with their share of the applicant pool.

PARTIES

Petitioner is the Boston Parent Coalition for Academic Excellence Corp., a voluntary association of parents and students in Boston.

Respondents are the School Committee of the City of Boston and several officials sued in their official capacities.

Respondent-Intervenors are the Boston Branch of the NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, and H.D. (a minor).

CORPORATE DISCLOSURE STATEMENT

Petitioner is a voluntary association with no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 89 F.4th 46 (1st Cir. Dec. 19, 2023).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 4489840 (D. Mass. Oct. 1, 2021).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 3012618 (D. Mass. July 9, 2021).

- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 996 F.3d 37 (1st Cir. Apr. 28, 2021).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 1422827 (D. Mass. Apr. 15, 2021).

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PETITION FOR WRIT OF CERTIORARI

Boston Parent Coalition for Academic Excellence Corp. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the First Circuit is available at 89 F.4th 46 (1st Cir. 2023) and reprinted at App. 1a–30a.

An earlier First Circuit opinion denying a motion for an injunction pending appeal is reported at 996 F.3d 37 (1st Cir. 2021).

The district court's indicative ruling denying a Rule 60 motion—issued after the district court retracted its initial opinion awarding judgment to the School Committee of the City of Boston and other defendants—is unreported but available at 2021 WL 4489840. It is reprinted at App. 31a–79a.

The district court's initial opinion awarding judgment to the defendants is unreported, but available at 2021 WL 1422827.

JURISDICTION

The final decision of the First Circuit sought to be reviewed was issued on December 19, 2023. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

For the second time in less than a year, one of the Courts of Appeal has allowed a public school district to implement admissions criteria designed to reduce admission of students from a particular racial group at a competitive high school on the theory that the reduction did not go *too far*. This "patently incorrect and dangerous" view of the equal protection guarantee "cries out for correction." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

The facts here show the danger of the rule adopted below and the need for this Court's intervention. The Boston School Committee overhauled admission at its three competitive admission "Exam Schools," replacing the longstanding admissions exam with a zip code quota that guaranteed spots at the schools for a set number of applicants with the highest GPA from each of Boston's neighborhoods. It chose the quota precisely because it would reduce the number of Asian American and white students who gained admission. Immediately after the vote, the Committee's president had to resign in disgrace after he was caught on a hot mic ridiculing the names of Asian-American parents who had signed up to speak in opposition to the quota. Two other Committee members later met the same fate after the Boston Globe published further text messages between them expressing animus towards white residents of the West Roxbury neighborhood. The district court found that these Committee members "harbored some form of racial animus." App. 72a.

Under the rule now adopted in two Circuits, none of that mattered. Because the proportion of Asian-American and white students admitted to the Exam Schools under the zip code quota was still higher than each group's share of the applicant pool, the challengers' equal protection claim was doomed from the start. The rule permits a school district to target applicants of a group that it deems "overrepresented" until members of that group no longer achieve at a level above their share of the population. This is antithetical to the Constitution's guarantee of equal protection under the law.

It is also in tension with multiple pillars of this Court's precedent. Time and again this Court has emphasized that racial balancing for its own sake is *per se* unconstitutional. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (*SFFA*) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (*Fisher I*)); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). It has rejected the notion that racial discrimination might ever be "benign," that is, designed to help some groups but not to hurt others. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226–27 (1995). And it has developed a totality-of-the-circumstances framework designed to smoke out illegitimate discriminatory intent in facially-neutral policies. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

Yet the Court of Appeals would permit a school district to openly target students on the basis of their race until the percentage of their "racial group" in the incoming class drops below its share of the applicant pool. The rule evades the one mechanism designed to

uncover proxy racial discrimination by declaring that no discrimination has occurred where racial balance exists. This turns all three lines of precedent on their head and demands this Court's intervention.

The nature of the Court of Appeals' disparate impact measure is so counterintuitive that lower courts have not applied it in any other context. When a state election law is shown to have been enacted to limit the voting power of a particular racial group, for example, no Court of Appeal would sustain it on the grounds that the voters of that group can still vote on par with other groups. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–32 (4th Cir. 2016). Such a benchmark is foreign to an intentional discrimination claim of any stripe, which by its nature demands an appraisal of the challenged law's effect. *See Coal. for TJ*, 2024 WL 674659, at *4–5 (Alito, J., dissenting from denial of certiorari). That is why the lower courts consistently apply the same before-and-after comparison in many other situations. *See, e.g.*, *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013).

This issue is not going away. The model the Fairfax County School Board used to remake the student body at Thomas Jefferson has already been "trumpeted to potential replicators as a blueprint for evading" this Court's decision in *SFFA*. *Coal. for TJ*, 2024 WL 674659, at *5. Should the Court turn away this case, it will only embolden government officials to continue targeting disfavored racial groups—particularly, Asian Americans. The facts of this case make it especially troubling, and the Court's refusal to intervene would send the signal that even overtly

racist behavior will not stand in the way of racial balancing by proxy. Certiorari should be granted before the "virus" of this rule spreads any further. *See id.* at *5.

STATEMENT OF THE CASE

I. Factual Background[1]

Boston's Exam Schools are three of the most prestigious public high schools in America. App. 35a–36a & n.3. Founded in 1635, the Boston Latin School is the oldest operating high school in the United States, counting among its alumni five signers of the Declaration of Independence.[2] Along with the Boston Latin Academy and the John D. O'Bryant School, the Exam Schools are rated the top three high schools in Boston—and among the leaders nationally—by U.S. News & World Report. App. 35a–36a & n.3. Together, the three schools enroll almost 6,000 students. App. 36a n.3. The School Committee of the City of Boston, which operates Boston Public Schools (BPS), oversees Exam School admissions. App. 32a.

Boston residents may apply to the Exam Schools for entrance in either seventh or ninth grade. App. 36a. Before the overhaul that became the subject of this case, Exam School admissions were based on an applicant's grades in English Language Arts and

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[1] Much of the facts come from the agreed-upon statement of facts and attached exhibits, available in the First Circuit appendix beginning at page 164 (hereinafter cited as "Record Below"). The Record Below was quite voluminous, so this Petition cites to the opinions below in the Appendix wherever possible.

[2] *See* Boston Latin School, *BLS History*, https://www.bls.org/apps/pages/index.jsp?uREC_ID=206116&type=d (last visited Apr. 9, 2024).

Math and his or her performance on a standardized test. App. 37a. BPS assigned a point value to each student's average grades and then added the applicant's score on the exam to calculate each applicant's composite score. *Id.* Each applicant ranked the three Exam Schools in order of preference, and BPS issued admissions decisions under a ranked-choice system—applicants with the highest scores received an offer to attend their first-choice school, and this process continued until all the seats at each school were filled. *Id.* Each student's admissions decision was based only on his or her composite score and preference ranking of the three schools. *Id.*

BPS staff began analyzing potential changes to the Exam School admissions criteria as early as 2019. In the fall of that year, BPS established a committee to review proposals for overhauling Exam School admissions. App. 37a–38a. And in July 2020, the School Committee followed Superintendent Brenda Cassellus' recommendation to establish the Exam School Admissions Criteria Working Group. App. 39a. The School Committee tasked the Working Group with submitting a recommendation on revisions to the Exam School criteria to the seven-member Committee. *Id.*

From the very beginning, the racial composition of the schools was at the center of the conversation. The data the Working Group considered—much of it consisting of modeling of the racial composition of the Exam Schools under various potential alternative criteria—revealed an almost singular focus on race. *See* Record Below at 174–75 (agreed-upon statement of facts ¶ 41) & 1753–94 (exhibits 44–54). The Working Group also completed an "Equity Impact

Statement" under the BPS "Equity Impact Planning Tool," which has as a core principle that BPS "must make a hard pivot *away from a core value of equality* —everyone receives the same—to equity: those with the highest needs are prioritized." *See* App. 40a–41a (emphasis added). Members of the Working Group viewed their job in terms of racial balancing. One of the members told the School Committee that one of the two "imperatives" facing the Working Group was "rectifying historic racial inequities afflicting exam school admissions for generations." Record Below at 422.

The Working Group presented its recommended zip code quota to the School Committee on October 8, 2020. App. 40a. Prominent in its presentation were multiple slides containing racial data on standardized testing and Exam School applications, as well as a slide discussing previous litigation that had restricted BPS' use of race in the past. *See* App. 42a; *see also* Record Below at 1475–76, 1481. But the key slide showed the "Projected Shift" in the racial composition of the Exam Schools under the Working Group's recommendation. Modeling predicted a substantial drop in Asian American and white representation with a corresponding gain for black and Hispanic applicants. Record Below at 1486.

Members of the School Committee endorsed the proposal, some in more explicit terms than even the Working Group had done. School Committee member Lorna Rivera focused on "the issue of just really naming it, you know, and really considering race and ethnicity" and called on the Committee to "be explicit about racial equity, and we do need to figure out again how we could increase those admissions rates,

especially for Latinx and black students." Record Below at 433–34. Alexandra Oliver-Dávila was, amazingly, even more explicit, saying that she "want[s] to see those schools reflect the District. There's no excuse, you know, for why they shouldn't reflect the District, which has a larger Latino population and black African-American population." Record Below at 462. At the next meeting, a Working Group member assured them that the zip code plan would "allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." Record Below at 653. Rivera supported the plan only as a first step—she criticized it "because white students would continue to benefit from 32 percent of the seats according to this plan. Look at the data, it's not a huge change for Asian and white families." Record Below at 943.

The October 21 meeting was also notable because School Committee president Michael Loconto was caught on a hot mic ridiculing the names of Chinese-American parents who had signed up to oppose the proposal. *See* App. 42a–43a. Far from being offended, Rivera and Oliver-Dávila's text messages to each other showed they thought the incident was extremely funny. App. 43a; *see also* Record Below at 2025. All three members would eventually resign in disgrace—Loconto the next day and the two others months later[3] when the *Boston Globe* published further text messages between them expressing animus towards white residents of the West Roxbury neighborhood of

[3] *See also* Max Larkin, *Second Boston School Committee Member Resigns Following Leaked Text Messages*, WBUR (June 8, 2021), https://www.wbur.org/news/2021/06/08/second-resignation-boston-school-committee.

Boston. App. 48a, 50a–51a, 56a–57a. But all voted that night to approve the Working Group's recommendation of a zip code quota with just minor changes. App. 42a.

Under the plan the School Committee approved, the venerable standardized test was no more. App. 44a. BPS ranked applicants according to their GPA only and then filled 20% of the seats at each of the Exam Schools with the top-ranked applicants. App. 45a. After that, however, the plan allocated a set number of seats to each of Boston's 29 zip codes—and a grouping the School Committee created for students who were homeless or in the custody of child services—based on the school-aged population of each. App. 44a–46a. Rather than a Citywide competition for Exam School seats, the quota prompted 30 separate competitions for the seats within each zip code.

II. Racial Impact of Criteria Overhaul

The quota accomplished the School Committee's and Working Group's racial balancing goal. Modeling demonstrated that the quota would reduce the number of offers issued to Asian American and white students not only compared to the previous test-in criteria, *see* App. 47a, but also relative to a hypothetical Citywide competition using only GPA, *see* Record Below at 1778. That is precisely how it worked. The proportion of admitted students who were white or Asian American fell from 61% to 49%, App. 16a, 47a, and the decline occurred due to the gerrymandering effect of the zip codes, Record Below 2070–71, 2892, 2898, 2900. Because each zip code was allocated seats solely based on its share of school-age children, some zip codes—those with many students

with high GPAs—experienced much more stringent competition for its allocated seats than did others.

By design, those zip codes were the ones with more Asian American and white students. The average admitted student GPA varied substantially by zip code. In the largely white and Asian American West Roxbury zip 02132, for example, the average GPA of the 69 admitted students was 11.52 on a 12-point scale. Record Below at 2892, 2898, 2900. Not a single student from West Roxbury was admitted with a GPA under 10.0—and the same was true in at least five other zip codes with a majority white and Asian American population. *See id.* But in the predominantly black and Hispanic Dorchester zip code of 02121, the *average* GPA of an admitted student was 9.79 and 41 of the 67 students admitted had a GPA below 10.0. *See id.* On the whole, students in areas with more white and Asian American students had to achieve substantially higher GPAs to gain admission into an Exam School under the quota.

III. The Lawsuit

Boston Parent Coalition for Academic Excellence is a nonprofit organization formed to "promot[e] merit-based admissions to Boston Exam Schools" and "diversity in Boston high schools by enhancing K-6 education across all schools in Boston." App. 47a–48a. Membership "is open to any student, alumni, applicant, or future applicant of the Boston Exam Schools, as well as their family members." App. 48a.

The Coalition sued the School Committee in February 2021 on behalf of 14 Asian American and white students who were in the process of applying to the Exam Schools as sixth graders and faced the

prospect of the zip code quota. *See* App. 48a. Ten of the 14 reside in the West Roxbury neighborhood, which faced particularly high admissions requirements and the express animus of two Committee members who later resigned in disgrace. *See id.*; *see also* Record Below at 2082–88. The Coalition initially sought a preliminary injunction, but the district court opted to collapse its decision on the injunction into its merits decision. App. 9a. After that, the Coalition and the School Committee agreed to a stipulated record to reach a decision before BPS made admissions offers. *Id.* The record—compiled with the help of public records requests—contained voluminous data, School Committee deliberations, and text messages between Committee members during the body's meetings. The district court conducted a trial on the papers and entered judgment in favor of the School Committee, holding that the zip code quota was not enacted with discriminatory intent. App. 9a.

The Coalition immediately appealed and unsuccessfully sought an injunction pending appeal from the First Circuit. *Boston Parent Coal. for Academic Excellence Corp. v. Sch. Comm. of City of Boston*, 996 F.3d 37 (1st Cir. 2021). But before briefing began on the merits, the *Boston Globe* published its exposé of Committee members' Rivera and Oliver-Dávila's text messages during the October 21, 2020, Committee meeting. App. 9a–10a, 56a–57a. These messages—which heaped scorn on white residents of West Roxbury—were omitted from the stipulated record despite the Defendants' representation that the record contained "[a] true and accurate transcription of text messages between Boston School Committee Members, Vice-Chairperson Alexandra Oliver-Dávila and Lorna Rivera during the October 21, 2020 Boston

School Committee meeting," Record Below at 181; *see* App. 56a–57a, 66a–68a & n.15, 78a n.23. As a result, the Coalition sought to reopen the case in the district court through a Rule 60(b) motion. App 10a. On July 9, 2021, the district court withdrew its initial opinion as "factually inaccurate." ECF No. 121 in Case No. 1:21-cv-10330-WGY (D. Mass.). However, it ultimately denied the Coalition's Rule 60 motion. Although the court found that "[t]hree of the seven School Committee members harbored some form of racial animus," App. 72a, it denied the motion partly on the grounds that the text messages it deemed "racist" would not have changed the result, App. 72a–75a.

The First Circuit affirmed. It first held that the Coalition had standing to sue on behalf of five of the original 14 students. App. 14a. Although an injunction was no longer possible, the panel held that the Coalition was still entitled to seek relief for those five students who would have been admitted to one of the Exam Schools had there been a Citywide competition with no quotas. *Id.* On the merits, however, the panel held that the Coalition could not establish that the zip code quota disproportionately harmed Asian American and white applicants because those groups still earned more seats than their share of the applicant pool would suggest. *See* App. 17a–19a (holding that the School Committee "chose an alternative that created less disparate impact, not more"). So even though the First Circuit understood that the zip code quota "was chosen precisely to alter racial demographics," App. 29a, the court held it did not violate the five students' equal protection rights.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Rule Permits Racial Balancing by Proxy, Undermining Decades of This Court's Precedent

First. If there is one constant in this Court's equal protection precedents, it is disdain for racial balancing. Beginning with the very first modern admissions case to reach this Court in 1978, the controlling opinion declared that a university's purpose "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin" would be "facially invalid." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Then, in demanding the government satisfy strict scrutiny before race-based set-aside for public contracting, the Court disparaged a rigid 30% minority contracting quota as not "narrowly tailored to any goal, except perhaps outright racial balancing." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Indeed, even in cases where the Court ultimately permitted universities to use race in admissions to "obtain[] the educational benefits of 'student body diversity,'" *Fisher I*, 570 U.S. at 309 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)), it declared racial balancing to be "patently unconstitutional," *id.* at 311 (quoting *Grutter*, 539 U.S. at 330).

Tellingly, it was the Court's commitment to eradicating racial balancing that ultimately led to the downfall of race-based university admissions. When the Court discarded the diversity rationale last term, it did so in large part because it recognized that universities' actual admissions procedures under *Grutter* and *Fisher* were indistinguishable from a

"numerical commitment" to racial balancing. *See SFFA*, 600 U.S. at 221–23. This echoed the complaints of dissenting justices in the past. *See Grutter*, 539 U.S. at 383–85 (Rehnquist, C.J., dissenting) ("[T]he correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'"). Ultimately, *SFFA* recognized that despite the Court's denunciation of racial balancing in cases like *Grutter* and *Fisher*, universities were still doing it. So the Court ditched the rule that enabled it.

The rule adopted below—and in the Fourth Circuit in *Coalition for TJ*—likewise enables racial balancing. It precludes an equal protection challenge to facially-neutral admissions criteria unless members of the targeted racial group gain admission at a lesser rate than the group's share of the applicant pool. And this case shows the consequences of that bar, as it has doomed the Coalition's case despite a district court finding that multiple decisionmakers expressed racial animus. *See* App. 29a ("More evidence of intent does not change the result of this case, given that our analysis assumes that the Plan was chosen precisely to alter racial demographics."); 72a ("Three of the seven School Committee members harbored some form of racial animus, and it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics.").

Indeed, it would be difficult to imagine a rule better suited to permit schools to engage in racial

balancing. Nothing in either the First or Fourth Circuit's formulation of the rule prohibits the setting of racial targets. Rather, the First Circuit's reliance on Title VII disparate impact cases seems to *encourage* it. *See* App 17a–18a. According to that court, the purpose of disparate impact analysis is to encourage, "as between equally valid selection processes," decisionmakers "to use the one that reduces under-representation (and therefore over-representation as well)." App. 18a. In other words, to encourage racial balancing—even through intentional discrimination. *See id.* (accusing the Coalition of seeking to "leverage a disparate-impact theory of discrimination against the Plan for its alleged reduction—but not reversal—of certain races' stark over-representation among Exam School invitees"). Thus, it is no exaggeration to say that "[t]he holding below effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups." *Coal. for TJ*, 2024 WL 674659, at *4); *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 903 (4th Cir. 2023) (Rushing, J., dissenting) ("[T]he majority rejects the very possibility that a State could ever discriminate against a racial group by intentionally reducing its success in a competitive process to a level equal with that of other races."). Such a rule flouts this Court's prohibition on racial balancing.

Second. The ease by which school districts can evade the per se prohibition on racial balancing undermines this Court's framework for assessing intentional discrimination claims. *Arlington Heights* envisioned a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The "starting point" of that

inquiry is an assessment of "[t]he impact of the official action" to determine whether the challenged action "bears more heavily on one race than another." *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

According to the First and Fourth Circuits, that is also the end point, even if members of one racial group are targeted for a substantial reduction in benefits. This per se bar blocks lower courts from considering precisely the kind of evidence of discriminatory intent that *Arlington Heights* said was so important in answering the key question—whether the decisionmakers implemented the policy "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *see Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").

Third. Even where the type of racial animus exhibited here is absent, the First Circuit's definition of disparate impact clashes with a long line of this Court's precedents confirming that even seemingly "benign" racial discrimination is inherently suspect. The Court has repeatedly rejected the use of quotas and set-asides designed to "help" individuals in certain racial groups, understanding that "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *SFFA*, 600 U.S. at 218–19. It has invalidated a set-aside of 16 out of 100 seats for minority candidates in medical school admissions,

Bakke, 438 U.S. at 289 (opinion of Powell, J.); a 30% set-aside for minority subcontractors on government contracts, *Croson*, 488 U.S. at 507–08; and a university admission scheme that awarded 20% of the points necessary for admission "solely because of race," *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Yet by defining disparate impact in terms of racial balance, the First Circuit's rule permits this same supposedly "benign" consideration of race those cases rejected.

The Constitution demands that the Government "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *SFFA*, 600 U.S. at 223 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). This Court's precedent has consistently moved in that direction. The First Circuit's rule threatens that progress and undermines the Court's consistent condemnation of racial discrimination. Certiorari is necessary to stem the tide that widespread adoption of a similar rule would create.

II. The First Circuit's Disparate Impact Definition Diverges from the Typical Treatment of Intentional Discrimination Claims in Circuit Courts

The First Circuit's per se bar on many intentional discrimination claims conflicts not only with this Court's precedent, but with how Courts of Appeals generally assess evidence of disparate impact within the *Arlington Heights* analysis. Put simply, the First Circuit's rule appears nowhere in other circuits' consideration of intentional discrimination claims in any other context. Certiorari is necessary to clear up this split in authority and make clear the proper way

to measure disparate impact as one factor in assessing discriminatory intent.

Perhaps the best illustration of the outlier nature of the First Circuit's rule is that even the Fourth Circuit—which applied the same rule in *Coalition for TJ*—doesn't apply it outside this specific context. In *McCrory*, a Fourth Circuit panel held that the North Carolina General Assembly had enacted an election law overhaul with racially discriminatory intent. Despite a lack of direct evidence of racial animus towards black voters, the court's *Arlington Heights* analysis concluded that the legislature sought to "entrench itself" through "targeting voters who, based on race, were unlikely to vote for the majority party." *McCrory*, 831 F.3d at 233. By "targeting," though, the court did not mean that the law made it more difficult to vote for prospective black voters than for voters of other races. Instead, the legislature "targeted" black voters by "restrict[ing] voting mechanisms it knew were used disproportionately by African Americans." *Id.* at 229. But it restricted these mechanisms—same-day registration, early voting, and the counting of out-of-precinct ballots—for everyone, and with the restrictions in place, black turnout *rose* by 1.8% over the previous comparable election. *See id.* at 232. The district court thought these facts mitigated any disparate impact the law had on black voters, but the Fourth Circuit disagreed. It harshly criticized "the standard the district court used to measure disparate impact," saying it "required too much in the context of an intentional discrimination claim."[4] *Id.* at 231.

[4] The First Circuit's discussion of Title VII cases as if that were the standard for demonstrating disparate impact under

Instead, it was enough in that context to show that "African Americans disproportionately used each of the removed mechanisms." *Id.*

McCrory endorsed a before-and-after comparison approach. It did not matter that the legislature's action still allowed black North Carolinians to vote in high (or greater) numbers—on the contrary, the panel explicitly rejected a standard that would have required plaintiffs to prove that the remaining voting options were not sufficient. *See id.* at 230 (citing *Arlington Heights*, 429 U.S. at 260, 265–66). Instead, to show the legislation targeted black voters, the Fourth Circuit simply looked at what existed before and noted that the legislature pared back methods of voting that black voters had disproportionately used. So it was unsurprising that when it came time to analyze competitive K-12 admissions cases, three different district courts within the Fourth Circuit applied *McCrory* to find that new admissions criteria had a disparate impact on Asian American students. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022), *rev'd* 68 F.4th 864 (4th Cir. 2023); *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 560 F. Supp. 3d 929, 952 (D. Md. 2021) ("As to disparate impact, no real dispute exists that the field test criteria disproportionately affected Asian American students. Since the field test was implemented, the acceptance rate for Asian American students has dropped at each of the programs." (citation omitted));

Arlington Heights also diverges from *McCrory*, where the Fourth Circuit was careful to note that substantially less proof of disparate impact is required in a case where impact is not the entirety of the claim. 831 F.3d at 231 & n.8.

Boyapati v. Loudoun Cnty. Sch. Bd., No. 1:20-cv-01075, 2021 WL 943112, at *8 (E.D. Va. Feb. 19, 2021) ("[B]ased on the facts alleged, it is plausible that the new Plan would have a disproportionately negative effect on Asian students, when compared with previous admission levels at certain middle schools."). These courts employed a commonsense approach to the use of disparate impact as an evidentiary tool in intentional discrimination cases. Simply put, if a change in the law made things for members of a particular racial group more difficult than they were before, that is at least *evidence of* discriminatory intent, even though it is not dispositive.

That approach didn't last in admissions cases. Things began to reverse course when, in a concurrence to the panel's decision to grant a stay pending appeal in *Coalition for TJ*, Judge Heytens suggested that the Coalition had not demonstrated disparate impact because the proportion of Asian Americans admitted under the challenged criteria was higher than the group's share of the applicant pool. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *3 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring). Sensing the Fourth Circuit's warning that *McCrory* would no longer apply in this context, the district court in *Association for Education Fairness* subsequently changed its position on disparate impact in a renewed motion to dismiss. *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358, 367–68 (D. Md. 2022). Just months later, the *Coalition for TJ* panel adopted Judge Heytens' analysis on the merits. 68 F.4th at 880–82. The panel in this case followed suit.

The divergence from *McCrory* shows how this case and *Coalition for TJ* effectively created a new rule that permits school districts to engage in racial balancing. *McCrory*'s treatment of disparate impact is more typical in *Arlington Heights* cases.[5] Perhaps the most analogous case is *Pryor*, 288 F.3d 548. That was a challenge to an NCAA bylaw that increased the academic standards that athletes had to meet to be eligible for a Division I scholarship. *See id.* at 552–55. The NCAA said it enacted the policy to improve the graduation rate of black college athletes, but the athletes who challenged it argued that it was adopted to "effectively 'screen out' or reduce the percentage of black athletes who could qualify for athletic scholarships." *Id.* at 564. The Third Circuit allowed the claim to proceed, noting that the complaint alleged "the NCAA sought to achieve its stated goal of improving graduation rates by using a system that would exclude more African-American freshmen who, in the past, might have qualified for scholarships." *Id.* at 565–66. This is conventional reasoning—the

[5] Whether the method of measuring disparate impact matters depends on the facts of a particular case. Sometimes it does not. A recent example is *Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018)—a case the Eleventh Circuit ultimately reviewed en banc and dismissed on jurisdictional grounds. But the panel reached the *Arlington Heights* analysis and found that Alabama's statute nullifying a city's minimum wage increase had a disparate impact on black residents because it "denied 37% of Birmingham's black wage workers a higher hourly wage, compared to only 27% of white wage workers." *Id.* at 1294. In this context, a disparate impact would necessarily exist regardless of the way impact is defined, because the before-and-after effect and the after-only effect are related. Nevertheless, the panel there still employed a before-and-after analysis, comparing the situation before the state law was passed to the one that existed under that law.

relevant comparator being "the past" success of black athletes at earning scholarships. But under the admissions-specific rule in the First and Fourth Circuits, the comparator instead would have been the proportion of students of other races who could earn scholarships under the new policy. In that scenario, the plaintiffs might have lost if the number of black athletes obtaining scholarships was still high under the challenged law—even if they had evidence of racial animus.[6]

This lays bare just how consequential the split of authority is on this issue. The proliferation of the rule adopted below will only widen the gulf between these two approaches. Only this Court's intervention can change the course of events and make clear to lower courts the proper way to measure disparate impact in *Arlington Heights* analysis.

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[6] As Justice Alito noted, a finding of no disparate impact is outcome determinative in many circuits because those courts "consider[] disparate impact to be a necessary element of a successful challenge to a facially neutral policy." *Coal. for TJ*, 2024 WL 674659, at *5 n.8. This, too, is contrary to *Arlington Heights*, which says only that impact "may provide an important starting point" of the "sensitive inquiry" into intent. 429 U.S. at 266; *see also McCrory*, 831 F.3d at 231 (emphasizing that disparate impact is just one factor in the *Arlington Heights* analysis). But it only heightens the need for this Court's review, since treating disparate impact as dispositive leaves no escape hatch for a finding of discriminatory intent in egregious cases like this one.

III. This Case Presents a Clean Vehicle to Address a Live Question of National Importance

On top of the doctrinal reasons to take this case sits the elephant in the room: this issue is not going away. This Court has struggled with cases involving racial discrimination in education for more than a century.[7] Last term, *SFFA* finally resolved to end it once and for all—"all of it." 600 U.S. at 206. This case and those like it across the country threaten to undermine that promise. This Court should grant the petition and address this pressing issue before it is too late.

Boston is not the only place where local school administrators seek to overhaul competitive admissions in pursuit of racial balance. This Court recently saw what Fairfax County did in the *Coalition for TJ* case, but similar efforts are underway in many of our nation's largest school districts.

- In New York City, former mayor Bill de Blasio launched an effort to replace the venerable admissions exam for the City's eight test-in Specialized High Schools with a geographic quota. His main selling point was that the

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[7] *Cumming v. Bd. of Educ.*, 175 U.S. 528 (1899); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Fisher I*, 570 U.S. 297; *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (*Fisher II*); *SFFA*, 600 U.S. 181.

quota would produce racial balance—with Asian American enrollment plummeting 40%.[8] His schools chancellor Richard Carranza derisively told critics "I just don't buy into the narrative that any one ethnic group owns admission to these schools."[9] And when this plan failed in the state legislature,[10] de Blasio and Carranza unilaterally altered admission criteria for a portion of the class to accomplish that same purpose.[11]

- In San Francisco, the school board scrapped merit-based admissions at competitive Lowell High School in favor of a lottery after controversy over its heavily Asian American

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[8] *See* New York City DOE, *Specialized High Schools Proposal* at 6–7, 12, https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/specialized-high-schools-proposal.pdf?sfvrsn=c27a1e1c_9 (last visited Apr. 9, 2024).

[9] *See* Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. Times (June 5, 2018), https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html.

[10] The bill stalled in the State Senate largely on account of opposition from Asian American legislators, particularly Senator John Liu. *See* Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. Times (June 24, 2019), https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html.

[11] *See* Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools* (June 3, 2018), https://www.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversityspecialized-high#/0; *see Christa McAuliffe Intermediate Sch. PTO v. de Blasio*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022), *appeal pending* No. 22-2649 (2d Cir.).

student body. One of the board members had tweeted several offensive things about Asian Americans, claiming once that they use "white supremacist thinking to assimilate and 'get ahead.'"[12] Voters recalled her and two other board members who voted for the lottery, and the Board reinstated merit-based admissions in a 4–3 vote.[13]

- In Montgomery County, Maryland, the Board of Education overhauled the admissions criteria for its magnet middle school programs following discussion littered with support for racial balancing. *See Ass'n for Educ. Fairness*, 560 F. Supp. 3d at 953. Asian American enrollment in the programs plummeted after the changes. *See id.* at 952. The district court found that the plaintiff parent association had plausibly alleged "that the County acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data." *Id.* at 953. But then the Board overhauled the criteria again—still disadvantaging Asian Americans—and the district court granted a second motion to

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[12] *See* Thomas Fuller, *'You Have to Give Us Respect': How Asian Americans Fueled the San Francisco Recall*, N.Y. Times (Feb. 17, 2022), https://www.nytimes.com/2022/02/17/us/san-francisco-school-board-parents.html.

[13] *See SF school board votes to bring back merit-based admissions at Lowell High School*, ABC7 (June 22, 2022), https://abc7news.com/lowell-high-school-admissions-merit-based-sfusd-board-vote-sf-lottery-system-ranking/11989124/.

dismiss based primarily on the same disparate impact rule at issue here. *See Ass'n for Educ. Fairness*, 617 F. Supp. 3d at 367–68.

- Other cities are moving to scrap selective admission schools altogether in large part due to their racial composition. The Chicago Board of Education passed a resolution in December 2023 that established a goal of moving away from competitive admission schools, saying the school system should replace them with "anti-racist processes and initiatives that eliminate all forms of racial oppression."[14] And the Seattle public school system is dismantling its "highly capable cohorts," calling it "highly inequitable" due to the substantial number of white and Asian American students in the programs.[15]

Wherever competitive admission K-12 schools exist, it seems that policymakers have targeted them for their racial makeup. And in every one of these circumstances, Asian Americans have been singled out for unfavorable treatment. As Justice Alito observed, "[p]ublic magnet schools with competitive admissions based on standardized tests have served as engines of social mobility by providing unique opportunities for minorities and the children of

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[14] Reema Amin & Becky Vevea, *Chicago Public Schools leaders want to move away from school choice*, Chalkbeat (Dec. 12, 2023), https://www.chalkbeat.org/chicago/2023/12/12/chicago-public-schools-moves-away-from-school-choice/.

[15] Claire Bryan, *Why Seattle Public Schools is closing its highly capable cohort program*, Seattle Times (Mar. 31, 2024), https://www.seattletimes.com/education-lab/why-seattle-public-schools-is-closing-its-highly-capable-cohort-program/.

immigrants, and these students' subsequent careers have in turn richly contributed to our country's success." *Coal. for TJ*, 2024 WL 674659, at *2. The disparate impact rule adopted in the First and Fourth Circuits would permit local school boards to turn these schools into laboratories for racial balancing. Only this Court's intervention could prevent that outcome.

As the sheer number of similar disputes shows, if the Court does not take this case up now, it is likely that this rule will continue to spread. *See id.* at *5. The opinion below and the Fourth Circuit's opinion in *Coalition for TJ* both "offer a roadmap for other federal courts to provide cover" when schools "skirt the Equal Protection Clause." *Id.* at *5 n.9. And university administrators are already advocating the use of similar admissions criteria to evade this Court's decision in *SFFA*. *Id.* If this Court waits until administrators implement that advice, it will be too late for countless students already being denied educational opportunities. The Court should grant this petition and decide the issue now.

This case provides an exceptionally clean vehicle to do just that. Unlike in many challenges to admissions criteria, there is no threat of mootness here. This case concerns the zip code quota that was used for admission to the Exam Schools in the fall of 2021, and the Coalition now seeks relief for just five students who would have gotten in had there been a Citywide competition without a zip code quota.

This case represents the Court's best chance to address a rule that threatens to undermine this Court's precedent, divide lower courts, and permit the type of discrimination the Court sought to eradicate in *SFFA*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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