No. 23-170

IN THE

Supreme Court of the United States

COALITION FOR TJ,

Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE EQUAL PROTECTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP) of the Legal Insurrection Foundation (LIF),[2] a Rhode Island tax-exempt 501(c)(3), is devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism.

Since its creation in February 2023, EPP has filed more than a dozen civil rights complaints, in various fora, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP transparently updates the public on all of its activities at EPP's own website.[3]

Pertinent to our interest in this case, a constant theme that EPP has uncovered in its activities is that entities engaging in racially discriminatory conduct frequently attempt to obfuscate the purpose of such conduct. For example, EPP has documented that many institutions of higher education, even after this Court's *Students for Fair Admissions* opinion,[4] will likely continue to

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1. This brief conforms to the Court's Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than Amicus Curiae the Equal Protection Project of the Legal Insurrection Foundation funded its preparation or submission. All parties have been notified of EPP's intention to file this brief within the timeline set forth in Rule 37.2.

2. https://legalinsurrectionfoundation.org/.

3. https://equalprotect.org/.

4. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

discriminate surreptitiously in several ways, including by considering an applicant's race under the guise of eliciting information regarding an applicant's *experience* with race, by dispensing with standardized testing, and by using word games – such as "first generation," "historically underrepresented group," or "marginalized populations" – as crude proxies for race and skin color.[5]

Nor is the desire to continue engaging in racially discriminatory conduct post-*Students for Fair Admissions* limited to academia. As EPP recently spotlighted, the use of algorithms, unseen by the public, to racially manipulate pools of job candidates provided to potential employers and recruiters is an emerging trend.[6]

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5. *See Six Ways Higher Ed Will Attempt To Evade The Supreme Court's Affirmative Action Ruling*, *https://legalinsurrection.com/2023/07/six-ways-higher-ed-will-attempt-to-evade-the-supreme-courts-affirmative-action-ruling/*; *see also Supreme Court struck down affirmative action, but that won't stop Harvard*, William A. Jacobson & Kemberlee A. Kaye, Fox News, *available at https://www.foxnews.com/opinion/supreme-court-struck-down-affirmative-action-wont-stop-harvard.*

6. *https://legalinsurrection.com/wp-content/uploads/2023/07/Follow-Up-Letter-To-LinkedIn-Re-DIR-Feature-7-5-23.pdf*; *see also LinkedIn Should End 'Diversity in Recruiting' Feature: "Discrimination by algorithm is still discrimination," available at https://legalinsurrection.com/2023/07/linkedin-should-end-diversity-in-recruiting-feature-discrimination-by-algorithm-is-still-discrimination/.*

EPP's experience in this area is directly applicable to the instant matter because in this case, the court below improperly endorsed the use of supposedly "race-neutral" means as a pretext and methodology to boost enrollment for preferred minorities while causing non-preferred minority enrollment to plummet. While EPP supports Petitioner's arguments in favor of the Court granting certiorari, EPP submits this brief to address an area squarely in EPP's experience – the use of facially race-neutral means as a smokescreen for invidious discrimination to evade this Court's ruling in *Students for Fair Admissions*.

SUMMARY OF ARGUMENT

While we believe the opinion of the court below was in error when rendered, it is even more suspect in light of this Court's *Students for Fair Admissions* opinion.

First, the court below held that there was no intentional discrimination because statements by Respondent Board members in support of increasing enrollment of certain minority groups did not necessarily imply that they intended to discriminate against other minority groups; thus, the court below employed rational basis, not strict scrutiny. *See Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 885 (2023)(holding that Petitioner's argument that increases in black and Hispanic enrollment "naturally led to fewer overall Asian American students" in the "zero-sum environment of school admissions" was an "inferential leap" that "rested on unsteady ground, because its basic rationale has been pointedly rejected by [this] Court.") (citing cases). But in *Students for Fair Admissions*, which issued after the opinion of the court below, this Court expressly stated that student "admissions are zero-sum.

A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." 143 S. Ct. at 2169. Thus, the Fourth Circuit's decision to employ rational basis scrutiny as opposed to strict scrutiny cannot survive after the recognition in *Students for Fair Admissions* that racial manipulation in a zero-sum context, such as that here, is subject to strict scrutiny.

Second, the Fourth Circuit's opinion stated that "diversity [was] a *compelling* state interest,"[7] and therefore that diversity "serve[d], at minimum, as a legitimate interest in the context of public primary and secondary schools." *Id.* But diversity was decisively rejected as a compelling state interest in *Students for Fair Admissions*. *See* 143 S. Ct. at 2190 ("[J]ust as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s] ... the alleged educational benefits of diversity cannot justify racial discrimination today.")(Thomas, J., concurring)(citing *Fisher v. Univ. of Tx. at Austin*, 570 U.S. 297, 320 (2013)). This Court's opinion strongly suggested that diversity could not be a legitimate state interest either, due to problems with measurability, lack of a way of establishing a cessation date, and other issues. Indeed, *Students for Fair Admissions* admonished that "[e]liminating racial discrimination means eliminating all of it." 143 S. Ct. at 2161. For these reasons, the Court should grant certiorari, vacate the opinion of the court below, and remand

7. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 887 (4th Cir. 2023)(quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)(emphasis added by Fourth Circuit)).

("GVR")[8] for further consideration in light of *Students for Fair Admissions*.

If, however, the Court considers GVR unworkable in this case, it should grant certiorari to correct the gross legal errors committed by the court below. In addition, as discussed below, other courts have let semantics prevail over substance – they are allowing race-neutral admissions criteria verbiage to launder intentional discrimination. Without the Court's decisive intervention and course correction in this case, such a legally-sanctioned discriminatory subterfuge will undermine *Students for Fair Admissions*.

In short, should this Court decide to *not* GVR this case, it *should* grant certiorari to make clear that racial discrimination through supposedly race-neutral subterfuge is unlawful under *Students for Fair Admissions*.

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8. Granting certiorari, vacating the opinion of the court below, and remanding for further consideration is commonly known as GVR (grant, vacate, and remand). *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996)("[T]he Solicitor General . . . invites us to grant certiorari, vacate the judgment below, and remand the case (GVR) so that the Court of Appeals may . . . decide it in light of the Commissioner's new statutory interpretation. . . . The GVR order has, over the past 50 years, become an integral part of this Court's practice. . . .").

ARGUMENT

I. The Fourth Circuit's decision is fatally flawed because it expressly relied on a premise that was rejected by this Court in *Students for Fair Admissions,* namely that Respondent's deliberate effort to boost black and Hispanic student enrollment was not evidence of intentional discrimination against applicants of other races.

The court below determined that Respondent Board members lacked the intent to discriminate because although there were statements by Respondent Board members supporting increased black and Hispanic student enrollment, that did not mean that they intended to discriminate against other racial groups:

> [T]he Coalition embraces the district court's ultimate, 'Hail-Mary' line of reasoning: that the Board must have discriminated against Asian American students 'by proxy.' Specifically, that proposition maintains that the Board sought to increase the number of Black and Hispanic students enrolled at TJ and, in the 'zero-sum environment' of school admissions where the number of available seats is finite, that effort naturally led to fewer overall Asian American students enrolling at TJ — thus exposing a discriminatory intent toward those students. … But that inferential leap rests on unsteady ground, because its basic rationale has been pointedly rejected by the Supreme Court.

Coalition for TJ, 68 F.4th at 885 (citations omitted)(citing cases).

But in *Students for Fair Admissions*, this Court held otherwise. 143 S. Ct. at 2169 (Harvard's "understanding of the admissions process," i.e., its argument that racial preferences did not harm others' chances for admission, "is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").

The fact that increases in black and Hispanic student enrollment came "at the expense of" Asian students' decreased enrollment was made clear in Judge Rushing's dissent. "After receiving voluminous racial data, the Board allocated seats at TJ based on the middle school an applicant attends. The data showed that this change would indisputably disadvantage so-called 'feeder' schools that had historically sent many students to TJ, the vast majority of whom were Asian." *Coalition for TJ*, 68 F.4th at 900 (Rushing, J., dissenting). As Judge Rushing concluded, "[a]llocating seats by attended school . . . result[ed] in some geographic distribution but would also 'disadvantage' applicants from feeder schools, the great majority of whom were Asian. Armed with that knowledge, the Board chose the approach that better targeted a reduction of Asian student enrollment." *Id.* at 901 (Rushing, J., dissenting).

The Fourth Circuit's rejection of Petitioner's "zero-sum" argument led it to conclude that discriminatory intent – a prerequisite necessary to trigger strict scrutiny and its "compelling government interest" requirement – did not exist. Consequently, the court below improperly employed rational basis scrutiny – the lowest level of constitutional review – which only required that diversity be considered a "legitimate" state interest. *See Coalition for TJ*, 68 F.4th at 886-87 ("[T]he Coalition cannot satisfy

its burden of proving that the Board's adoption of the race-neutral challenged admissions policy was motivated by an invidious discriminatory intent," and therefore "the challenged admissions policy is assessed by us under the rational basis standard of review.").

Because the court below refused to find that Respondent Board members' desire to increase black and Hispanic student enrollment constituted an intent to discriminate against students of other races – i.e., the Fourth Circuit rejected the "zero-sum" theory – the Court should issue a GVR order remanding this case back to the Fourth Circuit for reexamination in light of *Students for Fair Admissions* which explicitly endorsed the "zero-sum" theory. Because, under that theory, an intent to boost admissions rates of preferred races necessarily meant an intent to discriminate against others, strict scrutiny applies.

Because the Fourth Circuit rendered its decision before this Court issued its opinion in *Students for Fair Admissions*, it is appropriate for this Court to GVR this case under 28 U.S.C. § 2106.[9] *See Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997)("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity

9. 28 U.S.C. § 2106 states, in pertinent part, that "[t]he Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."

for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is ... potentially appropriate.") (internal citation omitted). However, if this Court is not inclined to issue a GVR order, it should nevertheless grant certiorari to address the important issues of this case on the merits.

II. The court below held that "diversity" justified Respondent's actions, but *Students for Fair Admissions* rejected diversity as such a justification.

The court below concluded that Respondent's actions satisfied rational basis review, because this Court's binding precedents held diversity to be a legitimate governmental interest:

> On this record, the challenged admissions policy's central aim is to equalize opportunity for those students hoping to attend one of the nation's best public schools, and to foster diversity of all stripes among TJ's student body. The Supreme Court has recognized that — in the context of higher education — promoting a broad spectrum of student diversity qualifies as a *compelling* state interest, in view of the 'substantial,' 'important,' and 'laudable ... educational benefits that flow from a diverse student body.' *See Grutter v. Bollinger*, 539 U.S. 306, 330, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *see also Parents Involved*, 551 U.S. at 783, 127 S.Ct. 2738[10] (Kennedy, J., concurring

10. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701 (2007).

> in part and concurring in the judgment) ('Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.'). Expanding the array of student backgrounds in the classroom serves, at minimum, as a legitimate interest in the context of public primary and secondary schools. And that is the primary and essential effect of the challenged admissions policy. Accordingly, the policy is rationally based, and the challenge interposed against it by the Coalition must be rejected.

Coalition for TJ, 68 F.4th at 887 (emphasis in original).

The problem is that the Fourth Circuit, in issuing this decision, was without the benefit of this Court's decision in *Students for Fair Admissions*. *See* 143 S. Ct. at 2172-73 ("Respondents point to language in *Grutter* that, they contend, permits . . . 'periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.' But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional.")(citing *Grutter*, 539 U.S. at 342; *see also id.* at 2190 ("[J]ust as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], *see Brown v. Board of Education*,[11] the alleged educational benefits of diversity cannot justify racial discrimination today.")(Thomas, J., concurring)(citing *Fisher*, 570 U.S. at 320). Diversity, therefore, is no longer a sufficient compelling justification for discriminatory governmental action that many,

11. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

including the court below, assumed that it once was. *See Students for Fair Admission,* 143 S. Ct. at 2207 ("The Court's opinion rightly makes clear that *Grutter* [which held that the educational benefits that flow from diversity is a compelling interest] is, for all intents and purposes, overruled.")(Thomas, J., concurring).

A reexamination of its prior ruling in light of *Students for Fair Admissions* by the court below should result in a change of outcome, since diversity fails to serve even as a "legitimate" state interest in student admissions. For example, *Students for Fair Admissions* pointed out that the goals of diversity are often not measurable. 143 S. Ct. at 2166 ("Because '[r]acial discrimination [is] invidious in all contexts,' we have required that universities operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review][,]' [but] it is unclear how courts are supposed to measure [diversity] goals")(quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)). The Court also noted that diversity goals, even if they can be measured, may lack an appropriate target metric that can be used to determine when cessation of the diversity efforts is appropriate. *Id.* ("Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?"). The Court observed that questions of degree are not ones that a court is equipped to resolve. *Id.* at 2167 ("[T]he question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.") (emphasis in original).

In addition, this Court noted, racial composition is gauged by racial categories that are plainly overbroad, arbitrary, undefined and underinclusive. *Id.* at 2167-68 ("[T]he [racial] categories are themselves imprecise in many ways. Some of them are plainly overbroad[, …] other racial categories, such as 'Hispanic,' are arbitrary or undefined[, … a]nd still other categories are underinclusive."). Finally, *Students for Fair Admissions* instructs that focusing on racial diversity as a beneficial policy requires stereotyping. When a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." *Id.* at 2169.

In light of these detailed legal findings in *Students for Fair Admissions*, a GVR order would be appropriate to allow the Fourth Circuit to reconsider its decision that diversity in student admissions in this case constituted a "legitimate" state interest. GVR is especially useful here because the Fourth Circuit cited no other rationale to support the Respondent's actions, which means that the court below will have to reverse course on its own and affirm the district court's grant of summary judgment in favor of Petitioner, in light of *Students for Fair Admissions*. In any event, a GVR order in this case would "assist[] the court below by flagging a particular issue that it does not appear to have fully considered," and would "assist[] this Court by procuring the benefit of the lower court's insight before [this Court] rules on the merits." *Chater*, 516 U.S. at 167.

If this Court decides *not* to GVR this case, however, it should grant certiorari to correct the damaging legal approach of the court below which undermines *Students for Fair Admissions*.

III. If this Court decides *not to* GVR this case, it should grant certiorari for the additional reason that failure to grant certiorari to correct the Fourth Circuit's mistaken approach will undermine *Students for Fair Admissions.*

Unfortunately, some other courts in addition to the Fourth Circuit have taken an approach of accepting supposedly race-neutral criteria which are a subterfuge to conceal invidious discrimination. In a case in the U.S. District Court for the District of Massachusetts, *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of the City of Boston*, No. 21-10330-WGY (D. Mass.)(hereinafter, "the Boston Zip Code case"), now on appeal, the district court found that a facially "race-neutral" admissions criterion inoculated the school from liability despite strong evidence of intent to racially discriminate.

The race-neutral means in that case involved the use of zip codes to determine admissions to Boston's elite "Exam Schools," which had the effect of increasing black and Hispanic admissions and concomitantly decreasing white and Asian admissions. Initially, the district court ruled against Plaintiff because even though Defendants were "keenly aware of the Plan's effect on diversity and [were] interested in increasing the Exam Schools' "racial, socioeconomic and geographic diversity [better to reflect the diversity of] all students (K-12) in the city of Boston," strict scrutiny did not apply because "the mere invocation of racial diversity as a goal is insufficient to subject [an otherwise race-neutral plan] to strict scrutiny." *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. of the City of Boston*, No. 21-10330-WGY, 2021 WL 1422827, at *10 (D. Mass. Apr. 15, 2021). This was despite

the court finding that the zip codes used by the plan were "proxies that [we]re race conscious," *id.* at *11, and that statements made by Defendants reflected a racially discriminatory intent. *Id.* at *12.[12]

After Plaintiff appealed, new evidence was unearthed that Defendants had made racist statements against white students *while the City's plan was being adopted*, including a text message stating that one defendant hated white-majority West Roxbury, Massachusetts, and another stating that a second defendant was "sick of westie whites."

Despite these text messages, and with another bite of the apple after the appeal in the case was stayed,[13] the district court *still refused* to find for Plaintiff:

> This Plan is not the celebrated result of transcending racial classifications that this Court once found it to be. Three of the seven School Committee members harbored some form of racial animus, and it is clear from the new record that the race-neutral criteria

12. These defendant statements included, *inter alia*, that defendants needed to "be explicit about racial equity," "need[ed] to figure out again how we could increase those admissions rates, especially for Latinx and [B]lack students," "the Plan being a 'step in the right direction' for 'addressing racial and ethnic disparities in educational achievement and to advance ethnic studies and racial equity in the school district,'" and "the Plan not going 'far enough because White students continue to benefit from thirty-two percent of the seats.'" *Id.* at *12 n.16. Still that was not enough for the district court to invoke strict scrutiny.

13. On a Rule 60 Motion for Relief from a Judgment or Order.

> were chosen precisely because of their effect on racial demographics. In other words, but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen. . . . [But, t]he Plan's criteria are all facially race neutral. The precedent is clear that when the governmental action is facially race neutral, 'good faith [is] presumed in the absence of a showing to the contrary,' i.e., unless the plaintiff proves disparate impact and discriminatory animus under *Arlington Heights*.

Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. of City of Boston, No. 21-10330-WGY, 2021 WL 4489840, at *15 (D. Mass. Oct. 1, 2021). If that isn't an impossibly high bar to overcome, EPP is hard-pressed to think of one that could be higher. Essentially the court said that even if discriminatory intent, in the form of blatantly racist statements, is crystal clear, and even if those statements are combined with, and caused an undisputed dramatic racial impact, the mere use of race-neutral means inoculates a plan from strict scrutiny. That is the very definition of a smokescreen, and serves to eviscerate important aspects of the Fourteenth Amendment's equal protection guarantees.

The case is now on appeal, but despite hearing oral argument on December 7, 2022, no ruling has issued to date. *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. of City of Boston*, No. 21-1303 (1st Cir.). Recently, on June 1, 2023, Defendants submitted supplemental authority in the form of the Fourth Circuit's opinion here, suggesting that this opinion supports their case on appeal.

In another case, a Maryland district court initially ruled for plaintiff, but after reviewing a Fourth Circuit opinion that mirrors the one potentially *sub judice* here, reversed course and held that race-neutral means could be used to inoculate discriminatory intent having racially disparate impact.

That case, *Association for Educational Fairness v. Montgomery County Board of Education*, involved a school district implementing admissions changes to a magnet school that Plaintiff argued "visit[ed] a discriminatory impact on Asian American students and was implemented with a discriminatory intent or purpose." 560 F. Supp. 3d 929, 942 (D. Md. 2021)(citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)).

In finding for Plaintiff on a motion to dismiss, the court held that "[a]s to disparate impact, no real dispute exists that the [admissions changes] disproportionately affected Asian American students," and that "Board members' public statements underscore that the [admissions changes were] implemented, at least in part, to readjust the racial composition of the magnet programs." *Id.* at 953. These statements included Defendant school board members saying that they were "not doing a very good job of bringing in African American and Latino students," that the school's racial composition should "reflect the community that we live in, and ... address some of the disparities that exist," and other statements of that ilk. *Id.* The court concluded that "[w]hen viewed most favorably to the Plaintiff, the [admissions changes] go[] beyond permissible race-conscious considerations and appear[] designed to achieve a new racial equilibrium . . . . Thus, the Complaint has made plausible that strict scrutiny

must apply when assessing the constitutionality of the [admissions changes]." *Id.* at 956.

However, after reviewing the Fourth Circuit's grant of a stay of the district court's decision in this case, which mirrored the reversal of the district court's decision it would issue a year later, the Maryland district court reversed course, and dismissed the case, adopting portions of the Fourth Circuit's opinion. *Assn. for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358, 367, 371-73 (D. Md. 2022)(citing *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022)).

As the Fourth Circuit's opinion below is already improperly influencing the outcome of district court cases contrary to this Court's holdings in *Students for Fair Admission*, time is of the essence for this Court to grant certiorari and reverse the Fourth Circuit's opinion. Failure to do so will allow the mistaken legal standard applied by the court below to infect legal opinions across the land and undermine *Students for Fair Admissions*; this Court must not allow that to happen.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a GVR order remanding this case back to the Fourth Circuit in light of this Court's recent *Students for Fair Admissions* opinion, or grant certiorari to correct the legal errors committed by the court below.

Respectfully submitted,

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