No. 23-170

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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
CELIA HOWARD O'LEARY
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org
coleary@southeasternlegal.org

September 19, 2023 *Counsel for Amicus Curiae*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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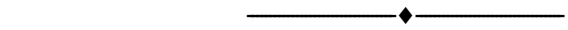
INTEREST OF AMICUS CURIAE[1]

Founded in 1976, Southeastern Legal Foundation ("SLF") is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to reclaim civil liberties and restore constitutional balance. This aspect of its advocacy is reflected in regular representation before the Supreme Court, including cases such as *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

This case concerns SLF because SLF advocates for a colorblind interpretation of the Constitution and preservation of the rights granted to all citizens in the Equal Protection Clause, and it defends the rights to educational opportunities regardless of race. This case is important to SLF because Fairfax County threatens to erode the achievements our nation has made regarding race in school admissions.



[1] Rule 37 statement: The parties were given timely notice of Amicus' intent to file. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Racial classifications of any nature are "forbidden" under our Constitution. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2170 (2023) (*SFFA*). Yet to this day, school districts like Fairfax County take it upon themselves to manipulate policies and practices to achieve a certain racial makeup among their students, often in the name of so-called diversity.

Following racial protests in 2020 and calls for more diversity, Fairfax County changed the admissions policy at Thomas Jefferson High School (TJ). Although TJ's new policy appears race-neutral at first glance, the facts show that it was adopted to increase black and Hispanic enrollment and to decrease Asian-American enrollment.

Such racial balancing does not and cannot have a place in our nation's public schools. Not only does racial balancing give the government carte blanche to engage in social experiments, but it also "would support indefinite use of racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality op.). If this Court fails to intervene, "the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination." *SFFA*, 143 S. Ct. at 2192 (Thomas, J., concurring).

ARGUMENT

I. Certiorari is needed to affirm that racial balancing is patently unconstitutional in any form.

This Court "has repeatedly condemned as illegitimate" the practice of racial balancing, especially in schools. *Parents Involved*, 551 U.S. at 726 (plurality op.). Racial balancing occurs when the government reconfigures its policies to increase or decrease representation of certain races, thereby grouping individuals according to their race. *See id*. at 733. Because "state entities may not experiment with race-based means to achieve ends they deem socially desirable," *id*. at 748 (Thomas, J., concurring), a perceived imbalance in the racial makeup of schools does not give school districts free rein to tinker with enrollment until numbers are just right. *Id*. at 736 (plurality op.); *Milliken v. Bradley*, 433 U.S. 267, 280-81, n.14 (1977) ("[T]he Constitution is not violated by racial imbalance in the schools, without more."); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.").

If racial balancing were constitutional, it would never end. Constantly maintaining a "proportional representation of various races . . . would support indefinite use of racial classifications" in violation of the Equal Protection Clause. *Parents Involved*, 551 U.S. at

731 (plurality op.) (quoting *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting)). "[T]here is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing demographics." *Id*. at 756-57 (Thomas, J., concurring); *Freeman*, 503 U.S. at 495 ("In such a society it is inevitable that the demographic makeup of school districts, based as they are on political subdivisions such as counties and municipalities, may undergo rapid change.").

Admissions programs that rely on racial balancing "effectively assure[ ] that race will always be relevant . . . and that the ultimate goal of eliminating race as a criterion will never be achieved." *SFFA*, 143 S. Ct. at 2172 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)) (internal quotation marks omitted). For this reason, this Court has long struck down racial balancing as "patently unconstitutional," *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and "not to be achieved for its own sake," *Freeman*, 503 U.S. at 494.

A. Manipulating admissions policies to achieve so-called diversity based on race is unconstitutional.

Although *Brown v. Board of Education* established that school districts must eliminate the vestiges of *de jure* segregation, 347 U.S. 483 (1954), such remediation "is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At

some point, the discrete injury will be remedied, and the school district will be declared unitary." *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971).

Nearly seventy years have passed since that landmark decision. School districts can no longer sort students by race under *any* circumstances. They also cannot hide behind seemingly race-neutral policies to manipulate the racial makeup of their student bodies, particularly in the name of so-called diversity. *See Parents Involved*, 551 U.S. at 732 (plurality op.) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' "); *see also SFFA*, 143 S. Ct. at 2192 (Thomas, J., concurring) ("The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise.").

Thus, when admissions policies are tied to the racial demographics of a surrounding region, there is a heavy presumption that a school district is engaged in racial balancing. *Parents Involved*, 551 U.S. at 726. Manipulating admissions policies to reduce representation of one racial group and to increase representation of another racial group is a quintessential example of racial balancing to achieve a socially desirable outcome. *Id*. at 726-27. The act of racial balancing does not need to be achieved through quotas and set asides. The mere act of adjusting policies and procedures to alter a

school's demographics is enough to find unconstitutional racial balancing.

B. Fairfax County engages in unconstitutional racial balancing through its admissions program.

In the name of so-called diversity, Fairfax County recently altered its admissions policy to adjust the racial makeup of its student body. This change was far from benign; as evident through officials' words and actions, the district unconstitutionally "experiment[ed] with race-based means to achieve ends [it] deem[ed] socially desirable." *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring).

"The discussion of TJ admissions changes was infected with talk of racial balancing from its inception." App. 106a. First, the Virginia General Assembly passed a budget bill in 2020 requiring Governor's Schools, like TJ, to release reports on their diversity goals—including information about how the schools were targeting "historically underserved" students. App. 99a. Second, the summer of 2020 witnessed the death of George Floyd and ushered in racial protests across the country. App. 100a.

In the wake of those events, the TJ principal "lamented that TJ 'does not reflect the racial composition in [Fairfax County Public Schools (FCPS)]' " because its student body was predominately Asian-American. *Id*. She added that if TJ did reflect the racial composition of FCPS, it "would enroll 180 black students and 460

Hispanic students." App. 60a. By expressing a desire to enroll a target number of students by race, her statement alone reflected an intent to racially balance the TJ student body.

But that was not all. Following the principal's remarks, the Fairfax County School Board held frequent meetings and conversations regarding the racial composition of its schools. One Board member wrote in an email that "the Board and FCPS needed to be explicit in how we are going to address the under-representation of Black and Hispanic students." *Id*. Another wrote that George Floyd's death required the Board to re-examine the "unacceptable numbers of African-Americans that have been accepted to T.J." *Id*. Again, these comments strongly suggest a desire to use the full force of government authority to balance out the racial composition of the TJ student body.

Also in the summer of 2020, Fairfax County officials attended state task force meetings on diversity. App. 100a. The takeaway from those meetings was that each public school in Fairfax County needed to reflect the "diversity" of their surroundings more closely. *Id*.; *see also* App. 106a-107a (declaring "that TJ should reflect the diversity of FCPS, the community and Northern Virginia [NOVA]."). The plan was solidified a few weeks later, when the Board unanimously passed a resolution stating that its "goal is to have TJ's demographics represent the NOVA region." App. 107a.

As the Supreme Court held in *Parents Involved*, intentionally manipulating admissions practices so

that a student body reflects the demographics of the local area is evidence of unconstitutional racial balancing. *Parents Involved*, 551 U.S. at 726 (plurality op.). Thus, Fairfax County's efforts to alter its admissions practices were plainly unconstitutional under *Parents Involved*.

But Fairfax County did not stop there. When considering implementing a lottery system that indicated a decrease in Asian-American enrollment, one Board member expressed concern that the proposed lottery model did not go far *enough* to manipulate TJ's demographics. She argued it would "leave too much to chance" and may not "give us the diversity we are after[.]" App. 107a. And the district court found that "[s]ome Board members[‘] opposition to the lottery was at least in part due to a fear that a lottery might not go far enough to achieve racial balancing." *Id*.

As a result, the Board settled on the set aside program that is now before this Court. Through that program, TJ guarantees admission to the top 1.5% of each graduating middle school class in Fairfax County. Pet. at 10. The remaining unallocated seats are awarded to students based on a holistic review, which includes examining whether a student comes from an "underrepresented" middle school. *Id*. In turn, "underrepresented" means students who were not of white or Asian descent. App. 100a; App. 107a-108a.

As a result of the new admissions policy, TJ admitted 56 fewer Asian-American students, even though FCPS extended 64 more total offers. App. 89a. While

Asian-American enrollment dropped drastically from 73% to 54%, the enrollment of white, black, and Hispanic students increased across the board. *Id*.

As the Supreme Court held in *Parents Involved*, "[t]he principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' " 551 U.S. at 732 (plurality op.); *accord SFFA*, 143 S. Ct. at 2192 (Thomas, J., concurring) ("Yet, as the universities define the 'diversity' that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests.") (internal citation omitted). Fairfax County cannot hide behind semantics and buzz words like "underrepresentation" to mask overt racial balancing. *See* Pet. at 20-21.

The Board's statements, actions, and policy changes indicate overt, unconstitutional racial balancing. The catalyst for these changes began in 2020 under the guise of so-called diversity. But statements by officials made it clear that when Fairfax County sought to increase "diversity" and give more opportunities to "underrepresented" students, it really meant increasing the number of black and Hispanic enrollment at TJ and decreasing the number of Asian-American students enrolled at the school.[2] The Board made no secret

[2] *Grutter* had already established that when a school attempts to increase admissions of one race, it naturally disfavors another

that it wanted TJ to reflect the demographics of the region more closely. But it is well settled, and the district court correctly held, that this kind of racial balancing to achieve a socially desirable outcome is patently unconstitutional.

II. Certiorari is needed to ensure that the Department of Education meets its duty to preserve equal protection under the law.

Our nation is united by the promise of equal protection under the law, as enshrined in our founding documents, defended in the Civil War, and codified into law. The Equal Protection Clause and Civil Rights Acts symbolize decades of hard-fought, piecemeal victories in the battlefield and in America's courtrooms to achieve a lasting promise of equal treatment and opportunity. But in recent years, that promise has been all but forgotten.

Equal opportunity and colorblindness are being pushed aside in the name of so-called equity and diversity. *See SFFA*, 143 S. Ct. at 2193 (Thomas, J., concurring). In practice, the concepts of equity and diversity encourage the government to assign broad racial stereotypes to individuals based on skin color, espousing "the benighted notion" that discrimination can be a good thing. *Id*.

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race and is therefore unconstitutional. 539 U.S. at 316-17, 326-27; *see also SFFA*, 143 S. Ct. at 2199 (Thomas, J., concurring) ("[I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups.").

Perhaps no federal agency is promoting these divisive concepts more actively than the United States Department of Education Office of Civil Rights ("OCR"). Once the arbiter of equal protection, OCR now looks the other way. In one stunning instance, OCR even issued a letter declaring that a school district had violated Title VI through overt racial discrimination, only to suddenly—and quietly—revoke its findings altogether following a change in presidential administrations. Carl Campanile, *US Dept. of Education Curbs Decision on Race-Based 'Affinity Groups'*, New York Post (Mar. 7, 2021).[3]

Starting in 2018, after receiving a Title VI complaint, OCR conducted a two-year investigation into Evanston/Skokie School District 65 ("District 65"). *See* U.S. Department of Education Letter of Finding (Jan. 2021).[4] By early January 2021, OCR had drafted a letter of finding that was eighteen pages long and listed several Title VI violations, including District 65's use of "racially exclusive affinity groups" whereby the students and staff were segregated by race, *id*. at 3-4, privilege walks that categorized students and staff into groups based on skin color, *id*. at 5-6, curriculum and trainings that stereotyped individuals by race, *id*. at 5-7, and mandatory segregation during staff training, *id*. at 4. OCR found that all of these actions, and more,

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[3] https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/.

[4] https://www.slfliberty.org/wp-content/uploads/sites/12/2021/06/Letter-of-Finding.pdf.

contributed to disparate treatment in the district and created a hostile environment. *Id*. at 14-15.

OCR even notified District 65 about its findings. Campanile, *US Dept. of Education Curbs Decision*. But on January 22, 2021, just two days after President Biden took office, the investigation was suspended and the letter rescinded. *Id*. The reason: the Biden administration was prioritizing so-called equity and diversity. *Id*. That meant school districts like District 65 were free to continue segregating staff and students by race, to stereotype based on skin color through curriculum and trainings, and to force individuals to participate in privilege walks and exercises.

This is just one illustration of how equity and diversity do not—and cannot—comport with equality as defined under the law. OCR has abdicated its duty to investigate equal protection and Title VI violations, allowing school districts like District 65 and Fairfax County to engage in overt racial discrimination and racial balancing through their policies and practices.

Our nation's courts of law—particularly this Court—must provide the necessary check on these school districts to ensure that our nation's longstanding promise of equality is not just a promise but a reality.

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CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this amicus curiae brief, this Court should grant the writ of certiorari.

Respectfully submitted,

KIMBERLY S. HERMANN
CELIA HOWARD O'LEARY
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org
coleary@southeasternlegal.org

Counsel for Amicus Curiae

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