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 *AMICI CURIAE* FORMER FEDERAL OFFICIALS OF THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the U.S. Department of Education's Office for Civil Rights, having served under former Secretary of Education Betsy DeVos, and are interested in the lawful and appropriate enforcement of Title VI of the Civil Rights Act of 1964 (Title VI). As this Court recently recognized, Title VI extends at least as far as the Equal Protection Clause. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2156 n.2 (2023) (*SFFA*).

The following individuals are represented on this brief:

Kimberly M. Richey is the former Principal Deputy Assistant Secretary for Civil Rights, having served from 2018 to 2021, including as Acting Assistant Secretary for Civil Rights for parts of 2020 and 2021.

Candice Jackson is the former Deputy Assistant Secretary for Strategic Operations and Outreach, having served from 2017 to 2018, including

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[1] The parties were timely notified of the filing of this *amici curiae* brief. *See* Supreme Court Rule 37.2. Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

as Acting Assistant Secretary for Civil Rights for parts of 2017 and 2018.

David C. Tryon is a former Deputy Assistant Secretary for Policy and Development, having served from 2019 to 2021.

William E. Trachman is a former Deputy Assistant Secretary for Policy and Development, having served from 2017 to 2019, and later as Senior Counsel from 2019 to 2021.

Christian Corrigan is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2019 to 2021.

Sarah Perry is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2020 to 2021.

The Department of Education's Office for Civil Rights (OCR) functions as an administrative law enforcement agency. OCR has jurisdiction over nearly all recipients of federal funds from the Department of Education, and enforces several federal civil rights statutes, including Title VI and its implementing regulations. 42 U.S.C. § 2000d; 34 C.F.R. § 100, *et seq.*[2]

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[2] OCR also enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, as well as Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.*

As part of its enforcement authority, OCR receives complaints from the public, and where appropriate, investigates those complaints and brings recipients of federal funds into compliance with Title VI through resolution agreements or enforcement proceedings. *See, e.g.*, U.S. Dep't of Educ.'s Off. for Civil Rts., How to File a Complaint with the Department of Education (September 2010);[3] *see also* U.S. Dep't of Educ.'s YouTube Channel, *OCR Short Webinar: How to File an OCR Complaint* (Mar. 20, 2020).[4]

OCR also initiates its own investigations in some instances, called Directed Investigations, and, separately, opens Compliance Reviews related to major OCR initiatives. *See* U.S. Dep't of Educ.'s Off. for Civil Rts., Case Processing Manual 23 (August 26, 2020) (describing Compliance Reviews in Section 401 of and Directed Investigations in Section 402).[5]

OCR also has jurisdiction over complaints arising under the Age Discrimination Act, 42 U.S.C. § 6101, *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905.

[3]https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf.

[4] https://www.youtube.com/watch?v=BuwVa3JJE-4.

[5]https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf. On January 17, 2019, for instance, OCR announced a Compliance Review initiative on the topic of the inappropriate use of restraint and seclusion with respect to students with disabilities. *See* Campus Safety Magazine*, U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws* (Jan. 21, 2019), https://www.campussafetymagazine.com/safety/u-s-dept-ed-children-disabilities/. Similarly, on February 26, 2020, OCR

SUMMARY OF THE ARGUMENT

As former federal officials in the U.S. Department of Education's Office for Civil Rights (OCR), *Amici* witnessed firsthand how jurisprudential gaps in the Court's Equal Protection cases allowed Executive Branch officials to announce—through sub-regulatory guidance that did not go through formal Notice and Comment—what it expected of schools throughout the country.

Unfortunately, this led to substantial vacillations in OCR policy guidance to the public. In some instances, OCR guidance addressing the use of race to achieve diversity was issued, withdrawn, re-issued, and is now back under consideration for withdrawal. Most notably, some administrations actively encouraged schools to engage in race-based measures to seek diversity, while others, by contrast, emphasized the very important limitations on the legal use of race in education under Title VI.

Amici were signatories to a brief in the *SFFA* matter, urging the Court to set clear and predictable lines for schools when considering the use of race. *See*

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announced a major initiative to open Compliance Reviews on the topic of sexual assault in elementary and secondary schools. *See* Letter to Superintendents from Assistant Secretary for Civil Rights Kenneth L. Marcus, *Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools* (Feb. 26, 2020), https://content.govdelivery.com/accounts/USED/bulletins/27debd7.

Brief of Amici Curiae Former Federal Officials of the U.S. Department of Education's Office for Civil Rights in Support of Petitioner, Nos. 20-1199 & 21-707 (May 6, 2022).[6]

This Court's decision in *SFFA* was careful to draw those lines in its decision. *See, e.g.*, *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 2161 (2023) ("Eliminating racial discrimination means eliminating all of it."); *id.* at 2176 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."); *id.* ("But despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.").

Once again, however, OCR has attempted to put its own gloss on the Court's decisions.

Initially, for instance, political appointees working in OCR made widely reported statements urging schools and the public to avoid relying on third-party interpretations of *SFFA*. Specifically, the OCR's Assistant Secretary for Civil Rights, Ms. Catherine Lhamon, spoke at the National Summit on Equal Opportunity in Higher Education soon after the Court issued its opinion in *SFFA*. Ms. Lhamon was quoted

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[6] https://www.supremecourt.gov/DocketPDF/20/20-1199/222710/20220506160451513_2022.05.06%20SFFA%20v%20Harvard%20and%20UNC%20Amici%20Merits%20Stage.pdf

as saying that schools, and the public generally, will know what the law is after *SFFA* only "when you hear from us." In a prominent Tweet, one journalist called

the remark a "jab" at groups who had been offering their own robust interpretations of *SFFA*. *See* Bianca Quilantan, X (formerly Twitter), (July 26, 2023).[7]

News reports indicate that the audience in the room received the message, loud and clear. *See* Jillian Berman, Morningstar News, *Inside the room where Biden administration officials and college leaders game planned college admissions after affirmative action* (Jul. 26, 2023) ("College leaders in the room seemed largely receptive to the pitch from the Biden administration—that maintaining diversity in higher

[7]https://twitter.com/biancaquilan/status/1684212496754782209

education is not only possible, but imperative in the wake of the Supreme Court's decision.").[8]

Since Ms. Lhamon's initial remarks at the National Summit on Equal Opportunity in Higher Education, two packages of sub-regulatory guidance have indeed been published. First, on August 14, 2023, the Department of Education's OCR and the Department of Justice's Civil Rights Division jointly published a Dear Colleague Letter (August 14 DCL),[9] and a Questions and Answers Resource document (August 14 Q&A).[10]

Most notably, the documents instructed schools throughout the country that even after *SFFA*, they were free to use race-conscious measures to affect the racial demographics of their student body, so long as

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[8]https://www.morningstar.com/news/marketwatch/20230726514/inside-the-room-where-biden-administration-officials-and-college-leaders-game-planned-college-admissions-after-affirmative-action

[9] U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts., *Dear Colleague Letter Re: Resources on Students for Fair Admission, Inc. v. President and Fellows of Harvard College and Students for Fair Admission, Inc. v. University of North Caolina et al. (SFFA cases)*, (August 14, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf (August 14 DCL).

[10] U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts.*, Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admission, Inc.*, *v. Harvard College and University of North Carolina* (August 14, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf (August 14 Q&A).

individual applicants did not receive a direct preference solely on the basis of their race:

> In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.

August 14 Q&A, at 3.

Then, on August 24, 2023, OCR unilaterally issued further sub-regulatory guidance, purporting once again to offer the definitive take on how schools can use and consider race, despite the *SFFA* decision. OCR reiterated the principle that schools may focus on the racial demographics of their students, so long as their programs and activities are technically open to everyone:

> [A] program does not violate Title VI merely because it focuses its recruitment efforts on students of a particular race or national origin if the program is open to all students without regard to race or ethnicity.

U.S. Dep't of Educ.'s Off. for Civil Rts., *Dear Colleague Letter Re: Race and School Programming*, at 11 (August 24, 2023) (August 24 DCL) (citing *Fisher II* for the proposition that schools may target specific

racial groups for admission as a "race-neutral" alternative).[11]

Put simply, while the *SFFA* decision was a major step forward in carefully defining the use of race in the context of education, there remains a significant threat that current OCR officials will continue to interpret *SFFA* narrowly, while future OCR officials may opt to offer a more robust interpretation of the Court's embrace of the principle of non-discrimination. Once again, stakeholders may face "regulatory whiplash" on the topic of whether proxy race discrimination is legal.

Additionally, in the meantime, schools will treat these public guidance documents as the definitive interpretations of *SFFA*, for the purpose of using race in their programs and activities. That, in and of itself, is cause for the Court to step in once more on the topic of race discrimination in schools.

ARGUMENT

I. OCR Guidance on Proxy Discrimination Measures Vacillated Significantly Before *SFFA*.

Extraordinary and rapid shifts in federal policy undermine consistency and predictability for thousands of schools and millions of students. Similarly, public confidence in the administration of civil rights laws is undermined when the same body of

[11] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230824.pdf

caselaw is read in a disparate fashion. And schools, in particular, must confront this confusing landscape against the backdrop of the incredibly severe consequence of losing all federal education funds in an OCR enforcement action. 34 C.F.R. § 100.8(c).

Yet before *Amici*'s tenure in OCR, the Obama Administration actively encouraged schools to adopt race-conscious policies, by counting Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), with the four dissenters in that case. *See id.* at 788 (Kennedy, J., concurring) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.").[12]

OCR guidance documents, in particular, drew heavily from Justice Kennedy's concurring opinion in *Parents Involved,* handpicking elements from that concurrence and joining them with the views of the dissenters to offer purported affirmative points of law. *See* U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary*

[12] This Court has specifically cautioned against this sort of "vote tallying" of concurrences and dissents. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) (advising that when the Court is fragmented, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.").

Schools, at 5 (Dec. 2, 2011) (2011 ESE Guidance) ("Although *Parents Involved* ultimately was decided on other grounds, a majority of Justices expressed the view that schools must have flexibility in designing policies that endeavor to achieve diversity or avoid racial isolation, and, at least where those policies do not classify individual students by race, can do so without triggering strict scrutiny.").[13]

To drive home OCR's point regarding using broad race-based measures to achieve diversity, the 2011 Guidance prognosticated about what this Court might do if faced with a case where a school adopted a host of race-conscious policies that stopped just short of making decisions specifically based on the race of individual students:

> Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be "unlikely" to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.

2011 ESE Guidance, at 5.

This analysis, although it appeared in OCR's Elementary and Secondary Guidance document, was not clearly limited to that context, and would just as easily apply to post-secondary institutions as well.

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[13] https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf

Indeed, in a joint guidance document directed at post-secondary schools, the Departments once again cited Justice Kennedy's concurrence in *Parents Involved* for the proposition that schools are entitled to consider the racial impact of their decisions on diversity and racial isolation, so long as they are motivated by the benevolent idea of enhancing racial diversity, and not by other purposes.

> [L]eeway to devise race-conscious measures to achieve diversity or avoid racial isolation extends only to circumstances where entities pursue the goal of bringing together students of diverse backgrounds and races.

U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts., *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education*, at 5 n.11 (Dec. 2, 2011) (internal quotation marks omitted) (2011 Postsecondary Guidance).[14]

Thus, during the Obama Administration, OCR relied on Justice Kennedy's concurrence for the proposition that some "good" race-based decisions were permitted, and not subject to strict scrutiny. This position, however, is in deep tension with other longstanding precedents. *See Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) ("[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, it may not always be clear that a so-called preference is in fact benign. More than good

[14] https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf

motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (internal quotation marks and citations omitted); *see also Fisher University of Texas (Fisher I)*, 570 U.S. 297, 328 (2013) (Thomas, J., concurring) ("The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities."); *Regents of Univ. of California v. Bakke*, 438 U.S. at 307 (1978) (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

In addition to the 2011 ESE Guidance and the 2011 Postsecondary Guidance, the Department of Education and Department of Justice later issued even more joint guidance, after this Court's decision in *Fisher I*. *See* U.S. Dep't of Educ.'s Office for Civil Rights and U.S. Dep't of Justice's Civil Rts. Div., *Questions and Answers About Fisher v. University of Texas at Austin* (Sept. 27, 2013) (2013 *Fisher I* Guidance).[15]

The 2013 *Fisher I* Guidance reiterated in full the Departments' earlier guidance from 2011, *id.* at 3, but also went further, and characterized this Court's decision regarding strict scrutiny in *Fisher I* as an extremely narrow holding, which applied essentially only to admissions policies.

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[15] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.pdf

More broadly, in the 2013 *Fisher I* Guidance, the Departments affirmatively suggested ways that schools could generate "racial diversity" by simply sidestepping this Court's precedents on admissions. *Id.* at 2. Specifically, the Departments stated:

> The Court's opinion does not address a college or university's ability to promote diversity through other efforts that do not consider an individual's race in admissions, such as engaging in targeted outreach and recruitment or partnering with high schools through pipelines programs to promote student body diversity.

Id. at 2 (Answer 2).

And, although the guidance was reaffirmed as operative by OCR as late as 2016,[16] it was in serious tension with *Fisher v. Univ. of Texas*, 579 U.S. 265, 385 (2016) (*Fisher II*) which suggested that "race-neutral" plans adopted specifically for race-conscious reasons are on just as shaky ground as outright racial preferences.

Specifically, in *Fisher II*, this Court held:

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[16] *See* U.S. Dep't of Educ.'s Off. for Civil Rts., *Questions and Answers About Fisher v. University of Texas at Austin II*, at 2 (Sept. 30, 2016) (Question 2) ("The guidance issued by the Departments in 2011, 2013, and 2014 regarding the voluntary use of race to achieve student body diversity remain in effect, and were supported and reinforced by *Fisher II*."). https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

> As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, *though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment*. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I,* 570 U.S., 133 S. Ct., at 2433 (Ginsburg, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." [*Id*.] Consequently, *petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.*

Fisher II, 579 U.S. at 386 (emphasis added); *see also Students for Fair Admissions, Inc. v. President and Fellow of Harvard College*, 397 F. Supp. 3d 126, 200–01 (D. Mass. 2019) ("[P]etitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral. Here, just as in *Fisher II*, the Court is not persuaded that such a plan would actually be more race neutral.") (internal quotation marks omitted).

After reviewing and thoroughly considering the guidance documents published between 2011 and 2016 on the topic of race-conscious policies, the Department of Justice and the Department of Education opted to withdraw them all. On July 3, 2018, the Departments wrote in a Dear Colleague Letter: "The Departments have reviewed the

documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI."[17]

Yet upon President Biden's election, President Obama's previous Assistant Secretary for Civil Rights, Ms. Catherine Lhamon, returned to her position in October 2021. And during her confirmation process, she submitted answers to a Senate Committee's Questions for the Record, which echoed the same themes of these prior guidance documents: that OCR could simply tally the votes of Justice Kennedy and the dissenters in *Parents Involved* to support the idea that schools could take race into account in order to affect the racial demographics of their student bodies:

> [Question] 25. Has the U.S. Supreme Court ever ruled that K-12 schools have a compelling state interest in a student body diversity?
>
> [Answer] In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), a majority of the justices on the Supreme Court recognized the compelling interests that K-12 schools have in obtaining

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[17] U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts., *Updates to Department of Education and Department of Justice Guidance on Title VI*, at 2 (July 3, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf

> the benefits that flow from achieving a diverse student body and avoiding racial isolation. *Justice Kennedy, in concurrence, explained that he was in agreement with Justice Breyer's dissenting opinion*, which was joined by Justices Stevens, Souter, and Ginsburg, in recognizing these compelling interests.
>
> [Question] 26. Has the U.S. Supreme Court ever recognized "reducing racial isolation" as a compelling state interest that justifies racial preferences at the K-12 level?
>
> [Answer] Please see the previous answer.

See U.S. Senate Health Committee Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of Education (July 14, 2021), at 14-15 (emphasis added).[18]

Put simply, the August 14 DCL, the August 14 Q&A, and the August 24 DCL revive the underlying theory set forth by OCR in 2011, which is also echoed in the Fourth Circuit's decision below: that schools may consider race in broad terms to gerrymander the racial demographics of their student body.

But this theory ignores the overarching directives of *SFFA*. Instead, it interprets *SFFA* as

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[18] https://mslegal.org/wp-content/uploads/2021/08/Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf

narrowly limited only to the issue of direct racial preferences in the admissions process. The Court should take this case to disabuse the federal bureaucracy—and, by extension, the Fourth Circuit—of such a narrow reading.

II. Since *SFFA*, Executive Branch Agencies Have Already Issued Guidance Embracing Proxy Discrimination Like the Kind Practiced by Fairfax School District.

This Court has unmistakably held that conduct that is undertaken specifically because of racial classifications constitutes race discrimination, even if done to "correct" a racial disproportionality. *See Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. … The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.").

Nevertheless, just since *SFFA*, the Biden Administration has opted to embrace, once again, the idea that proxy race discrimination may occur—in service of racial diversity specifically—without triggering heightened scrutiny.

It is this exact viewpoint that is reflected by the Fourth Circuit's opinion in this matter. *See, e.g.*, *Coalition for TJ v. Fairfax County School Bd.*, 68 F.4th 864, 885-86 (4th Cir. 2023) ("To the extent the Board may have adopted the challenged admissions

policy out of a desire to increase the rates of Black and Hispanic student enrollment at TJ—that is, to improve racial diversity and inclusion by way of race-neutral measures—it was utilizing a practice that the Supreme Court has consistently declined to find constitutionally suspect.").[19]

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[19] In *Ricci*, the Court held that an employer could offer a defense to its race-based conduct only by establishing a strong basis in evidence that it would otherwise be liable under Title VII with respect to a disparate-impact theory. 557 U.S. at 585 ("[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

Note, however, that there is no genuine disparate impact component to Title VI. While one Title VI administrative regulation touches on a disparate impact theory, its viability is extremely suspect. *Compare* 34 C.F.R. § 100.3(b)(2) *with* Dep't of Educ., *Final Report of the Federal Commission on School Safety*, at 70 (Dec. 18, 2018) ("[T]hat [disparate impact] theory lacks foundation in applicable law and may lead schools to adopt racial quotas or proportionality requirements."), https://www2.ed.gov/documents/school-safety/school-safety-report.pdf; *see also Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) ("Title VI itself reaches only instances of intentional discrimination.") (internal quotation marks and brackets omitted); *but see* U.S. Dep't of Educ.'s Off. for Civil Rts. and U.S. Dep't of Justice's Off. for Civil Rts., *Resource on Confronting Racial Discrimination in Student Discipline*, at 12 (May 25, 2023) ("OCR also investigated … whether the district's discipline policies and procedures had an unjustified *discriminatory effect* on Black students in violation of Title VI and its implementing regulations.") (emphasis added), https://www2.ed.gov/about/offices/list/ocr/docs/tvi-student-discipline-resource-202305.pdf.

In short, unless the Court grants a writ of *certiorari* here, it is not just the Fourth Circuit that will live under this rule—it is the whole of the United States, at least until such time as future OCR officials revisit the recently-issued policy guidance.

Indeed, OCR has already found sufficient ambiguity in *SFFA* to describe many instances where the use of race is perfectly permissible. As we note above, this will eventually result in additional regulatory "whiplash" on this topic when another presidential administration exercises control over Executive Branch agencies. But the immediate consequences are just as concerning: for the indefinite future, many schools will adopt and entrench new race-conscious policies, often relying on OCR's publicly-issued guidance. *Contra SFFA*, 143 S. Ct. at 2160 ("[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.") (internal quotation marks and citations omitted).[20]

As noted above, the Department of Justice and the Department of Education jointly issued the August 14 DCL and the August 14 Q&A regarding *SFFA*. Essentially, the documents interpret *SFFA* as

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[20] Even the dissent in *SFFA* recognized that schools spend significant resources to develop their race-conscious admissions programs to avoid conflicting with the Constitution or Title VI. *Id.* at 2259. Based on *Amicis*' experience, it is highly likely that schools are paying close attention to what OCR is saying in the wake of *SFFA*.

narrowly related to the context of direct racial preferences in the admissions process.

Indeed, OCR announced that it would double down on its prior position—which involved sweeping claims about racial diversity based on ill-defined racial classifications—that schools *ought* to be racially and ethnically diverse:

> The benefits of diversity in educational institutions extend beyond the classroom as individuals who attend diverse schools are better prepared for our increasingly racially and ethnically diverse society and the global economy.

August 14 DCL at 1. *Contra SFFA*, 143 S. Ct. at 2167 ("It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.").

And despite the Court's clear statements against broad racial stereotypes in *SFFA*, the August 14 DCL expressly instructed schools that they may target their diversity efforts at particular racial groups. OCR wrote: "[F]ulfilling this commitment will require sustained action to lift the barriers that keep underserved students, including students of color, from equally accessing the benefits of higher education." August 14 DCL, at 2; *see id.* at 1-3 (using the phrase "students *of color*" four separate times).

Separately the August 14 Q&A contains a sweeping statement that schools are completely free to pursue efforts to affect the racial demographics of their classes, so long as they do not engage in direct decisions based on an applicant's race:

> In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.

August 14 Q&A, at 3.

Indeed, the August 14 Q&A offers detailed examples that are meant to guide schools in skirting the bar on direct racial preferences, by instead focusing on proxy discrimination measures that are purportedly "race-neutral":

- "To promote and maintain a diverse student applicant pool, institutions may continue to pursue targeted outreach, recruitment, and pipeline or pathway programs (referred to here as 'pathway programs')." *Id.* at 3.
- "The Court's decision in *SFFA* does not require institutions to ignore race when identifying prospective students for outreach and recruitment…" *Id.* at 4.
- "For example, in seeking a diverse student applicant pool, institutions may direct outreach and recruitment efforts toward schools and

school districts that serve predominantly students of color and students of limited financial means." *Id.* at 4.

- "An institution may consider race and other demographic factors when conducting outreach and recruitment efforts … [and] the institution may give pathway program participants preference in its college admissions process. *Id.* at 4.

The August 14 Q&A also suggests that schools might alter their longstanding admissions processes specifically in order to gerrymander their racial demographics:

> Similarly, institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. An institution may choose to study whether application fees, standardized testing requirements, prerequisite courses such as calculus, or early decision timelines advance institutional interests.

Id. at 6.

In short, the August 14 Q&A is meant to give schools cover for considering race in broad terms as a proxy factor. The Fourth Circuit's decision echoes this very principle. *See Coalition for TJ*, 68 F.4th at 893 (Rushing, J., dissenting) ("A school board's motivation to racially balance its schools, even using the means

of a facially neutral policy, must be tested under exacting judicial scrutiny.").

OCR's subsequent August 24 DCL also gives schools a green light to engage in ostensibly "race-neutral" measures related to diversity. *See* August 24 DCL, at 11 ("[A] program does not violate Title VI merely because it focuses its recruitment efforts on students of a particular race or national origin…"); *id.* at 12 (noting that OCR would likely reject a complaint alleging that a "school district is discriminating on the basis of race by supporting groups and activities that limit their concerns to problems faced more often by people of a certain race, or otherwise focus on people of that race.").

To put to rest any doubt that OCR plans to give effect to all of these guidance documents, Ms. Lhamon gave an interview to the Center for American Progress, where she stated emphatically:

> When I hear a member of Congress, [or] when I hear Attorneys General, [or] when I hear some activist groups, sending letters to schools saying "you should change these practices because the law demands it," I do think it's important to be clear: that *we* issue Dear Colleague Letters. And *we* let people know what the law is.

Center for American Progress, *A Convo With Catherine E. Lhamon, Asst. Sec. for the Office of Civil*

Rights (Aug. 29, 2023) (emphasis in the original) (timestamp at 33:03).[21]

In sum, while *SFFA* cleared up numerous ambiguities in the area of race-conscious decision-making by schools, some gaps still remain. Particularly troubling is OCR's suggestion that proxy discrimination is not "discrimination" at all, and is actually race-neutral, such that it may continue indefinitely, without any judicial oversight. This contrasts starkly with *SFFA*'s underlying premise: "[W]hat one dissent denigrates as 'rhetorical flourishes about colorblindness,' … are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law." *SFFA*, 143 S. Ct. at 2174.

Notably, because OCR often considers admissions and scholarships under similar standards with respect to Title VI, it is likely that OCR would also treat a school's efforts to target its financial aid to members of certain racial demographics—if done through facially race-neutral means like geography—as permissible under *SFFA*. *See* Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964, Federal Register Vol. 59, No. 36 (Feb. 23, 1994) (citing *Bakke* for the proposition that "a college may use race or national origin as a condition of eligibility in awarding financial aid if it is narrowly tailored to promote diversity.").[22] So leaving

[21] https://www.youtube.com/watch?v=drdDKG_lrtY&t=1981s
[22]https://www2.ed.gov/about/offices/list/ocr/docs/racefa.html

ambiguity in the area of proxy discrimination affects more than just admissions policies.

The documents issued by federal agencies also fly directly in the face of the powerful concurrences in *SFFA*. For instance, Justice Thomas's concurrence in *SFFA* explicitly considers and rejects the idea that proxy discrimination is different for constitutional purposes, as opposed to direct discrimination: "These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate." *Id.* at 2187 (Thomas, J., concurring).

Justice Gorsuch's concurrence likewise calls into question the fundamental assumption behind racial classifications: "[B]ecause race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity." *Id.* at 2201 (Gorsuch, J.); *id.* ("[A]ll racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities.").

In sum, it is clear that federal agencies are interpreting *SFFA* narrowly to leave open a wide swath of race-conscious decision-making by schools. That situation, without further Court intervention, is likely to lead to "regulatory whiplash" the next time that there is a new occupant in the White House. But the more immediate outcome is that schools are likely to build up significant infrastructure around the agency guidance that has been issued after *SFFA*.

Here, the Court should once again address the issue of race-motivated decision-making by schools, so as to ensure that stakeholders, lower courts, and federal agency officials have the guidance that they need to follow the law and the Constitution.

III. At a Minimum, an Order Granting *Certiorari*, Vacating the Fourth Circuit's Decision, and Remanding to that Court, is Appropriate.

"Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice." *SFFA*, 143 S. Ct. at 2176.

Yet Fairfax County School Board specifically considered race in fashioning its admissions policies. *See Coalition for TJ*, 68 F.4th at 892 (Rushing, J., dissenting) ("Because the evidence shows an undisputed racial motivation and an undeniable racial result, I respectfully dissent.").

Notably, the Fourth Circuit issued its decision in favor of Fairfax County School Board on May 23, 2023. That was a little more than a month before this Court's decision in *SFFA*, which was issued on June 29, 2023. The Fourth Circuit was therefore indisputably operating against the backdrop of the pre-*SFFA* case law, which caused many schools—like Harvard and the University of North Carolina—to

believe that the use of race in service of a broad diversity interest was permissible.

But *SFFA* subsequently (and correctly) held that schools do not have a generalized interest to seek racial diversity that could meet strict scrutiny under the Equal Protection Clause or Title VI. Instead, students "must be treated based on [their] experiences as an individual—not on the basis of race." *SFFA*, 143 S. Ct. at 2176.

Indeed, the idea that a school district may adopt specific measures to engage in proxy discrimination in favor of certain racial groups—to the disadvantage of members of other racial groups—was anticipated by the majority in *SFFA*: "[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." *Id.* (internal quotation marks omitted).

In the same vein, the assertion that favoring certain racial groups over others is merely a benign effort to seek racial diversity also cannot stand: "While the dissent would certainly not permit university programs that discriminated against black and Latino applicants, it is perfectly willing to let the programs here continue." *Id.* at 2175.

Yet the Court below, following earlier precedents, rejected a challenge to a program that was targeted at achieving racial balance instead of focusing on individual students. *Contra Coalition for TJ*, 68 4th at 892 ("Racial balance cannot be the goal,

whether labeled 'racial diversity' or anything else.") (internal quotation marks omitted)

Because the Opinion below was issued before the Fourth Circuit had the benefit of *SFFA*, even if the Court is not inclined to add the case to its merits docket, it is a prime candidate to grant, vacate, and remand for further consideration in light of *SFFA*.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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