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 *AMICUS CURIAE* OF CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fairfax County School Board (the Board) violated the Equal Protection Clause when it overhauled the admissions criteria at Thomas Jefferson High School for Science and Technology (TJ).

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STATEMENT OF *AMICUS CURIAE*[1]

The Center for Equal Opportunity (CEO) is a nonpartisan, nonprofit research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies do not divide our people according to skin color and national origin. CEO supports colorblind policies and seeks to block the expansion of racial preferences in all areas including in admissions to educational institutions. CEO has participated as *amicus curiae* in numerous cases relevant to the analysis of this case. See *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fair Admissions*, 143 S. Ct. 2141 (2023).

Amicus submits this brief to explain that it is essential for federal courts to apply strict scrutiny to evaluate changes to admissions policies enacted for a racial purpose at educational institutions such as the changes made by the Board in the instant case.

[1] The parties were notified of the filing of this brief at least 10 days before its filing. See Sup. R. 37.2(a). Pursuant to Rule 37.6, *amicus* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Students for Fair Admissions v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), this Court recognized that the use of race in the college admissions process violates Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. This case provides the Court with an ideal vehicle to expand on its position in *Fair Admissions* that "eliminating racial discrimination means eliminating all of it." *Id.* at 2161.

The Fairfax County School Board has a long and sordid history of race discrimination by proxy. The challenged overhaul of the admissions practices at TJ in the instant case is consistent with and expands on this history of actions undertaken for racially motivated purposes. These efforts have included but are not limited to: 1) creating admissions preparatory programs that discriminate on the basis of race, 2) reducing or eliminating the use of standardized testing, 3) the use of student essays and recommendations to determine and to make admissions decisions based on the race of applicants, and 4) targeted geographic quotas.

Such race-targeted efforts are spreading after *Fair Admissions*. For example, just ten days after this Court announced its ruling prohibiting the use of race in college admissions, senior administrative officials of top law schools met to discuss methods to maintain or

increase racial diversity on college campuses.[2] In an online panel moderated by University of California-Berkeley Law School dean Erwin Chemerinsky on behalf of the Association of American Law Schools, Timothy Lynch, General Counsel of the University of Michigan, advised law school administrators to look to *Fair Admissions* for guidance on how to achieve racial outcomes without triggering strict scrutiny.[3] Mr. Lynch said:

> Law schools should be thinking about the first statement that [Chief Justice] Roberts made [in *Fair Admissions*], which is trying to take opportunities to increase diversity through race-neutral means. The hard part of interpreting it is his language about not using the same means, not having a back-door approach.[4]

Mr. Lynch identified the instant case as one "important for how [universities] move forward," because TJ had successfully used a superficially race-neutral proxy for the purpose of increasing racial diversity.[5] This Court has repeatedly held that a government action for the purpose of achieving a racial result triggers

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[2] Aaron Sibarium, *Law School Administrators Huddle to Circumvent Affirmative Action Ban*, WASH. FREE BEACON (Aug. 23, 2023), https://freebeacon.com/campus/law-school-administrators-huddle-to-circumvent-affirmative-action-ban/.

[3] *Id*.

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

[5] *Id*.

strict scrutiny review. The fact that the means employed to achieve a racial outcome appear race neutral does not change that fact. The Court has only permitted the use of a facially race-neutral alternative to achieve a racial outcome as a narrowly tailored means of achieving a compelling governmental interest. The Court should take this opportunity to clarify that even ostensibly race-neutral actions taken for a racial purpose violates the law.

Evaluated pursuant to the proper judicial standard of strict scrutiny, the Board's change to the TJ admissions plan violates the Equal Protection Clause because its manifest racial purpose does not serve a compelling governmental interest. The Fourth Circuit's decisions to the contrary are erroneous.

ARGUMENT

I. The Board has a long and sordid history of manipulating TJ admissions practices for racial purposes

TJ has long been recognized as one of the premier high schools in the United States.[6] Established by the State of Virginia in 1985 as a Virginia Governor's School intended to provide "a small population of students whose learning levels are remarkably different

[6] See, e.g., Drew Lindsay, *Success Factory: Inside America's Best High School*, WASHINGTONIAN (Sept. 21, 2009), https://www.washingtonian.com/2009/09/21/success-factory-inside-americas-best-high-school/.

from their age-level peers" with academic opportunities "beyond those offered in their home schools,"[7] TJ provides a specialized education for grades 9-12 emphasizing science, technology, engineering, and mathematics.[8] Understandably, the questions of which students to admit to TJ, and how admissions decisions are made, have been the source of controversy since nearly the school's founding.

Students are selected through a relatively complex admissions process administered by the TJ Admissions Office. Although its precise elements have shifted over time, the process was generally consistent from 1985-2020. First, students earned a sufficiently high index score—a combination of entrance exam scores and middle school grades—to earn a spot in the semifinalist pool. Second, semifinalist students provided additional personal information, essays, and teacher recommendations. An admissions committee then evaluated this information to select TJ's incoming class.

From very early in the school's history, this second-round process has considered race. In 1985, for example, the Board instructed the admissions committee to take into account "considerations relative to achieving

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[7] *Governor's Schools*, VA. DEP'T OF EDUC., https://www.doe.virginia.gov/teaching-learning-assessment/specialized-instruction/governor-s-schools (last visited Sept. 17, 2023).

[8] *TJHSST Freshman Application Process*, FAIRFAX CNTY. PUB. SCHS., https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman (last visited Sept. 17, 2023).

an appropriate representative student body in regard to racial/ethnic and sex distributions."[9] In the years since, the Board has continually developed new strategies in the admissions process to racially balance the composition of entering classes.

A. 1990-1997: The Board discriminates against applicants on the basis of race and ethnicity, and creates racially segregated "pipeline" programs

In 1986, the Board created a committee responsible for "oversight" of the TJ admissions process. The committee proposed procedural changes intended to increase the number of black and Hispanic students at the school.[10] One obstacle to be overcome in this regard was the admissions test because, in the eyes of committee officials, an insufficient number of black and Hispanic students achieved scores high enough to qualify for the second-round, semifinalist pool.

In 1990, the Board adopted a racial affirmative action policy urged by TJ's then-admissions coordinator. Members of the admissions office were instructed to identify promising black and Hispanic applicants from outside the semifinalist pool and present them to the Board's oversight committee for a "second look."[11]

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[9] PAMELA VARLEY, VALUES IN CONFLICT: THE FUROR OVER ADMISSIONS POLICY AT A POPULAR VIRGINIA MAGNET SCHOOL 8 (2006).

[10] *Id*.

[11] *Id*.

Applicants were subsequently admitted to TJ pursuant to this procedure, displacing applicants of other races with index scores sufficient to reach the semifinalist pool.

Still dissatisfied with the number of black and Hispanic students admitted through the "second look" process, the Board in 1992 sought to create a "pipeline" of academically competitive students with the Board's desired racial and ethnic identities. The Board directed Fairfax County Public Schools (FCPS) to develop a two-year math and science enrichment program called "Visions" for promising black and Hispanic middle school students.[12] This program included TJ exam preparation.[13]

These two initiatives—"second look" and Visions—succeeded in raising the proportion of black and Hispanic students at TJ. Total enrollment of students of these racial groups at TJ ranged between 8.5% and 12.3% during the seven-year period spanning 1991 to 1998.[14] By comparison, TJ's first graduating class (admitted in 1985) was 95.3% percent white or Asian.[15]

In 1997, a group of parents whose children had qualified as semifinalists but were denied admission to the school learned that approximately thirty black or Hispanic students had been admitted to TJ under its

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[12] *Id*.

[13] *Id*. at 10–11.

[14] *Id.*

[15] *Id*. at 10.

affirmative action program despite having index scores that would have disqualified the applicants from consideration if they were white or Asian.[16] The parents complained to the Board, intimating that they might file a lawsuit.[17]

The Board was keenly aware these parents had colorable discrimination complaints. The neighboring school district in Arlington County, Virginia, lost a lawsuit that same year after defending its policy of reserving half of its seats in a popular elementary school lottery for racial and ethnic minority students. The judge in that case ruled that diversity could never constitute a compelling governmental interest and, in the alternative, even if it could, that Arlington County's program was not sufficiently tailored to further diversity. *Tito v. Arlington Cty. School Bd.* (No. 97-540-A, 1997 U.S. Dist. LEXIS 7932, at *16, E.D. Va. May 13, 1997). Arlington County responded by modifying the lottery to award points based on three equally weighted "diversity" factors: (1) whether the applicant was from a low-income or "special" family background, (2) whether English was the applicant's first or second language, and (3) the racial or ethnic group to which the applicant belonged.[18] Through this policy, Arlington County school officials sought to attain a student body "in proportions that approximate the distribution of students from those groups in the district's overall

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[16] *Id.* at 12.

[17] *Id*.

[18] *Tuttle v. Arlington Cnty. School Bd.*, 195 F.3d 698, 701 (4th Cir. 1999).

student population."[19] The District Court again condemned Arlington County, calling the revised lottery "a transparent attempt to circumvent *Tito*."[20]

In response to *Tito*, *Tuttle*, and continuing pressure from Fairfax County parents who alleged that the admissions policy discriminated against their children, the Board discontinued its segregated "Visions" pipeline program and its policy of admitting black and Hispanic students with prohibitively low index scores.[21] As a result, enrollment at TJ of students of these races dropped below levels acceptable to the Board.

In 2000, the Board instructed then-superintendent Daniel Domenech to increase TJ's racial diversity in a way the Board would deem legally "safe."[22] This directive led to the Board's first experiments with geographic quotas as a proxy for race.

B. 1998-2003: The Board tests geographic quotas and participates in privately funded pipeline programs that racially discriminate

With the Board cautious of any policy that included overt racial preferences, superintendent Domenech

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[19] *Id*.

[20] Pia Nordlinger, *Good School, Bad Quota*, WKLY. STANDARD (Jun. 8, 1998), https://www.washingtonexaminer.com/weekly-standard/good-school-bad-quotas.

[21] VARLEY, *supra* note 9, at 13.

[22] *Id*.

resorted to "geographic diversity" to achieve the desired racial composition at TJ.

In 2002, the Board increased TJ's incoming class size from 400 to 430, reserving thirty seats for semifinalists from "underrepresented" middle schools who would have otherwise been rejected.[23] But this plan failed. Twenty-eight of the new set-aside seats went to white and Asian instead of black and Hispanic applicants, which did not racially mix the school as intended.[24]

Notwithstanding, a significantly higher number of black and Hispanic students applied to TJ. The total number of applicants from these racial groups increased from 271 to 394, and 45 ranked in the top 800 compared to only 15 the previous year, with 30 offered admission compared to just nine the previous year.[25] School officials attributed this surge to publicity to the debate around TJ admissions together with a concerted push by the Parent Teacher Student Association's Diversity Committee to host information sessions for minority families and to sponsor a series of test preparation sessions with eighth-grade minority students.[26]

The Board also replaced the racially discriminatory Visions program with a similar program called

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[23] *Id*. at 18.

[24] *Id*. at 19.

[25] *Id*.

[26] *Id*.

Quest, funded by the private Fairfax Education Foundation,[27] a nonprofit with ties to the county's school system.[28] The Board apparently believed that it could continue operating a racially discriminatory program in its middle schools, so long as the funding for this program came from an outside organization.

C. 2004-2019: The Board alters TJ's mission and admissions process with the explicit purpose of racially balancing TJ's student body

In the fall of 2003, the Board was confronted with two circumstances that it found undesirable: the failure of its geographic proxy scheme, and this Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (restricting an educational institution's consideration of race). The Board decided to tackle the TJ entrance examination, which it viewed as a longstanding obstacle to its racial diversity goals.

Superintendent Domenech initially proposed adding a non-verbal section to the TJ exam and expanding the semifinalist pool by replacing the index scoring

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[27] *Id*.

[28] Kevin Sief, *Fairfax Chamber of Commerce Starts Foundation to Bolster Public Schools*, WASH. POST (Feb. 25, 2011), https://www.washingtonpost.com/education/fairfax-chamber-of-commerce-starts-foundation-to-bolster-public-schools/2011/01/04/ABb33jD_story.html?_=ddid-3-1694926440 (noting that FCPS superintendent had previously served on the Foundation's board).

system with a minimum exam score.[29] The Board instead empaneled a "Blue Ribbon Commission" to analyze how to "increas[e] the diversity of [TJ's] student body based on [TJ's] mission and belief statements."[30] This commission suggested that the Board abandon its two-stage admissions process and, instead of creating a semifinalist pool, consider every applicant on the basis of their entire admissions packet. The Board declined this suggestion but voted in December 2004 to expand the semifinalist pool.

No longer would there be a fixed pool of 800: heeding the conclusion of the commission that the admissions process "relied too heavily on scores from one standardized test" that white and Asian students performed disproportionately well on,[31] the Board instead established minimum combinations of scores and grades on a sliding scale, such that a high GPA could balance out a lower test score, and vice versa.[32] Under this new system, 1,601 out of 2,902 applicants to TJ in the fall of 2004 qualified as semifinalists.[33]

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[29] PAMELA VARLEY, VALUES IN CONFLICT: THE FUROR OVER ADMISSIONS POLICY AT A POPULAR VIRGINIA MAGNET SCHOOL SEQUEL 1 (2006).

[30] FAIRFAX CNTY. SCH. BD., BLUE RIBBON COMMISSION ON ADMISSIONS 13 (2004), https://static1.squarespace.com/static/5f4289cac951f24569ad9488/t/5fff31973ca0ce3823453fa5/1610559896411/TJBlueRibbonReport.pdf.

[31] *Id*. at 14.

[32] VARLEY, *supra* note 29 at 3.

[33] *Id*. at 4.

Between 2004 and 2020, the Board tinkered extensively with the admissions process. These changes included altering the mission statement of the school, reducing the required number of recommendations from math and science teachers, and asking recommending teachers to disclose students' ability to contribute to "diversity."

The Board also "corrected" TJ's chartering purpose, declaring the school's mission was to prepare "future leaders . . . to address future complex societal and ethical issues."[34] To achieve this bold new goal, the Board sought diversity within its student body, "broadly defined to include a wide variety of factors, such as race, ethnicity, gender, English for speakers of other languages (ESOL), geography, poverty, prior school and cultural experiences, and other unique skills and experiences."[35]

By 2011, such changes so demonstrably reduced the academic readiness of the student body that a group of math teachers expressed concern to the Board and in local media.[36] One nationally renowned middle

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[34] FAIRFAX CNTY. SCH. BD. POL'Y 3555.4, https://www.boarddocs.com/vsba/fairfax/Board.nsf/files/99QRKR6E6833/$file/P3355.4.HighSchoolforScienceandTechnology.pdf.

[35] Hilde Kahn, *A Stubborn Excellence Gap*, EDUC. NEXT (Jun. 26, 2018), https://www.educationnext.org/stubborn-excellence-gap-despite-efforts-diversity-stalls-elite-public-high-school/.

[36] See, e.g., Emma Brown, *Math and Science Gaps Found at Elite Fairfax School*, WASH. POST (May 30, 2012), https://www.washingtonpost.com/local/education/math-and-science-gaps-found-at-elite-fairfax-school/2012/05/30/gJQAmT2s2U_story.html (noting that the proportion of freshmen on a "watch list" of students

school math teacher, distressed that TJ had rejected the most mathematically gifted eighth grader in Fairfax County, shared the Board's revised teacher recommendation materials with the *Washington Post* to illustrate how the admissions process had been "corrupt[ed]."[37] TJ's 2004 recommendation form asked teachers to rate candidates on "interest in math," "self-discipline," and "problem-solving skills."[38] In 2011, that same form sought information about a student's "intellectual ability," "commitment to [science, technology, engineering, and mathematics]," and whether the applicant's background, skills, and past experiences would "contribute to the diversity of [the TJ] student body."[39]

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with low grade-point averages "nearly doubled;" and that the issue became public after seven math teachers sent a letter to the Board detailing their concerns); John Dell, *The New Thomas Jefferson? It Includes Remedial Math*, WASH. POST (May 25, 2012), https://www.washingtonpost.com/opinions/the-new-thomas-jefferson-it-includes-remedial-math/2012/05/25/gJQAlZRYqU_story.html (detailing that FCPS no longer selected students primarily based on their promise in science, technology, and mathematics, resulting in a class where one-third of entering students were in "remediation in their math and science courses").

[37] Jay Mathews, *Is TJ Soft on Math?*, WASH. POST (Feb. 27, 2011 11:29 PM), https://www.washingtonpost.com/wp-dyn/content/article/2011/02/27/AR2011022704827.html?wprss=rss_metro.

[38] *Id.*

[39] *Id*.

D. 2020: The Board again introduces geographic quotas as a proxy for race

In 2020, the Board once again decided to set aside seats at specific middle schools to decrease the number of white and Asian students admitted to TJ. This decision to overhaul admissions in the case at issue began when TJ Principal Ann Bonitabitus lamented that TJ "did not reflect the racial composition of FCPS." Cert. petition at 7. The Board again subordinated TJ's traditional merit-based admissions criteria. The Board first considered a merit lottery to drastically reduce the white and Asian enrollment at TJ. Cert. petition at 8. But it decided that such a process would still yield too many Asian students.

The Board had once again come to the crux of its challenges in racially balancing TJ: family motivation to pursue the best educational opportunities available for their children. FCPS had long-established regional "Gifted and Talented (GT) Centers" for advanced learners—a system former superintendent Daniel Domenech recognized had historically low black and Hispanic enrollment.[40] Students who availed themselves of the accelerated coursework in GT Centers were those most successful on TJ's admissions exam, leaving few qualifying students in other neighborhood schools.

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[40] VARLEY, *supra* note 9 at 5 (noting that Domenech's "own educational philosophy was at odds with [the county's] much-beloved educational tradition" of creating "separate schools for children identified as 'gifted and talented' ").

To overcome this hurdle to achieving its desire for racial variety at TJ, the Board proposed eliminating the entrance exam entirely and granting a quota to every school in the county. It also added "experience factors" to the application process to further disadvantage white and Asian applicants. Cert. petition at 9.

The Board never intended to increase geographic diversity, since the middle schools granted slots within the quota scheme all funnel students into the same GT centers. A plan intended to increase geographic representation would have allocated seats according to county regions based on their population. Instead, students enrolled in the GT centers are *ineligible* for seats set aside for their local high school, despite living within its geographic boundaries. This plan had the sole, express purpose of racially balancing the student body by capping the number of white and Asian students admitted to TJ.

The Board has known for years that its wish to enroll more black and Hispanic students at TJ is frustrated by a "pipeline" issue. This issue has been studied exhaustively.[41] Black and Hispanic students have historically been under-identified for "Gifted and Talented" programs in Fairfax County, resulting in relatively low enrollments in the advanced middle school

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[41] See generally OFFICE OF RESEARCH AND STRATEGIC IMPROVEMENT, OFFICE OF TJHSST ADMISSIONS, THOMAS JEFFERSON HIGH SCHOOL FOR SCIENCE AND TECHNOLOGY: IMPROVING ADMISSIONS PROCESSES (Nov. 2020), https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BWE23Y004896/$file/TJ%20White%20Paper%2011.17.2020.pdf; VARLEY *supra* note 9 at 5-6.

math classes that students must complete in order to apply to TJ.[42] Moreover, a study prepared by the Board in 2020 found that of the eighth grade students enrolled in advanced math courses eligible to apply to TJ that year, just 38% of black students and 35% of Hispanic students chose to apply to TJ.[43] In contrast, 64% of eligible Asian students applied.[44]

In its haste to remedy a decades-long, systemic issue that became politically inconvenient during the social unrest that gripped the country in 2020, the Board has once again sought to engineer a preferred racial balance at TJ. Its chosen method in doing so evinces a clear preference for certain races and against others. Principal among this animus appears to be anti-Asian sentiment, once on display in remarks by former TJ principal Elizabeth Lodal, who resigned following an apology for her criticism of Asian students in 2006.[45] The revelations of anti-Asian attitude in the record, especially, is disturbingly similar to the factual circumstances in *Fair Admissions*. The Board's extensive, longstanding efforts to both discriminate for a racially

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[42] See generally OFFICE OF RESEARCH AND STRATEGIC IMPROVEMENT, *supra* note 41.

[43] *Id*. at 11.

[44] *Id*. at 12.

[45] Maria Glod, *Va. Principal Issues Apology for Remarks Linking Ethnicity and Cheating Was Wrong, Fairfax Leader Says*, WASH. POST (May 3, 2006), https://www.washingtonpost.com/archive/politics/2006/05/03/va-principal-issues-apology-for-remarks-spanclassbankheadlinking-ethnicity-and-cheating-was-wrong-fairfax-leader-saysspan/01cfcf99-d02f-4c11-b68e-e4997cf6d972/.

motivated purpose and to evade judicial sanction must end.

II. The Board's use of race triggers strict scrutiny

This Court has explained that the "central purpose" of the Equal Protection Clause is to "prevent the States from purposefully discriminating between individuals on the basis of race." See *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Therefore, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination. . . ." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race. . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

What Justice Clarence Thomas calls "genuine" strict scrutiny is "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1985); *Fair Admissions*, 143 S. Ct. at 2177 (Thomas, J., concurring). Genuine strict scrutiny remedies the "sordid business" of "divvying us up by race" that has plagued our nation's history. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., joined by Alito, J., concurring and dissenting). Even for ostensibly good reasons such as diversity, see *Fair Admissions* 143 S. Ct. at 2196-97 (Thomas, J., concurring), or statistical evidence of inequality, see *Croson* at 488 U.S. at 499, the use of race did not survive strict scrutiny. That is because "[t]he worst forms

of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 328 (2013) (Thomas, J., concurring). Only the rarest circumstances can overcome "genuine" strict scrutiny, such as prison race riots and remedial action for prior race discrimination that violated the Constitution or statute. *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Fair Admissions*, 143 S. Ct. at 2162.

A. Employing facially race-neutral means to achieve a racial outcome triggers strict scrutiny

Intentional race discrimination arises where an allegedly race-neutral policy, which is applied without bias, results in a racially disparate impact motivated by discriminatory intent. See *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). This idea is summed up in the maxim, "what cannot be done directly cannot be done indirectly." *Fair Admissions*, 143 S. Ct. at 2176. The prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. 277, 325 (1867). Laws or policies that are "motivated by a racial purpose or object" are subject to strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Strict scrutiny also applies to seemingly neutral laws or policies which have a "disproportionately adverse effect" that "can be traced to a

discriminatory purpose." See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

There are many constitutionally permissible reasons to enact each one of TJ's admissions changes. But each decision—and especially the wholesale elimination of the admissions test in 2020 at issue in the instant case—violated the Equal Protection Clause because at least one reason for each change was to reduce the number of white and Asian students admitted to TJ.

This is common sense, and proxies are not new. After the passage of the Fifteenth Amendment, southern states passed "grandfather clauses," which exempted anyone whose grandfather could vote before the passage of the Amendment from voting restrictions established to target black Americans. This Court was unanimous in that there was "no room for dispute" of the underlying, repugnant racial purpose and held that grandfather clauses violated the Fifteenth Amendment. *Guinn v. United States*, 238 U.S. 347, 363 (1915). Many Jim Crow laws, such as "[p]oll taxes, grandfather clauses, and property tests" were "ostensibly race-neutral" but nonetheless, were enacted for a racial purpose. See, e.g., Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1525 (2003). It would blink reality to hold that the state is prohibited from discriminating on the basis of race if officials can merely establish proxies to achieve the same results.

This Court's subsequent rulings recognize that the Civil War Amendments would be mere formalities if shadows or semantics defeated substance. See *Cummings*, 71 U.S. at 325 (1867); Rather, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate *all* official sources of invidious racial discrimination in the United States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (emphasis added).

B. Any level of action taken for a racial purpose triggers strict scrutiny

A racial purpose "implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Hernandez v. New York*, 500 U.S. 352, 360 (1991); *accord Feeney*, 442 U.S. at 279. This implies "but for" causation. *Fair Admissions*, 143 S. Ct. at 2209 (Gorsuch, J., concurring) (citing *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020)). The Court does not excuse race discrimination merely because there are non-racial motivations present, however abundant. See *Hunt*, 526 U.S. at 541*; Arlington Heights*, 429 U.S. at 265-56 (needing to show impermissible racial intent was a motivating factor, not a primary one); *Feeney*, 442 U.S. at 272 ("A racial classification . . . is presumptively invalid"); *Brown v. Artery Organization, Inc.*, 654 F. Supp. 1106, 1117 (D.D.C. 1987) (requiring under the Fair Housing Act that housing decisions are "not the product *in any way* of racial purpose or motive" (emphasis added)). "Eliminating racial discrimination means eliminating all of

it": a single motivation because of race—even if it is one among thousands—still requires strict scrutiny. *Fair Admissions*, 143 S. Ct. at 2154; see also *Croson*, 488 U.S. at 493 (1989).

Each individual change in TJ's admissions policy alone should trigger strict scrutiny, as each "was applied and administered by a public authority with an evil eye and an unequal hand." *Yik Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

III. This Court has only ever permitted the use of race-neutral alternatives to achieve a racial purpose as a narrowly tailored means to achieve a compelling state interest

In a concurring opinion in the Fourth Circuit decision, Judge Toby J. Heytens claimed that the "Supreme Court has repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means" and that "[i]t would be quite the judicial bait and switch to say such race-neutral efforts are also presumptively unconstitutional." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 891 (4th Cir. 2023).

Judge Heytens misreads this Court's precedents and conflates race-neutral with legal. *Grutter* mentions considerations of race-neutral alternatives as a narrow tailoring element of strict scrutiny. *Grutter*, 539 U.S. at 339-40. So do *Fisher*, *Croson*, *Adarand*, and *Parents Involved*. *Fisher I*, 570 U.S. at 312; *Adarand*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507; *Parents Involved*, 551 U.S. at 733-35. There never has been a

presumption of constitutionality for race-neutral measures that are a pretext for race. See *Feeney*, 442 U.S. at 272. "When there is proof that a racially discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-66; *Hunt*, 526 U.S. at 546 ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was motivated by a racial purpose."). Judge Heytens' misreading makes *Brown* and its progeny mere formalities; "it makes little sense to allow a government that is subtle enough to use an ostensibly neutral surrogate for race to get away with maintaining" racial discrimination. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 948 (1989).

Judge Heytens also assumes a compelling interest where none exists. This Court has never found a compelling state interest in racial diversity in K-12 schools. See *Parents Involved*, 551 U.S. at 746-47. "[F]ull compliance" with *Brown I* required "a system of determining admission to the public schools on a nonracial basis." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955). Without a compelling interest, TJ's admissions scheme fails strict scrutiny. See *Adarand*, 515 U.S. at 237. The Fourth Circuit cannot offer its blessing to what was never legal.[46]

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[46] In making this point, the Court should make explicit what Justice Thomas writes in, and ought to be clear in any fair reading of, the *Fair Admissions* decision, namely, that the holding in *Grutter* of a compelling interest in the purported educational benefits

IV. This Court should close the back door left ajar in *Fair Admissions*

In response to this Court's ruling in *Fair Admissions*, schools have announced an intention to use facially race-neutral proxies to racially balance incoming classes. Absent clarity from this Court, schools and administrators will operate under a misunderstanding of *Fair Admissions*.

Moreover, school officials are watching TJ closely, seeking more wiggle room to insulate from legal liability admissions practices that seek racial ends. For example, the University of Michigan's general counsel suggested that schools obscure any racial purpose behind changes to admissions practices:

> Whatever you do, you should be aware right now of the record you're creating, the record your faculties are creating. What record are you creating? In the Thomas Jefferson dissent, they look for . . . anything that could be used as evidence of discriminatory intent. The key question in terms of creating the record is, what can you say right now is the race neutral explanation for doing it?[47]

Additionally, this Court should reject the use of second-order proxies. The Biden Administration released guidance that suggests schools can establish increasingly insulated proxies for race. DEP'T OF EDUC. &

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of a diverse student body, sufficient to justify racial discrimination, is "for all intents and purposes, overruled."

[47] American Association of Law Schools, *supra* note 2.

DEP'T OF JUST., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISIONS IN Students for Fair Admissions v. Harvard College AND University of North Carolina 3-4 (Aug. 14, 2023), https://www.justice.gov/media/1310161/dl?inline.

This Biden Administration guidance advises that "[a]n institution may consider race" in the admissions process including through "outreach and recruitment" for pre-college programs. *Id.* at 4. Graduation from such a pipeline or "pathway program" therefore becomes a proxy for race. Notwithstanding, the Biden Administration counsels that an "institution may give pathway program participants preference in its college admissions process" to achieve a racial goal indirectly that this Court has prohibited. *Id.*

The Biden Administration's advice is clear: fill pre-college programs with students of the preferred races, then admit graduates of those programs with preference to evade this Court's edicts. See *id.*; *Swanner v. Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 461 (1994) (citing *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993)). Just like those implemented by the Board, race-exclusive education preparation programs function as a backdoor or second-level proxy to racially discriminate in admissions.

Schools should not escape their illegal use of race by diluting their discrimination with the right number of substitutes. This Court should clarify that if a racial purpose motivates state action *at any point*, the action

is subject to strict scrutiny review. See Section II.B, *supra*.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari.

Respectfully submitted,

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