No. _____

In The
Supreme Court of the United States

COALITION FOR TJ,

Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2020, the Fairfax County School Board (Board) overhauled its admissions to Thomas Jefferson High School for Science and Technology (TJ). The Coalition for TJ, a group of parents and students within the school district, alleged that those changes were adopted to racially balance the freshman class by excluding Asian Americans. The district court agreed and granted summary judgment to the Coalition. Over a dissent by Judge Rushing, a panel of the Fourth Circuit reversed. Despite evidence that the Board chose the new criteria to further its racial balancing goal—and evidence that the policy substantially reduced both the raw number and the proportion of Asian Americans admitted—the Fourth Circuit held that the admissions changes did not violate the Equal Protection Clause.

The question presented is whether the Board violated the Equal Protection Clause when it overhauled the admissions criteria at TJ.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a voluntary association that has no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

Coalition for TJ v. Fairfax County School Board, 68 F.4th 864 (4th Cir. May 23, 2023).

Coalition for TJ v. Fairfax County School Board, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022).

Coalition for TJ v. Fairfax County School Board, 142 S. Ct. 2672 (Apr. 2, 2022).

Coalition for TJ v. Fairfax County School Board, No. 1:21cv296, Order (E.D. Va. Feb. 25, 2022).

Coalition for TJ v. Fairfax County School Board, No. 1:21cv296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Coalition for TJ petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is available at 68 F.4th 864 and reprinted at App. 1a–84a.

An earlier Fourth Circuit decision granting a stay pending appeal is unreported but is available at 2022 WL 986994. This Court's order denying the Coalition's application to vacate the stay is available at 142 S. Ct. 2672 (2022) (mem.).

The decision of the United States District Court for the Eastern District of Virginia granting summary judgment for the Coalition is not reported but is available at 2022 WL 579809 and reprinted at App. 85a–111a.

JURISDICTION

The final decision of the Fourth Circuit sought to be reviewed was issued on May 23, 2023. App. 1a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

Thomas Jefferson High School for Science and Technology (known in the community as "TJ") is one of the nation's best public high schools.[1] App. 11a. From its Alexandria, Virginia, campus, it offers courses rarely seen at the high school level, particularly advanced math and science courses typically not taken until college.[2] Graduates attend elite universities and become leaders in their fields. As a result, admission to TJ is highly competitive. Until 2020, admission was largely based on standardized examinations given to all applicants who met certain minimum qualifications.

But in 2020, the Fairfax County School Board became consumed with transforming the racial composition of TJ. Over the course of roughly nine months, the Board overhauled its admissions policies to address what it saw as a major problem: TJ's student body—which was over 70 percent Asian American—did not reflect the racial makeup of the school district or Northern Virginia. The Board did away with the longstanding admissions exams and

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[1] TJ is currently rated America's top public high school by U.S. News and World Report. *See* U.S. News & World Report, Thomas Jefferson High School for Science & Technology, https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology-20461 (last visited Aug. 16, 2023).

[2] TJ's course catalog includes math classes such as multivariable calculus, linear algebra, and differential equations. *See* TJHSST, Course Catalog for 9th–12th Grade: Mathematics, https://insys.fcps.edu/CourseCatOnline/reportPanel/503/10/0/0/0/1;title=reportPanelSideNav (last visited Aug. 16, 2023).

replaced them with a "holistic" evaluation, complete with a middle-school quota and a points system that rewarded non-academic "experience factors."

The effects of these changes were immediate. The Board lauded the "data" of the "prospective freshmen class" before a single freshman even stepped on campus.[3] That's because the racial demographics more closely mirrored those of the surrounding area, advancing the Board's goal. Even though TJ expanded class sizes to admit dozens more students in the first year of the overhaul, the raw number of Asian-American students fell substantially. Admitted students in the three other racial or ethnic groups that the Board tracks—white, Black, and Hispanic—increased.

The issue in this case is simple—did the Board's overhaul violate the Equal Protection Clause? This Court has long recognized that a policy "fair on its face and impartial in appearance" may violate the Equal Protection Clause if "it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). In more modern parlance, the government must satisfy strict scrutiny "not just when [a policy] contain[s] express racial classifications, but also when, though race neutral on [its] face, [it is] motivated by a racial purpose or

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[3] *See* Fairfax County Public Schools, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM* (June 23, 2021), https://www.fcps.edu/news/tjhsst-offers-admission-550-students-broadens-access-students-who-have-aptitude-stem.

object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Here, the district court found that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception." App. 106a. Nevertheless, the Fourth Circuit panel held that the Board did not act with an impermissible racial purpose.

The Fourth Circuit's ruling merits this Court's review because it presents a question of national importance that the Court has yet to answer directly. Coming as it does on the heels of last Term's decision curtailing racial discrimination in higher education admissions, this is one of several ongoing challenges to competitive K-12 admissions criteria that seek to accomplish a racial objective "indirectly" because it "cannot be done directly." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (*SFFA*) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). Local school boards in these cases have enacted policies designed to balance the racial composition of their schools at the expense of Asian Americans. *See* App. 30a–33a (decision below).[4] Decisionmakers have made clear their desire to racially balance the student bodies at these schools—as the Board did when it adopted a resolution stating that its goal was "to have TJ's demographics represent

[4] *See also 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.); *Boston Parent Coal. for Academic Excellence v. Sch. Comm. of City of Boston*, No. 21-10330-WGY, 2021 WL 4489840 (D. Mass. Oct. 1, 2021), appeal pending Nos. 21-1303 & 22-1144 (1st Cir.); *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358 (D. Md. 2022), appeal pending No. 23-1068 (4th Cir.).

the [Northern Virginia] region." App. 91a–92a. Such policies raise the question of whether racial balancing is any less "patently unconstitutional," *SFFA*, 143 S. Ct. at 2172 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (*Fisher I*)), when it is done through ostensibly neutral criteria rather than explicitly racial classifications. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *7 (4th Cir. Mar. 31, 2022) (Rushing, J., dissenting from grant of stay pending appeal) ("Racial balancing is no less pernicious if, instead of using a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent."). This Court's review is necessary to answer that important question for the first time. Sup. Ct. R. 10(c).

Certiorari is also warranted because the Fourth Circuit's analysis conflicts with this Court's understanding of the equal protection guarantee. The majority below endorsed the proposition that the use of racial proxies is not suspect, so long as Asian-American enrollment does not fall *too much*. App. 30a–33a. It also discounted Board members' clear statements of a racial purpose, reasoning in part that the Board was only hoping to help applicants from *other* racial groups, not to harm Asian Americans. *See* App. 35a–36a, 39a–42a. Yet this Court has said there is no such thing as "benign" racial discrimination and has recognized that, in many competitive schools, "admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *SFFA*, 143 S. Ct. at 2169. This Court's review is necessary to determine whether the Fourth Circuit's decision was contrary to this Court's well-established equal protection jurisprudence.

Finally, the decision below created a circuit split regarding how to measure disparate impact in an intentional discrimination case—an issue that is outcome determinative in many cases. By dismissing record evidence that the proportion of Asian-American students admitted to TJ fell from 73% to 54% of the freshman class immediately following the Board's overhaul, the panel majority diverged from decisions of the Third and Ninth Circuits, which have considered such an immediate effect on the targeted group probative of discriminatory intent. *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). Resolution of this split is important because the Fourth Circuit's rule effectively bars discrimination claims even on behalf of individuals targeted with obvious racial animus if the individual's racial group still manages to maintain parity with other groups. *See* App. 80a (Judge Rushing explaining how a drop from 90% to 30% with explicit racial animus would not run afoul of the panel majority's rule).

STATEMENT OF THE CASE

I. Factual Background

TJ is among the best public high schools in the United States. App. 11a. Designated an academic-year Governor's School in Virginia and operated by the Fairfax County School Board,[5] the school has long had an extremely competitive admissions process. In

[5] While TJ is operated by the Board and under the jurisdiction of Fairfax County Public Schools (FCPS), students from Loudoun County, Prince William County, Arlington County, and Falls Church City are also eligible to attend. App. 11a–12a.

the recent past, the process included three standardized tests, covering math, science, and English. Prospective freshmen who scored high enough on those tests became semifinalists. App. 88a. The final class—typically made up of just under 500 students—was selected from these semifinalists based on a combination of GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay. App. 88a–89a. For the entering class of 2020, this process yielded an admitted class that was 73% Asian American—a similar proportion to the previous four years. App. 97a. And as in previous years, Asian Americans were the only racial group (of those tracked by FCPS) to earn more seats than the group's proportion of students in the district. App. 86a (racial demographics of FCPS); *id.* at 64a (racial composition of TJ admitted classes).[6]

Frustration among the Board and FCPS officials about the racial composition of TJ boiled over beginning in the spring of 2020. Reaction began almost immediately after admissions data was released for that fall's entering class. Coincidentally, that release was on June 1—just a week after George Floyd's murder in Minneapolis set off nationwide protests. On June 7, TJ Principal Ann Bonitatibus wrote to the TJ community lamenting that TJ "did not reflect the racial composition in FCPS" and that if it did, it "would enroll 180 black and 460 Hispanic

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[6] Cites to the Fourth Circuit dissent are for convenience. The Joint Appendix filed in the Fourth Circuit consists of over 3,000 pages. *See* ECF No. 44 in No. 22-1280 (4th Cir.). Where the dissenting opinion is cited in this section, it cites the relevant portion of the record below.

students, filling nearly 22 classrooms." App. 90a. Shortly thereafter, Board member Karen Corbett Sanders promised "intentful action" and emphasized in written communications that "the Board and FCPS needed to be explicit in how we are going to address the under-representation of Black and Hispanic students." App. 100a. Another Board member, Karen Keys-Gamarra, declared that the Board "must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to TJ." *Id.*

Over the summer, Keys-Gamarra and several other FCPS officials, including Superintendent Scott Brabrand and TJ admissions director Jeremy Shughart, attended state task force meetings focused on the demographics of Governor's Schools. *Id.* Brabrand returned from these meetings with a sense of urgency and proposed to the Board in September a complete overhaul of the TJ admissions criteria. App. 100a–101a. Brabrand's presentation included multiple pie charts comparing the racial composition of TJ to that of FCPS, making it clear that Asian Americans stood in the way of their goals. App. 102a; *see also* App. 65a–67a. He proposed a so-called "merit lottery" and presented the results of modeling that showed the proposal would drastically cut Asian-American enrollment while increasing enrollment of white, Black, and Hispanic students. *Id.* Board members' reaction was mixed. Some of those who opposed the lottery were worried it would "leave too much to chance" and could not "guarantee an increase in racial/SES diversity." App. 107a, 67a. Another Board member who supported the lottery was blunt about her reasoning, writing that she planned to

"support the proposal towards greater equity, to be clearly distinguished from equality." App. 108a.

In its next meeting on October 6, the Board voted unanimously to adopt a resolution directing that TJ's state diversity report "shall state that the goal is to have TJ's demographics represent the [Northern Virginia] region." App. 91a–92a. It also voted to eliminate standardized testing from the admissions process. App. 92a. Under the Board's direction, staff then worked to develop various "holistic" plans—including those that would employ geography-based set-asides and award bonus points to students based on various "experience factors." *See* App. 67a. Bonus points were meant to "level the playing field" and "change who got in" by accounting for portions of the application process that "historically favored White and Asian candidates." *Id.* Additionally, data the Board requested showed that a handful of FCPS middle schools which hosted Level IV Advanced Academic Program centers[7] had become substantial feeders to TJ and that an overwhelming majority of the students who applied and were accepted to TJ from these feeder schools were Asian American. *See* App. 71a–72a.

Armed with this data, the Board ultimately chose to adopt a holistic admissions system that incorporated bonus points for factors such as attendance at a middle school that traditionally did not send many students to TJ, as well as eligibility for free or reduced priced lunch. *See* App. 88a–89a. These bonus points were substantial—mere attendance at

[7] These Level IV centers host academically gifted students who are zoned to attend other FCPS middle schools. App. 105a.

an underrepresented middle school would more than make up the difference between a 3.5 and a 4.0 GPA.[8] And at the last minute, the Board grafted on top of that points system a guarantee of admission for 1.5% of the students in the eighth grade class at each FCPS middle school, leaving only about 100 unallocated seats to be claimed by the remaining applicants. App. 98a, 105a. Superintendent Brabrand clarified that the Board intentionally chose to allocate these seats by *attending school*, rather than *zoned school*, despite fears that this would penalize students who chose to attend Level IV centers. App. 105a–106a. This choice meant less geographic diversity at TJ, but it did further the goal of limiting Asian-American enrollment. *See* App. 73a–74a.

The impact of the Board's overhaul was immediate. Even though the entering class *expanded* by 64 seats, TJ admitted 56 *fewer* Asian-American applicants than it had the preceding year. App. 89a. The share of Asian-American students in the admitted class also plummeted from 73% to 54%—not coincidentally, the exact drop predicted by staff's early modeling. *Id.* Asian-American students found it more difficult to get in both because the 1.5% allocation made students from the feeder schools compete

[8] Under the points system that was implemented, students could earn up to 900 "base points." Of these, GPA was worth 300 points—with each GPA point on a 4.0 scale being worth 75 points. On top of the 900 "base points," 225 bonus points were available based on the Experience Factors—including 90 for receiving free or reduced price lunch and 45 for attending an underrepresented middle school. *See* ECF No. 122-13 in Case No. 1:21-cv-00296 (pages 162–65 of the deposition of Jeremy Shughart).

against each other for limited seats (96 fewer got in)[9] and because Asian Americans were disproportionately unlikely to qualify for the two most common Experience Factor bonuses.[10] *See* App. 98a–99a; *see also* App. 77a. And while Asian-American representation dropped, every other racial group tracked by FCPS experienced a marked increase. FCPS celebrated this racial outcome in its annual press release. *See supra* n.3.

II. Procedural History

The Coalition for TJ is a grassroots organization with about 200 members based in Fairfax County, some of whom have children who have applied or will apply to TJ. App. 87a. It sued the Board in March 2021 on the ground that the revised admissions policy violates the Equal Protection Clause because it was adopted and implemented to discriminate against Asian-American applicants. The district court granted summary judgment to the Coalition in February 2022, holding that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception," App. 106a, and that "the Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ," App. 108a. The district court enjoined the Board from

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[9] *See* ECF No. 122 at 11 in Case No. 1:21-cv-00296 (¶ 19) & ECF No. 126 at 11–12 (¶ 19) (number of Asian-American students admitted from these six schools dropped from 204 to 108).

[10] For example, only 27.2% of the students receiving the underrepresented school bonus points were Asian American, even though about half of students in the overall applicant pool were Asian American. *See* ECF No. 126-8 at 5 in Case No. 1:21-cv-00296 (Exhibit A to declaration of Jeremy Shughart).

implementing the challenged admissions policy. App. 111a.

The Fourth Circuit then stayed the injunction pending appeal, over Judge Rushing's dissent. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022). This Court denied the Coalition's emergency application to vacate the stay, although Justices Thomas, Alito, and Gorsuch indicated that they would have granted it. 142 S. Ct. 2672 (2022) (mem.). The Fourth Circuit then reversed on the merits, holding that "the challenged admissions policy does not disparately impact Asian American students" and that "the Coalition cannot establish that the Board adopted its race-neutral policy with any discriminatory intent." App. 11a. Judge Rushing again dissented, criticizing the majority for "refus[ing] to look past the Policy's neutral varnish." App. 54a. She would have held that "undisputed evidence shows that the Board successfully engineered the Policy to reduce Asian student enrollment at TJ—while increasing enrollment of every other racial group—consistent with the Board's discriminatory purpose." App. 75a. The Coalition timely filed this Petition.

REASONS FOR GRANTING THE PETITION

I. The Use of Facially Race-Neutral Admissions Criteria to Achieve Racial Balance Presents an Unsettled Question of National Importance

As this Court has long recognized, "education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It is thus no surprise that history is full of landmark decisions addressing racial discrimination in education.[11] Indeed, the most recent such decision—issued just two months ago—emphatically declared that "[e]liminating racial discrimination means eliminating all of it," ending 45 years of toleration of racial discrimination in higher education admissions. *SFFA*, 143 S. Ct. at 2161.

Yet at the same time, a new species of racial discrimination has been spreading through some of our largest public school systems. Like the discrimination this Court invalidated in *SFFA*, it primarily targets Asian-American students. But unlike that discrimination, it takes the form of facially race-neutral admissions criteria intentionally

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[11] *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*, 347 U.S. 483; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *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*, 143 S. Ct. 2141.

designed to achieve the same results as overt racial discrimination. Particularly when the results sought are tied to the demographics of the school district or the surrounding area, this is known as racial balancing. *See Parents Involved*, 551 U.S. at 729–32 (plurality op.) ("Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts."); *id.* at 766–67 (Thomas, J., concurring) (rejecting the justification that a classroom should reflect America's diverse society: "Environmental reflection ... is just another way to say racial balancing.").

In recent years, several of the nation's largest public school systems—from Boston[12] to New York[13]

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[12] In 2020, the Boston School Committee ended the longstanding admissions process for the City's three "Exam Schools" in a process described as a "hard pivot away from a core value of equality." *Boston Parent Coal. for Academic Excellence v. Sch. Comm. of City of Boston*, No. 21-10330-WGY, 2021 WL 4489840, at *5 (D. Mass. Oct. 1, 2021), appeal pending Nos. 21-1303 & 22-1144 (1st Cir.). The district court found that "the race-neutral criteria were chosen precisely because of their effect on racial demographics," *id.* at *15, but nevertheless sustained the plan on similar grounds as the Fourth Circuit here.

[13] In an attempt to "mirror NYC demographics more closely," New York Mayor Bill de Blasio and Education Chancellor Richard Carranza unsuccessfully tried to replace the admissions exam for the City's eight specialized high schools with a geography-based plan that would have reduced Asian-American admission by 40%. *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?sfvr (last visited Aug. 16, 2023). When that plan failed to win support in the state legislature, de Blasio and Carranza unilaterally altered the eligibility criteria for a program designed to help

to San Francisco[14] and beyond[15]—have engaged in public and private conversations about the racial composition of their competitive-admission schools. Uniformly, decisionmakers in these systems have concluded that the racial composition of these schools

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economically disadvantaged students in an attempt to accomplish a more modest racial balancing. *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-diversity-specialized-high#/0. A challenge remains pending at the Second Circuit. *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.).

[14] Asian-American voters led a successful effort to recall three San Francisco school board members in part due to their decision to gut merit-based admissions at selective Lowell High School in favor of a lottery. The lottery resulted in substantially fewer Asian-American students being admitted to Lowell. *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.

[15] In Montgomery County, Maryland, the School Board changed the admissions criteria for its magnet middle school programs following discussion littered with support for racial balancing. *See Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 560 F. Supp. 3d 929, 953 (D. Md. 2021). The district court denied the district's motion to dismiss, holding that the plaintiff parent association 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.* But the district changed the criteria again in the midst of the COVID-19 pandemic, resulting in an amended complaint. The district court granted the second motion to dismiss, and an appeal is pending in the Fourth Circuit. 617 F. Supp. 3d 358, appeal pending No. 23-1068.

is problematic. The consistent "problem" has been that Asian-American applicants earn substantially more seats in these programs than the group's share of the surrounding population, which makes it difficult for policymakers to achieve racial balance. Some have been open about their disdain for Asian-American parents and students,[16] but all have implemented plans that employ admissions criteria designed to tilt the playing field against Asian Americans.

Even among those districts participating in this alarming trend, the Fairfax County School Board stands out. Board members spoke openly about the need to readjust the TJ student body along racial

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[16] In New York, Chancellor Carranza said in a television interview: "I just don't buy into the narrative that any one ethnic group owns admission to these schools." *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. In Boston, three School Committee members ultimately resigned in disgrace over racist remarks or text messages—including the School Committee chairman, who resigned after mocking the names of Asian-American parents who had signed up to speak in opposition to the plan. *See* Christopher Gavin, *'Inappropriate. Unacceptable': Boston School Committee chairman Michael Loconto resigns after appearing to mock names during meeting*, Boston.com, Oct. 22, 2020, https://www.boston.com/news/schools/2020/10/22/boston-school-committee-chairman-resigns-after-appearing-to-mock-names-during-meeting; *see also Boston Parent*, 2021 WL 4489840, at *15 ("[t]hree of the seven School Committee members harbored some form of racial animus"). And in San Francisco, one of the recalled school board members had tweeted several offensive things about Asian Americans, including charging that they used "white supremacist thinking to assimilate and 'get ahead.'" Fuller, *supra* note 14.

lines, then they implemented criteria, such as the 1.5% per middle school set-aside and "Experience Factor" bonus points, designed to accomplish that goal. *See* App. 60a–63a, 67a, 74a–75a. Their plan was remarkably successful. Asian-American students—who comprise the only racial group "overrepresented" compared to the district and regional demographics—were the only students who suffered an adverse impact. The Board's effort was so successful that it appeared, in the words of another Fourth Circuit panel, to "target" Asian-American applicants "with almost surgical precision." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

Whether these actions violate the Equal Protection Clause is an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). While this Court has repeatedly condemned racial balancing through racial classifications as "patently unconstitutional," *SFFA*, 143 S. Ct. at 2172 (quoting *Fisher I*, 570 U.S. at 311), it has yet to explicitly address whether it is "no less pernicious" when done through ostensibly neutral admissions criteria. *See Coal. for TJ*, 2022 WL 986994, at *7 (Rushing, J., dissenting from grant of stay pending appeal). The longer this question is not resolved, the more incentive school districts (and now, universities) will have to develop workarounds that enable them to racially discriminate without using racial classifications. Strict scrutiny is, after all, almost certain to be fatal. *See SFFA*, 143 S. Ct. at 2162–63 (the prohibition of racial discrimination in education "cannot be overridden except in the most extraordinary case"). But the guarantees of *SFFA* might mean little if schools could accomplish the same discriminatory result through race-neutral proxies.

II. The Fourth Circuit's Decision Undermines This Court's Equal Protection Precedents

Although this Court has not yet addressed the question posed by the TJ admissions overhaul, the Fourth Circuit's decision undermines bedrock equal protection principles that this Court has repeatedly emphasized. It is long settled that the Equal Protection Clause protects an individual right to be free from racial discrimination, *see Miller*, 515 U.S. at 911; that it protects individuals of all races equally, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995); that there is no such thing as "benign" discrimination, *Fisher I*, 570 U.S. at 307; that racial balancing for its own sake is "patently unconstitutional," *id.* at 311; and that facially race-neutral policies may nevertheless be instruments of discrimination, *Yick Wo*, 118 U.S. at 373–74; *Miller*, 515 U.S. at 913. With respect to the last point, this Court has developed a mechanism for determining whether decisionmakers "selected or reaffirmed a particular course of action 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 Vill. of Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 265–68 (1977). But in its application of the *Arlington Heights* framework to this case, the panel majority betrayed these enduring principles.

The Fourth Circuit panel's quarrel with the district court was over these legal principles. The panel majority did not dispute the facts that led the district court to rule for the Coalition—rather, it went to great lengths to reject the legal premises of the district court's opinion. To reach the remarkable

conclusion that the Board did not act with discriminatory intent, the Fourth Circuit had to twist *Arlington Heights* and *Feeney* to: (a) sidestep this Court's consistent rejection of racial balancing; and (b) treat supposedly "benign" discrimination against Asian Americans as presumptively constitutional.

But racial discrimination is racial discrimination. The entire purpose of the *Arlington Heights* framework is to ensure that the government cannot get away with racial discrimination by masking it with neutral language. Long before *Arlington Heights*—and long before any of the modern education cases—this Court consistently struck down racially discriminatory laws that were superficially race-neutral. *See, e.g.*, *Guinn v. United States*, 238 U.S. 347 (1915) (Grandfather Clause); *Lane v. Wilson*, 307 U.S. 268, 269 (1939) (same); *Schnell v. Davis*, 336 U.S. 933 (1949) (literacy test); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (poll tax). Nowhere in these cases did the Court ever suggest that basic equal protection principles do not apply to facially neutral laws. Instead, the Court has held otherwise—that strict scrutiny applies whether a law is facially discriminatory or neutral but "motivated by a racial purpose or object." *Miller*, 515 U.S. at 913. Review is needed here to correct the Fourth Circuit's errant reading of *Arlington Heights* and *Feeney* and to resolve the fundamental conflict with this Court's equal protection jurisprudence. Sup. Ct. R. 10(c).

A. The Fourth Circuit's Opinion Permits Racial Balancing Through Facially Race-Neutral Means

Racial balancing in admissions occurs when a school seeks to admit an approximate proportion of

each racial group based on the group's representation in a larger population—whether it be the applicant pool or the geographic area. *See Parents Involved*, 551 U.S. at 727, 732 (plurality opinion) (school districts engaged in racial balancing when they sought to "attain[] a level of diversity within the schools that approximates the district's overall demographics"); *Grutter*, 539 U.S. at 386 (Rehnquist, C.J., dissenting) (law school "extend[ing] offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool" is "precisely the type of racial balancing that the Court itself calls 'patently unconstitutional'"). As noted, this Court has roundly condemned racial balancing when it is done through overt classifications, even in cases where it ultimately ruled in favor of the school. *See Grutter*, 539 U.S. at 329–30 (majority opinion) (rejecting the premise that a law school had an interest in enrolling a specific proportion of any racial group as "[t]hat would amount to outright racial balancing, which is patently unconstitutional").

Precedent has not treated the prohibition on racial balancing as an empty formalism. Instead, the Court has assured that "'[t]he Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *SFFA*, 143 S. Ct. at 2176 (quoting *Cummings*, 71 U.S. (4 Wall.) at 325). Likewise, the prohibition on racial balancing "is one of substance, not semantics," *Parents Involved*, 551 U.S. at 732 (plurality op.).

Yet the Fourth Circuit majority played the semantics game. It dismissed the claim of racial balancing simply because the TJ admissions policy contained "no racial quotas, goals or other standards

that would make for a straightforward case of 'racial balancing.'" App. 37a. And it adopted a rule that would shield from liability intentional action designed to reduce the success of a particular racial group so that the group is in parity with its proportion of the applicant pool or larger population. *See* App. 32a–34a. As Judge Rushing noted in dissent, under this rule a plaintiff would automatically lose[17] even where "a new law cut a racial group's success rate from 90% to 30% and the legislature was open about its discriminatory purpose, as long as no other racial group succeeded at a higher rate." App. 80a. Such a rule mocks not only *Arlington Heights*, which exists to ferret out such discrimination, but this Court's prohibition on racial balancing.

B. The Fourth Circuit Excuses "Benign" Discrimination

Beyond its endorsement of racial balancing by proxy, the Fourth Circuit also allowed long-discredited notions of "benign" discrimination to infect its *Arlington Heights* analysis. In rejecting the district court's finding of discriminatory intent, the majority below insisted that "the record is devoid of any statements ... showing that the policy was adopted 'because of' a specific intent to reduce the number of Asian American students at TJ." App. 36a. Even as it allowed that the Board intended the policy to help

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[17] Although *Arlington Heights* says only that the "impact of the official action ... may provide an important starting point" in determining discriminatory intent, 429 U.S. at 266, the Fourth Circuit made disparate impact a necessary predicate to moving forward with an intentional discrimination claim. App. 34a (holding that the supposed lack of disparate impact alone dooms the Coalition's claim).

Black and Hispanic students, the Fourth Circuit bypassed the "zero-sum" nature of admissions and failed to recognize that tilting the playing field in favor of certain groups necessarily tips it against other groups—here, Asian Americans. *SFFA*, 143 S. Ct. at 2169.

Consistent with the understanding that "purportedly benign discrimination may be pernicious," *id.* at 2191 (Thomas, J., concurring), this Court has never held that a showing of racial *animus* is necessary to prove intentional discrimination under *Arlington Heights*. Instead, it has subjected facially neutral racial discrimination to strict scrutiny regardless of the reason for the discrimination. *See, e.g.*, *Miller*, 515 U.S. at 915–19 (affirming the invalidation of a Georgia congressional district which was drawn to be majority-Black); *Hunt v. Cromartie*, 526 U.S. 541, 551–53 (1999) (dispute of material fact remains over whether State's motivation was racial or political).[18] These outcomes are consistent with this

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[18] Lower courts have often done the same—including the Fourth Circuit in a previous case. *See McCrory*, 831 F.3d at 222–23 ("Intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics."); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (affirming a finding of discriminatory intent where county board of supervisors "chose fragmentation of the Hispanic voting population as the avenue by which to achieve ... self-preservation"); *id.* at 778 (Kozinski, J., concurring in part and dissenting in part) ("[T]here is no indication that what the district court found to be intentional discrimination was based on any dislike, mistrust, hatred or bigotry against Hispanics or any other minority group."); *Pryor*,

Court's treatment of racial discrimination in admissions cases. After all, much like modern racial gerrymandering, the racial discrimination on display in cases such as *Bakke*, *Grutter*, *Fisher*, and *SFFA* is designed to achieve a desired racial end that is not fairly characterized as animus. In education, that aim is often racial balancing—which is racial discrimination all the same.

III. Certiorari Should Be Granted to Resolve a Split Among the Courts of Appeals

The panel opinion below also creates a clear circuit split. Under *Arlington Heights*, the racially disparate impact of a policy is one factor that courts ought to consider when determining whether a policy was adopted for a discriminatory purpose. 429 U.S. at 266. But the panel majority decision as to what constitutes a disparate impact conflicts with precedent in at least two other circuits. *See Pryor*, 288 F.3d 548; *Pacific Shores*, 730 F.3d 1142.

According to the Fourth Circuit majority, it is not enough to show that Asian-American admissions dropped substantially under the new policy. Instead, it held that a "proper disparate impact analysis" in this case required the Coalition to show that "Asian American students face proportionally more difficulty in securing admission to TJ than do students from

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288 F.3d at 565–66 (rejecting defendant's claim that "precedent from the Supreme Court, as well as from rulings by other circuit courts, consistently absolve decisionmakers from purposeful-discrimination liability so long as their intent was 'benign'").

other racial or ethnic groups."[19] App. 31a–32a. That required, in the majority's view, a showing that under the new policy, the percentage of admitted students who are Asian American is less than the percentage of applicants who are Asian American. *Id.* In adopting this standard, the panel majority declined to credit the substantial decline in admitted Asian-American students that the Board itself attributed to its admissions overhaul. *See supra* n.3. Instead, it labeled the year-over-year effect—which saw the proportion as well as the raw number of Asian-American students admitted fall dramatically—a "simple appraisal of one group's performance over time." App. 32a.

But such a "simple appraisal" is very relevant to an *Arlington Heights* analysis in the Third and Ninth Circuits. In *Pryor*, African-American athletes challenged an NCAA policy that changed the academic standards for receiving a Division I athletic scholarship. 288 F.3d at 552–55. The athletes alleged that the policy—which the NCAA said was aimed to improve the graduation rates of Black athletes—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 held they had a plausible equal protection claim because the complaint alleged that "the NCAA sought to achieve its stated goal of improving graduation

[19] For reasons discussed above, this method would allow school districts to alter admissions criteria to the point of racial balance within a geographic region. *See supra* at 24–25. This cannot be the proper method in all circumstances as this Court has repeatedly rejected the interest in racial balance as "patently unconstitutional." *Grutter*, 539 U.S. at 330.

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. Throughout its analysis, the Third Circuit relied on a simple comparison between the world before and after the policy's enactment. It did not focus on the proportion of Black student athletes who could still obtain scholarships after the proposition took effect.

The Ninth Circuit employed a similar analysis in *Pacific Shores*. That was a Fair Housing Act case challenging a municipality's rezoning, which the plaintiffs said was intended to close group homes for alcohol and drug users, thereby discriminating against disabled people. In reversing a grant of summary judgment to the city, the Ninth Circuit held that the rezoning—which did not explicitly target group homes but required them to complete an arduous permitting process—had a disparate impact because it "had the effect of reducing group home beds by 40%." 730 F.3d at 1162. The court was not concerned only with the status of group homes *after* the zoning ordinance passed, but primarily the *reduction* in group homes attributable to the ordinance's new requirements.

Under the analysis adopted by the other circuits, the substantial drop in Asian-American admissions to TJ following the Board's overhaul would be more than enough to establish disparate impact.[20] And it is this

[20] To be sure, the Coalition also introduced evidence that even within the post-overhaul applicant pool, the Board's 1.5% allocation by middle school and its imposition of the "experience factor" bonus points disparately impacted Asian-American students and made it significantly more difficult for them to get

analysis that is more consistent with the function of *Arlington Heights*. The "impact of the official action"—i.e., whether it "bears more heavily on one race than another"—is meant only as a "starting point" in assessing intentional discrimination. *Arlington Heights*, 429 U.S. at 266. That the share of Asian Americans in TJ's admitted class fell by 19 percentage points—while the share of every other racial group increased—surely at least raises the strong possibility that the admissions overhaul was meant to target Asian Americans. While that evidence may not outright prove discrimination on its own (disparate impact alone usually will not), in the Third and Ninth Circuits it would be evidence that weighs in favor of a claim that policymakers intended to harm the racial group that saw its fortunes substantially decline immediately after a policy's enactment. Yet in the Fourth Circuit, such evidence now must be disregarded.

Admissions cases like this one show the urgency of resolving this circuit split. The Fourth Circuit's reasoning would categorically bar *Arlington Heights* claims even where targeting is perhaps even more obvious than it was here. *Cf. Boston Parent*, 2021 WL 4489840, at *15 (lack of disparate impact under similar standard dooms claim even though "[t]hree of the seven School Committee members harbored some form of racial animus"). Lower courts considering these claims need to know whether a substantial drop like the one shown here weighs in favor of discriminatory intent. This Court should grant

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into TJ. App. 98a–99a. But the year-over-year drop on its face should have been evidence enough of this *Arlington Heights* factor.

certiorari to resolve this clear circuit split and provide guidance on the application of *Arlington Heights*.

IV. This Case Presents an Excellent Vehicle to Address This Urgent Question of Constitutional Law

This case presents the ideal vehicle to address the important constitutional issues presented. It comes with a fully developed record—complete with a finding of discriminatory intent in the district court, no dispute of material fact, and multiple comprehensive opinions on both sides in the lower courts.

Moreover, there is an urgency to address these issues now, rather than later. In the wake of *SFFA*, institutions of higher education are looking to the panel opinion below for guidance. For example, a mere ten days after this Court ruled in *SFFA*—and about a month after the decision below—the Association of American Law Schools held a "Conference on Affirmative Action."[21] Comments made by Timothy Lynch, Vice President and General Counsel of the University of Michigan, are indicative of the tenor of the conference. Mr. Lynch described the Fourth Circuit panel's decision here as showing how to be "race-conscious [through] race-neutral means to achieve greater … diversity gains."[22] Because of the

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[21] Program, Association of American Law Schools, Conference on Affirmative Action (July 10, 2023), https://www.aals.org/events/affirmative-action/program/.

[22] Association of American Law Schools, *AALS Conference on Affirmative Action: Panel 3*, at 2:40, YouTube (Aug. 2, 2023), https://www.youtube.com/watch?v=1Shl_vJ0xl4&ab_channel=AssociationofAmericanLawSchools.

statements of the Board that made it into the record below, he also cautioned law school leaders to be aware of "the record your faculties are creating."[23] Indeed, Mr. Lynch later suggests that "now is a good time … look at your websites … have someone do a cold review. One of your undergrads or something."[24]

Some universities are already strategizing how to get around this Court's ruling in *SFFA*, and they are looking to the panel decision below as the roadmap to do so. Only a decision from this Court can resolve this question and ultimately stop this troubling trend.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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[23] *Id.* at 10:41.

[24] *Id.* at 17:07.