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 THE AMERICAN CIVIL RIGHTS PROJECT, MANHATTAN INSTITUTE, AND HAMILTON LINCOLN LAW INSTITUTE AS AMICI CURIAE SUPPORTING THE PETITIONER

Daniel I. Morenoff
Counsel of Record
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivilrightsproject.org

Ilya Shapiro
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Counsel for Amici Curiae
[Additional counsel listed on signature page]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Treatises

Constitutional Provisions

INTEREST OF AMICI CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley and Wai Wah Chin, continue this research, including at the policy nexus of education and race underlying this litigation.

Hamilton Lincoln Law Institute ("HLLI") is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking. In its litigation practice HLLI has directly confronted, and unsuccessfully sought this Court's intervention to halt, the pervasive expansion of race-conscious decision-making

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[1] No counsel for a party authored any part of this brief. No one other than the amici curiae, their members, or their counsel financed the preparation or submission of this brief. The amici curiae provided counsel of record timely notice under Rule 37.2 of their intent to file this brief.

into areas outside school admissions. *Martin v. Blessing*, 571 U.S. 1040 (2013).

This case interests *amici* because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on educational excellence and racial nondiscrimination, policy commitments that we share.

SUMMARY OF ARGUMENT

Less than 60 years ago, Prince Edward County became the last Virginia jurisdiction to abandon "massive resistance" to school integration.[2] Virginia belatedly joined the national consensus that race should have no bearing on any child's education. So ended, for a time, our most glaring failure to live up to the Declaration of Independence, the Fourteenth Amendment, and (by Prince Edward's move) the Civil Rights Act of 1964.

Some still insist on allocating children's educational opportunities based on race. They were wrong during Jim Crow. They were wrong 16 years ago in Washington State, as this Court ruled in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). The Fairfax County School Board (the "Board") was wrong to adopt a race-balancing mechanism to exclude "overrepresented" Asians from Thomas Jefferson High School for

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[2] Katy June-Friesen, *Humanities*, Sept./Oct. 2013, Vol. 34, No. 5, Nat. Endowment for the Humanities, https://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town.

Science & Technology ("TJ"). And the Fourth Circuit was wrong to endorse the Board's efforts.

American law has disallowed intentional racial discrimination for generations. Strict scrutiny exists to stop such race-based policies—whether thinly veiled by proxies or not. To avoid applying it and approve the Board racially balancing TJ, the Fourth Circuit engaged in judicial flim-flammery. It flouted this Court's directives and misconstrued both its precedents and the record.

The Fourth Circuit instructs every racialist decisionmaker in America how to mask discrimination to defeat judicial scrutiny. That unworthy act threatens, practically, to undo this Court's course correction in *Students for Fair Admissions v. Harvard*, 143 S.Ct. 2141 (2023) ("SFFA"). The Court should take this case and reverse to prevent the Fourth Circuit's coaching from infecting America's entire educational landscape.

ARGUMENT

I. THE FOURTH CIRCUIT MISREAD THE RECORD UNDER THE WRONG STANDARD TO REVERSE THE DISTRICT COURT'S FINDING OF DISCRIMINATORY INTENT

A. The District Court Correctly Found Intentional Discrimination

At the district court, the petitioner pled and proved that the Board violated the Fourteenth Amendment's Equal Protection Clause by adopting a policy intended to achieve racial discrimination against Asian Americans. *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, 2022 U.S. Dist. LEXIS 33684, *12 (E.D. Vir. 2022) (finding that the Board

acted on "a consensus that, in the [Board's] view, the racial makeup of TJ was problematic and should be changed.").

The district court specifically found that: (a) "[t]hroughout the process, Board members … expressed their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school," *id.* at *14-15; (b) the Board's related "discussion of TJ admissions changes was infected with talk of racial balancing from its inception," *id.* at *29; (c) the Board sought "to accomplish their goal of achieving racial balance" by "decreas[ing] enrollment of the only racial group 'overrepresented' at TJ—Asian Americans," *id.* at *15; (d) the Board pursued that end by designing a new admissions policy that would "increase Black and Hispanic enrollment [and,] by necessity, decrease the representation of Asian-Americans," *id.* at *32; and (e) the Board achieved its end—the new program they adopted "has had, and will have, a substantial disparate impact on Asian American applicants to TJ," *id.* at *16-17.

Indeed, the Board began its process of altering TJ's admission's policy by unanimously "adopt[ing] a resolution requiring that FCPS's annual diversity report to the state 'shall clarify that the goal is to have TJ's demographics represent the NOVA region.'" *Id.* at *30-31.

B. The Fourth Circuit Reversed That Finding By Abusing Precedent and Disappearing The Board's Intentional Race-Balancing

The Fourth Circuit disagreed. It reviewed the district court's fact-finding de novo and displaced the lower

court's findings with its own. *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, 68 F.4th 864, 878 and seq. (4th Cir. 2023).

Asserting that "the record is devoid of *any* statements by Board members, meeting minutes, or other documentation showing that the policy was adopted 'because of' a specific intent to reduce the number of Asian American students at TJ[,]" it found that "the Coalition fails to identify *any* evidence suggesting that the Board adopted the policy 'at least in part because of' some calculated adverse effect on Asian American students – that is, the Coalition makes no showing of discriminatory intent by the Board." *Id.* at 883 and 875 (emphasis added).

Getting there, in the face of both this Court's "ha[ving] defined 'racial balancing' as seeking to obtain in some cohort a 'specified percentage of a particular group merely because of its race or ethnic origin'" and abundant evidence of Board members' "individual aspirations to improve student diversity" (as measured by race and pegged to the underlying demography of the region), took some doing. *Id.* at 884.

It took invoking irrelevancies. It took denying that the Board's intention to change the racial balance of TJ could have been an intent to racially balance TJ, in part because the Board avoided the magic words "Asian" and "race[.]" *Id.* at 884, 886, and 888 n.4 (Heytens, J., concurring). It took misconstruing this Court's precedent in *Personal Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), as somehow compelling a conclusion that race-balancing was not race-balancing and the intentional exclusion of Asian kids from TJ was not intentional racial discrimination against them.

These moves don't work.

Start with the Fourth Circuit's deployment of irrelevancies. Unsatisfied with blinding itself to evidence of the Board's intent to racially balance TJ, the Fourth Circuit chose to assess the Board's motivations in crafting TJ's new admissions policy by reviewing the Board's after-the-fact requirement that the resulting process "use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance or targets." *Coalition for TJ.*, 68 F.4th at 875. This window dressing is beside the point. One cannot gauge *why* an actor chose particular, race-neutral methods by confirming that those methods are race-neutral.

The Fourth Circuit's misuse of *Feeney* similarly presents no reason to reject the district court's finding of discriminatory intent. According to the majority below, *Feeney* transforms unconstitutional, intentional racial balancing into legal, laudable policymaking. It does no such thing. *Feeney* saw the Court reject a challenge that Massachusetts's statutory hiring preference for veterans resulted in sex-based discrimination. The relevant district court had found both that the preference "serves legitimate and worthy purposes" and that it "was not established for the purpose of discriminating against women." *Feeney*, 442 U.S. at 274. Fully acknowledging that more men than women were veterans, the Court concluded that the preference was not "originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place[.]" *Id.* at 279. Even as it reached this conclusion, the Court noted that:

> This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry … an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

Id. at 279 n. 25.

The TJ situation matches the footnoted exception to *Feeney* far better than it matches *Feeney* itself. Both the lead opinion and the concurrence below admit that the Board sought "to increase the rates of Black and Hispanic student enrollment at TJ[.]" *Coalition for TJ.*, 68 F.4th at 885 and 891. Given that Asians were (and are) the only so-called "overrepresented" demographic at TJ, "the adverse consequences of [the new system] upon [them were] inevitable[.]" "[A] strong inference that the adverse effects were desired can reasonably be drawn." And here, there *is* no underlying "legislative policy that has in itself

always been deemed to be legitimate[,]" only the kind of intentional race-balancing the Court has condemned for decades. *SFFA*, 143 S. Ct. at 2172 ("'[O]utright racial balancing' is 'patently unconstitutional.") (citing *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 311 (2013), among other authorities).[3]

Far from excusing the Board's discrimination, *Feeney* highlights its unconstitutionality.

C. The Fourth Circuit Reversed the District Court's Intent Finding Under the Wrong Standard

Federal Rule of Civil Procedure 52(a)(6) governs appellate reversals of district court fact-finding. While appellate courts often describe the summary judgment appellate standard as de novo, for decades they have acknowledged that they may displace district courts' findings of fact—even at summary judgment—only when clearly erroneous. *See, e.g.*, *Freeman v. Horwath*, 34 F.3d 333, 338 (6th Cir. 1994) (explaining that "the district

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[3] Similarly, the lead opinion invokes *Washington v. Davis*, 426 U.S. 229, 242 (1976). *Davis* rejected the contention that a policy producing a disparate impact, shorn of any allegations of intent, could deny anyone equal protection. Here, the petitioners never claimed that the Board violated their equal protection rights solely through adopting a policy with disparate impacts; had they done so, the case would have seen far less litigation over the Board's intentions. Nonetheless, the lead opinion cites *Davis* in support of refusing to employ a "before-and-after approach to [a] disparate impact inquiry[.]" *Coalition for TJ*, 68 F.4th at 886 n. 8. That conclusion does not follow from its premise. In colloquial terms, *Davis* is a dog that can hunt, but it won't hunt just anything.

court's … finding of fact" in an appeal of both a judgment on the pleadings and a cross-motion for summary judgment "may be reversed only if it was clearly erroneous."); *Stephens v. HHS*, 901 F.2d 1571, 1571 (11th Cir. 1990) (in appeal of summary judgment, holding "[a]s to the fact portion of the mix[ed question of law and fact at issue], we apply the clearly erroneous rule."); *Bechtel v. Robinson*, 886 F.2d 644, 647-651 (3d Cir. 1989) (reviewing fact-finding of district court's summary judgment under effectively parallel abuse-of-discretion standard); *Brock v. TIC Int'l Corp.*, 785 F.2d 168, 171 (7th Cir. 1986) (concluding that summary judgment appeal addressed "a question of fact, meaning that we can reverse the district court's determination only if it was clearly erroneous."); *Sheet Metal Workers Int'l. Assoc. v. Los Alamos Constr. Inc.*, 550 F.2d 1258, 1265 (10th Cir. 1977) (upholding summary judgment grant, because "when a trial court makes a choice between two permissible views of the evidence … such choice is not then 'clearly erroneous.'").

The Fourth Circuit ignored Rule 52(a)(6)'s requirement of "clear error." Given the lower court's abuse of the record to deny the Board's express intent to racially balance TJ, its use of the wrong standard may have been immaterial. Had it sought "clear error," it would have claimed to find it. Nonetheless, the Fourth Circuit's complete ignorance of Rule 52(a)(6) compounds its error.

II. THE FOURTH CIRCUIT APPLIED THE WRONG SUBSTANTIVE STANDARD: THE BOARD CANNOT SATISFY STRICT SCRUTINY

Having conjured away both the Board's well-documented discriminatory intent and the district court's express finding of that intent, the Fourth Circuit substantively assessed the Board's alteration of TJ's admissions "under the rational basis standard of review." *Coalition for TJ*, 68 F.4th at 887. Judge Heytens explained this selection in his concurrence: "no decision from the Supreme Court or this one [requires] applying strict scrutiny to a facially neutral admissions policy." *Id.* at 889.

Simultaneously, the Fourth Circuit misconstrued and misapplied this Court's decision in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), to impose an analysis unknown to American law.

According to the Fourth Circuit, under *Arlington Heights*, to prove an equal protection violation, a plaintiff must show both that a policymaker intended to discriminate and that its acts had a disparate impact. *Coalition for TJ*, 68 F.4th at 879. To test for it, the majority below contorts from *Arlington Heights* a version of disparate impact that excuses the documented impact of the Board's new admissions plan. But the Fourth Circuit misreads *Arlington Heights* on both scores: it compels neither proof of disparate impact, nor adoption of what the majority below calls disparate-impact analysis.

Had the Fourth Circuit applied the correct standard, this case would have easily resolved itself. The Board has never asserted that seeking to racially balance TJ served

any compelling purpose—not at the district court and not at the court of appeals. If strict scrutiny applies, that fact alone resolves it. Regardless, this Court's ruling in *Parents Involved* dictates that the Board's race-balancing of TJ *cannot* satisfy strict scrutiny.

A. Strict Scrutiny Properly Applies

This Court has long held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (citing cases ranging from *Shaw v. Reno*, 509 U.S. 630, 644 (1993), to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). It has repeatedly held that intentional race-balancing is unconstitutional. *E.g.*, *SFFA*, 143 S. Ct. at 2172 ("'[O]utright racial balancing' is 'patently unconstitutional.") (citing *Fisher I*, 570 U.S. at 311).

Evidence of intentional race-balancing, even through facially race-neutral means, triggers strict scrutiny. *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 352, 349 (5th Cir. 2011) (holding district court "erred in awarding summary judgment under a rational basis test" to school board that had approved facially neutral school redistricting undertaken "in an effort at maintaining the racial balance already existing"). Indeed, the Fourth Circuit has previously applied strict scrutiny to rule that the Equal Protection Clause forbids Virginia school boards from choosing admissions criteria for their alternative schools "to obtain a student body 'in proportions that approximate the distribution of students from [racial] groups in the district's overall student population.'" *Tuttle by Tuttle v.*

Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999) (quoting the unconstitutional policy). This Court recently reiterated that "'[W]hat cannot be done directly cannot be done indirectly. The 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 (citing *Cummings v. Mo.*, 71 U.S. 277 (1867)). It would be surpassingly strange for it to affirm the Fourth Circuit in upholding the indirect version (under rational basis review) of what the Fourth Circuit has already agreed (through strict scrutiny) that Virginia school districts cannot legally pursue directly.

B. Misreading *Arlington Heights* and Mismeasuring Disparate Impact Leads to Perverse Results

When applying strict scrutiny, the Fourth Circuit should have focused its inquiry on the Board's intent in developing and adopting the new TJ admissions policy. *Village of Arlington Heights*, 429 U.S. at 265.

Under *Arlington Heights*, a court *may* consider the presence of a disparate impact as *one kind* of circumstantial evidence of a government's intent to discriminate. *Id.* at 267-68. But *Arlington Heights does not require* a showing of disparate impact, recognizing that different cases would see different plaintiffs prove intent through different kinds of evidence.[4]

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[4] The Fourth Circuit also argues that *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) imposes this requirement. The court quotes language highlighting that a policy adopted with discriminatory intent

That's not how the Fourth Circuit reads *Arlington Heights*. The Fourth Circuit says it requires as part of an equal protection violation proof both that a challenged policy has a disparate impact and that it was adopted with a discriminatory intent. *Coalition for TJ*, 68 F.4th at 879.

The Fourth Circuit then moves beyond requiring plaintiffs to prove the presence of a disparate impact to transmuting its-newly-required disparate-impact element into something unrecognizable. The Fourth Circuit announces that to gauge a disparate impact, one must ignore the "baseline comparison" of the challenged policy's impact on the affected class; both the lead opinion and concurrence deride such before-and-after comparisons as turning "the previous status quo into an immutable quota[.]"). *Id.* at 880, 881 and 890. Instead, in nominal reliance on employment cases like *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Fourth Circuit claims that disparate impact must be weighed by comparing "a given racial or ethnic group's share of the number of applications to TJ versus that group's share of the offers extended – in other words, the group's 'success rate' … to how separate, otherwise similarly situated groups fared in securing offers of admission." *Id.* at 881.

(that lacks impact) could be repassed and valid immediately after litigation. This alleged parade of horribles fails. If the legislature repassed the same policy for the same discriminatory reasons, repassage would not inoculate it from invalidation. If they passed it *or any other policy* without such a discriminatory intent, passage would not implicate the Fourteenth Amendment. Rather than justifying an additional element for Constitutional challenges, it restates that the Equal Protection Clause bars only intentional discrimination.

None of that is right.

The petitioner has explained that the Fourth Circuit has created a circuit split. We add that the petitioner understates the depravity of the Fourth Circuit's argument in ways highlighted by its misapprehension of the impact of *Wards Cove*.

As the Fourth Circuit notes, in *Wards Cove* the Court established that in employment-law, disparate-impact cases, "the 'proper basis' for inquiring into disparate impact [i]s comparing 'the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Coalition for TJ*, 68 F.4th at 881. The Fourth Circuit put no emphasis on the word "*qualified*." That absence of emphasis does all the work in the Fourth Circuit's analysis.

The entire theory of *Wards Cove* is that, absent discrimination, any group *should* wind up with approximately the same percentage of any kind of job as its share of the qualified workforce. But the Fourth Circuit skips any consideration of the relative percentages of different groups among the *qualified* applicants to TJ. Necessarily, its adoption as a baseline for disparate-impact analysis of the "success rates" of different communities assumes away any differences in the qualifications of different groups and presumes (with no record support) that TJ applicants of each race or ethnicity *should* have the same "success rate."

What if that isn't true? What if under the prior policy—which no one has argued was illegal or that the Board had a strong basis in evidence to believe was illegal—one group overperformed its percentage of the

population and applicant pool, specifically because its members' hard work generated better-than-average qualifications?

Then measuring the impact of the policy change by comparing this group's current "success rate" to that of other groups would impose a structurally invalid comparator. The comparison would embed into its logic the assumption that an admissions policy *should* achieve a racial balance mirroring that of the greater population. The test the Fourth Circuit adopted to measure whether the Board's policy had a disparate impact would, instead, gauge for illegal race-balancing by asking whether the policy has harmed the targeted community *so much* that despite its greater-than-average qualifications, the policy affords it *less* than its race-balanced share of TJ's enrollment.

The Fourth Circuit's test perversely makes explicit, intentional race-balancing legal until its effects *exceed* a perfect racial balance. That test would not prevent racial balancing; it would enforce it.

The majority's concern that before-and-after comparisons turn past performance into a floor suffers from the same defect. If the previous policy was not illegally discriminatory, unless group qualifications radically alter from year to year, one *should* expect to see only incremental changes in the demography of admitted classes year-over-year. One *should* expect that, barring intentional discrimination through the adoption of a new admissions policy, one will not see an approximately 1/3 reduction in the Asian percentage of admitted students in a single year.

Given the record's trove of *direct* evidence of the Board's discriminatory intent, the Fourth Circuit did not need to engage in *any* disparate-impact analysis in this case. The Fourth Circuit's claim that the new policy lacked a disparate impact should be irrelevant. As the district court found: the Board *intended to harm* TJ's Asian applicants, it *has harmed* them, and its policies *will continue to harm* them as long as they remain in effect. The Equal Protection Clause requires no further "disparity" finding.

However, if it were going to consider disparity, the Fourth Circuit should have used a version of the doctrine consistent with American law, not an altered one that could only produce approval of what it exists to condemn.

C. This Court's Precedents Establish that the Board's Race-Balancing of TJ Cannot Satisfy Strict Scrutiny

In the presence of discriminatory intent, strict scrutiny's "two-step examination … asks first whether the [discriminatory policy] is used to 'further compelling governmental interests' … and second whether the government's [discriminatory policy] is 'narrowly tailored,' *i.e.*, 'necessary,' to achieve that interest.'" *SFFA*, 143 S. Ct. at 2162 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Fisher I*, 570 U.S. at 311).). When the Board never asserted that it had served *any* compelling purpose in seeking to racially balance TJ, that examination can rightly end only one way.

But this Court's decision in *Parents Involved* makes clear that this result is proper due to more than how the case was litigated below. The Court established bright red-lines for school districts to respect, which the Board violated, and the Fourth Circuit ignored.

Parents Involved's multiplicity of opinions may obscure the clarity of its holdings. Chief Justice Roberts wrote the lead opinion, which Justices Alito, Scalia, and Thomas joined in full and Justice Kennedy joined except as to parts III-B and IV. Part III-A of the Chief Justice's opinion, then, constitutes the decision of a Court majority. It applied strict scrutiny to gauge the constitutionality of the districts' racially discriminatory policy of assigning children to schools. It restated that in modern jurisprudence, the Court had only ever allowed race-conscious assignments of children to schools in two contexts: (a) where undertaken to "remedy[] the effects of past intentional discrimination," *Parents Involved*, 551 U.S. at 720; and (b) "in higher education" where serving to create a "diversity … not focused on race alone." *Id.* at 722. It noted the first had no application to the cases before it, because neither school district remained under a court-ordered desegregation decree. *Id.* at 720-721. *SFFA* ended judicial approval of the second subset, so it, too, has no further application.

In part III-B, four justices further faulted the tying of children's access to schools to "each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." *Id.* at 726. They specifically attacked the districts' assumption, supported by "no evidence that

the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts." *Id.* at 727. They described such engineering of a school's demography as "working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits ... a fatal flaw under our existing precedent [as] 'racial balance is not to be achieved for its own sake.'" *Id.* at 729-730 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

Although Justice Kennedy did not join that analysis, his own separate opinion went nearly as far. Although it asserted that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means [than race-based admissions]," *id.* at 789, it recognized a "compelling interest" only "in avoiding racial isolation," *id.* at 797.

Together, these opinions establish for race-balancing in K-12 schools that:

1. Strict scrutiny applies;
2. Strict scrutiny requires of a racially motivated school system altering an admissions policy either (a) a recent history of intentional discrimination to be redressed; or (b) a goal of ending documented racial isolation; and
3. Strict scrutiny *cannot* be met by a goal of matching schools' demography to that of the surrounding districts, because intentional racial balancing of K-12 schools is "patently unconstitutional."

Here, like in *Parents Involved*, the district court found the Board to have been motivated by a desire to racially balance TJ, not by any goal of ending the purported racial isolation of any community in Northern Virginia. *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *29. It had to so find, as: (a) no record evidence suggests any racial isolation in the relevant area, *id.* at *4; and (b) the area lacks either a recent history of intentional segregation or an ongoing desegregation case. None of this is surprising; eminent researchers have concluded that the area's public schools exhibit dramatically *less* racial isolation than the typical American metropolitan area. Memo. from Prof. Richard Sander and Dr. Henry Kim, UCLA Law School, to Dan Morenoff, Amer. Civil Rights Project, School Segregation in Northern Virginia (Jun. 15, 2022) (on file with the ACR Project).[5]

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[5] Prof. Sander and Dr. Kim have an ongoing in-depth national study of school segregation levels in the 100 largest metropolitan areas of the United States. As part of this ongoing study, Prof. Sander and Dr. Kim assessed, specifically, TJ's region's segregation using 2019 data compiled by the National Center for Education Statistics, and 2 different, applicable metrics: (a) the "index of dissimilarity," which measures "the proportion of Group A that would need to change schools to achieve an identical proportion of Group A to Group B students at all schools," for the area's Black and Hispanic populations (as measured against its White population); and (b) an "exposure index" adjusted to reflect the underlying demography, by "calculat[ing] the share of Group A students attending high schools in which the presence of Group B is at least 50% of the general area average" for TJ's region's Black and Hispanic populations (each as measured by "exposure" to the TJ Region's White population). Prof. Sander and Dr. Kim concluded that the TJ Region's "index of dissimilarity" scores for both groups (each equaling 0.43) were dramatically lower than "the 100-MSA average[s]" (of 0.59 and 0.49), while TJ's region's adjusted "index

The Fourth Circuit reached no contrary conclusion. It never contends that the Board sought to end racial isolation in the TJ Region through its alteration of TJ's admissions policy. It couldn't have done so, because the admissions policy affects only TJ, a single school with a total enrollment of approximately 1,800. Complaint, Dkt. 1, at p. 8 (¶ 22). *Nothing* the Board could do at or to TJ could affect the racial isolation of any group across the TJ Region, if any existed. The TJ Region is home to approximately 2.2 million people, including approximately 380,000 public school students. TJ's entire population amounts to less than 0.5% of the TJ Region's student body. If the TJ Region *had* an underlying racial isolation problem (which it does not), the Board's alteration of TJ's admissions process *could not* have meaningfully addressed that problem. *No* policy affecting so small a subset of the TJ Region's student population could *possibly* be "narrowly tailored" to address a hypothetical community's racial isolation.

For all these reasons, this case presents what part III-A of *Parents Involved* identified as "patently unconstitutional"—not Justice Kennedy's hypothetical where a district's governing body valiantly seeks to break children out of an isolated, educational ghetto.

As in *Parents Involved*, the district court found the Board to have *sought* to move the racial balance of TJ's enrollment toward that of the surrounding community, without *any* pedagogic assessment of whether achieving

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of exposure" scores for both groups (of 67% and 63%) were dramatically higher than "the 100-MSA average[s]" (of 44% and 52%). The TJ area's scores under both metrics, for both groups, reflect greater integration and less racial isolation than national norms.

such a student population would bear any educational fruit. *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *17 and *22. The Fourth Circuit did not engage here, but also did not conclude that the Board had any pedagogic justification for seeking to racially rebalance TJ to match the demographics of the region.

The Court established clear red-lines for districts seeking to racially balance their K-12 schools. The Board and the Fourth Circuit ignored them. While there are other reasons the Court should take this case and reverse the Fourth Circuit, reaffirming those red-lines would more than justify this Court in granting the petition for certiorari.

III. THE CONCURRING FOURTH CIRCUIT JUDGE MISCONSTRUED THIS COURT'S "NARROW TAILORING" JURISPRUDENCE AS ENDORSING RACE-BALANCING THROUGH NOMINALLY RACE-NEUTRAL MEANS

Judge Heytens took an additional step to justify the propriety of the Board's race-balancing. Besmirching decades of this Court's decisions, he claims that this Court "has repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means." *Coalition for TJ*, 68 F.4th at 891. According to the concurrence, Justice Scalia embraced this end in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989), as did Justice Thomas in *Grutter*, and Chief Justice Roberts in *Parents Involved*. *Id.*

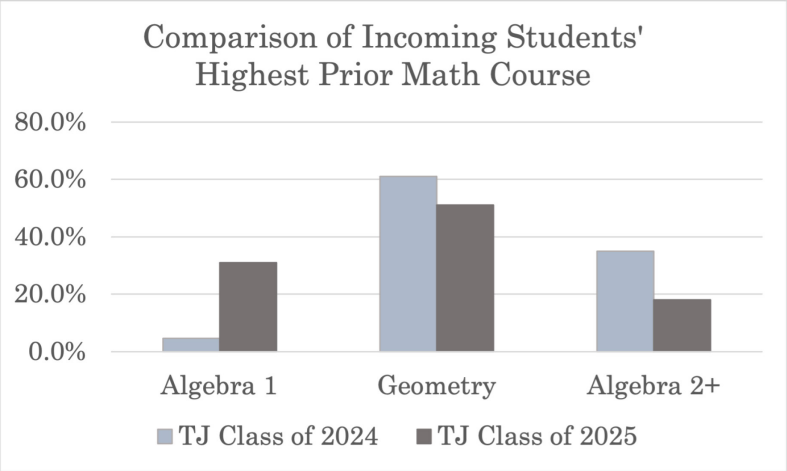
That contention is false. Put bluntly, those cases say no such thing. In *Grutter, Croson*, and *Parents Involved*, the Court applied strict scrutiny. *Grutter*, 539 U.S. at 326, *Croson*, 488 U.S. at 493, *Parents Involved*, 551 U.S. at 720. In each, as part of the Court's assessment of whether the discriminatory policy was sufficiently narrowly tailored to survive strict-scrutiny, it discussed the degree to which the defendant had considered less discriminatory and race-neutral alternatives. *Grutter*, 539 U.S. at 361-62, *Croson*, 488 U.S. at 509, *Parents Involved*, 551 U.S. at 735. These narrow-tailoring discussions mattered to the Court's decisions only to the extent that a compelling interest had been asserted and held to be in play. They rightly asked whether a lesser afront to equal protection was available that would be preferable to the policies at issue.

In no way did they "bless" the pursuit of "racial diversity" for its own sake, whether through open racial discrimination or through intentional proxies. This Court should take this case and correct the concurrence's slander, rather than allow its misrepresentation of the Justices' work to remain unchallenged.

IV. TJ'S EXPERIENCE UNDER THE BOARD'S RACE-BALANCING ADMISSIONS POLICY REFLECTS NO EDUCATIONAL GAINS FROM ENHANCED RACIAL "DIVERSITY"

On a policy level, TJ's experience under the Board's race-balancing admissions policy casts serious doubt on the idea that TJ's enhanced racially-scored "diversity" improved anyone's education.

The Board's intervention produced an incoming class of 2025 quantifiably less prepared than its predecessors. Data obtained through a FOIA request shows that, in comparison to TJ's class of 2024, TJ's class of 2025 (the first admitted under the new policy) included: (a) *half* the share of students entering after completing the highest possible math class; and (b) *seven times* as large a share of students entering after completing the *lowest* qualifying math class. Fairfax County Association for the Gifted, *TJHSST Class of 2025 Admissions: FCAG Analysis* (on file with the ACR Project).

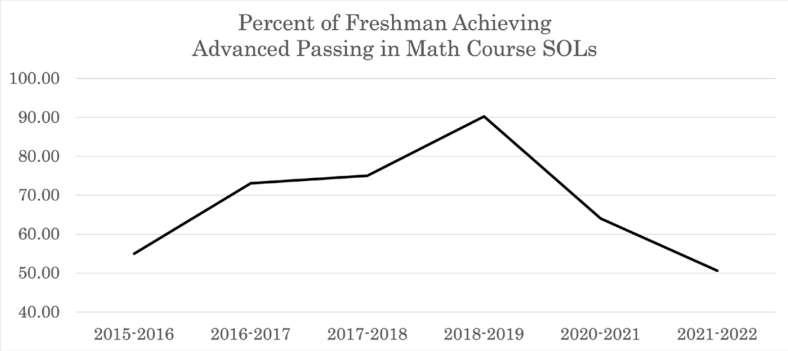


So dramatic a decrease in incoming preparedness almost had to result in a dramatic reduction in the performance of TJ's students.

The best available evidence shows just that. Virginia requires students to complete Standards of Learning examinations on concluding particular courses and

publishes the results. https://tinyurl.com/yxff4mfm. Those results can be filtered by school, grade, course, demographic, and level of performance (Virginia breaks down performance into three (3) passing tiers: (a) merely passing; (b) achieving a "proficient" passing score; and (c) achieving an "advanced" passing score).

TJ's results from the years before and the year after the Board changed its admissions policy demonstrate a sharp discontinuity.[6]



TJ's freshmen admitted under the Board's current plan achieve Advanced Passing math scores 44% less often than their peers did in 2018-2019. They achieve a lower percentage of Advanced Passing math scores than any peers since at least 2015-2016. A high-school-generation of advances and more has been wiped out overnight.

This experience doesn't square with the notion that enhancing racial "diversity," alone, improves the resulting

[6] The Board won't publish TJ's 2022-2023 SOL results until later this year.

education at an institution. It calls to mind the "mismatch" hypothesis developed elsewhere. Researchers have long compared data on college students' performances at institutions with and without race-based admissions policies. That research generated the "mismatch" theory that preferential admissions harm their purported beneficiaries. *See generally* Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students Its Intended to Help, and Why Universities Won't Admit It* (2012); Gail Heriot & Maimon Schwarzschild, *A Dubious Expediency: How Race Preferences Damage Higher Education* (2021).

The hypothesis predicts that interventions that increase populations at selective institutions by systematically admitting those whose objective metrics would not have qualified them: (a) tend to result in those so admitted faring less well academically than their classmates; (b) tend to see such students abandon the more demanding courses of study they preferred at enrollment at rates greater than they would have attritted at other institutions; and (c) eventually—result in fewer of the interventions' beneficiaries emerging as engineers, scientists, professors, doctors, and lawyers than would have resulted without the interventions.

Given TJ's small size and the short experience to date under the Board's race-balancing policy, we cannot be certain that TJ has re-proven the "mismatch" hypothesis.

Still, the data available appears consistent with the Board having produced a "mismatch" at the high school level.[7]

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[7] A second data set points in the same direction: TJ's recent rates of student attrition. FCPS publishes student attrition rates back through 2007-2008. https://bit.ly/3HO2s7v. Over the 14 years before the Board altered TJ's admissions process, TJ averaged 5.3 freshman departures; 2021-2022 saw 13, while 2022-2023 saw 7. The prior 14 classes averaged 12.5 departures over their freshmen and sophomore years; the Class of 2025 has seen 25. Such increased rates of exit are insufficient to *establish* that the Board has created a "mismatch," without visibility into the demography of the attritted population or any information on whether those students would have been admitted under the prior policy, but they are fully consistent with the "mismatch" hypothesis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel I. Morenoff
Counsel of Record
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivil-rightsproject.org

Ilya Shapiro
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Adam E. Schulman
Anna St. John
Hamilton Lincoln Law Institute
1629 K St. NW Suite 300
Washington, DC 20006
(917) 327-2392
anna.stjohn@hlli.org

Counsel for Amici Curiae