No. 23-170

In the Supreme Court of the United States

COALITION FOR TJ,

Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 20 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae the Commonwealth of Virginia, the State of Alabama, the State of Alaska, the State of Arkansas, the State of Georgia, the State of Indiana, the State of Kansas, the Commonwealth of Kentucky, the State of Louisiana, the State of Missouri, the State of Montana, the State of Nebraska, the State of North Dakota, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of South Dakota, the State of Tennessee, the State of Texas, the State of Utah, and the State of West Virginia (the States), represented by their attorneys general, have vital interests in protecting their citizens' Fourteenth Amendment rights, ensuring that local entities comply with federal law, and providing a public education for their citizens. The Fourth Circuit's decision undermines these interests by approving a school board policy that intentionally discriminates against Asian-American students in violation of the basic constitutional guarantee of equal treatment without regard to race or color.

The States agree with the arguments advanced by Petitioner Coalition for TJ and submit this brief to provide their unique perspective on the importance of this Court's review of the Fourth Circuit's erroneous decision.

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[1] Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel of record of their intent to file this brief at least 10 days prior to the due date for the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Shortly after the Fourth Circuit issued its judgment below, this Court held that "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2161 (2023). While the racial discrimination in *SFFA* was overt, this Court expressly warned that "what cannot be done directly cannot be done indirectly." *Id.* at 2176 (cleaned up). The Fourth Circuit lacked the benefit of this Court's decision in *SFFA*, and its reasoning cannot be reconciled with this Court's analysis.

Respondent Fairfax County School Board (the Board) set out to "remake" admissions at Thomas Jefferson High School for Science and Technology (TJ) because it was "dissatisfied with the racial composition of the school." App. 95a. To accomplish its "goal of achieving racial balance," the Board replaced its race-neutral and meritocratic admissions policy with a new one intentionally designed to decrease Asian-American enrollment. *Ibid.* The Fourth Circuit held that the policy did not violate students' equal protection rights. But its analysis conflicts with this Court's subsequent reasoning in *SFFA*. For instance, the Fourth Circuit rejected the argument that the Board's intent to increase the admission of certain racial groups necessarily disadvantaged others "in the 'zero-sum environment' of school admissions," contending that this "basic rationale has been pointedly rejected by the Supreme Court." App. 40a. But *SFFA* expressly held that school admissions are "zero-sum," meaning that "[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.

Similarly, the Fourth Circuit held that an intent to increase "diversity" could not be constitutionally suspect because "[t]he Supreme Court has recognized that . . . student diversity qualifies as a *compelling* state interest." App. 44a. But this Court made clear in *SFFA* that the same purported interest in the educational benefits of "diversity" was not compelling because it "cannot be subjected to meaningful judicial review," 143 S. Ct. at 2166, and rests on racial categorizations that are "arbitrary" and "plainly overbroad," *id.* at 2167.

Further, this Court has "many times over" reaffirmed that "racial balance is not to be achieved for its own sake." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007) (opinion of Roberts, C.J.) (brackets and quotation marks omitted). Racial balancing is contrary to this Court's "repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial . . . class." *Id.* at 730 (brackets and quotation marks omitted). The Fourth Circuit erred in reinstituting the Board's unconstitutional policy.

And after *SFFA*, the question presented here is one of exceptional importance. *SFFA* considered admissions policies that were racially discriminatory on their face. The admissions policy here is facially neutral but discriminatory in its purpose and effect. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). Now that *SFFA* has prohibited open discrimination, schools across the country are adopting similar tactics, seeking to continue their racial discrimination by proxy. 143 S. Ct. at 2176 (cleaned up). This Court should reject such

gamesmanship: "The Constitution deals with substance, not shadows." *Ibid.* (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

This Court should accordingly grant the writ of certiorari to protect the equal protection rights of students. Alternatively, it should vacate the Fourth Circuit's decision and remand for further consideration in light of *SFFA*.

BACKGROUND

TJ is an Academic-Year Governor's School in Alexandria, Virginia, administered by the Board as part of Fairfax County Public Schools (FCPS). It is regularly recognized as one of the best public high schools in the nation. Prospective students must apply for admission. Prior to 2020, eligible applicants[2] were placed in a semifinalist pool based on standardized test scores. App. 88a. Applicants were chosen for admission from the semifinalist pool "based on a holistic review that considered GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay." *Ibid.*

TJ's mission is critically important to the Commonwealth's, and the country's, competitiveness. TJ provides a highly challenging, world-class education for gifted high-school students, focusing on science, technology, and math. The students it educates are this country's future scientists, researchers, inventors, doctors, and engineers. Their skills will be crucial in fostering innovation, solving the complex

[2] To be eligible, applicants were required to reside in a participating school division, be enrolled in eighth grade, have a minimum 3.0 grade point average, have completed or be enrolled in Algebra I, and pay an application fee (which could be waived based on financial need). App. 88a.

problems facing society, and maintaining the preparedness of our workforce.

Certain Fairfax County middle schools serve as Advanced Academic Program (AAP) Level IV centers. App. 105a. Gifted students, many of whom would attend other middle schools based on their residential addresses, are admitted to these centers based on work samples and aptitude test scores. FCPS, *Advanced Academics Identification and Placement for Current FCPS Students* (last visited Sept. 21, 2023), https://tinyurl.com/2p8te6fe. AAP centers "offer[] identified students a highly challenging instructional program" that "is designed to meet the needs of advanced learners." FCPS, *Full-Time Advanced Academic Program, Grades 3-8 (Level IV)* (last visited Sept. 21, 2023), https://tinyurl.com/5d79b4ba. Historically, many of the students accepted to TJ attended particular AAP centers. *E.g.*, App. 71a (half of the 486 total offers extended to the class of 2024 came from six feeder schools). Moreover, a disproportionate share of applicants from these six AAP centers were Asian-American. *E.g.*, App. 71a–72a. While not every AAP center sent significant numbers of students to TJ, every "feeder" school for TJ was an AAP center. Compare 4th.Cir.App. 0187 with *id.* at 2899–900.

In the fall of 2020, the Board, along with Superintendent Scott Brabrand, began overhauling the school's admissions process to change "the racial makeup of TJ." App. 93a. Three events precipitated these changes. First, the Board was "pushed . . . to act quickly to change TJ admissions with an explicit eye towards its racial composition" due to state agency initiatives to improve "diversity" at Governor's Schools, which the Board interpreted as admissions "within 5% of diversity in their local districts." App. 100a–

101a. Second, in May 2020, widespread unrest arose in response to George Floyd's murder. App. 14a–15a, 90a. Finally, a week later, admissions statistics for TJ's Class of 2024 showed that fewer than ten Black students had been admitted. App. 90a.

In response, Board members, Brabrand, and TJ's principal determined that the school's racial composition must change. Six days after the admissions statistics were released, TJ's principal lamented that the school "d[id] not reflect the racial composition in FCPS" because, if it did, it "would enroll 180 Black and 460 Hispanic students, filling nearly 22 classrooms." App. 14a, 60a, 90a. Later that month, Board member Sanders emailed Brabrand declaring that "the Board and FCPS need to be explicit in how we are going to address the under-representation of Black and Hispanic students." App. 14a, 90a. And Board member Keys-Gamarra told her colleagues, "in looking at what has happened to George Floyd, we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to TJ." App. 14a–15a, 90a, 100a.

Concluding that "TJ should reflect the diversity of FCPS, the community and Northern Virginia," FCPS staff developed a "merit lottery" proposal for TJ admissions, which Brabrand presented to the Board. App. 91a, 106a–107a. Brabrand's presentation projected the racial effect of his proposal—"a drastic drop in Asian-American students at TJ." App. 102a. The racial modeling touted a projected rise in Black enrollment from 1% to 7% and Hispanic enrollment from 3% to 8%, with a concomitant decrease in Asian-American enrollment from 73% to 54%. 4th.Cir.App. 0310.

Among other features, the merit lottery would have used "Regional Pathways" to cap offer numbers within FCPS regions. App. 91a. Board members recognized that geographic caps could be used to obtain their desired racial outcome. See App. 108a (Board member Sanders advising that "geographic diversity" will "result in greater diversity in the demographics."); App. 17a n.3. Some Board members, however, expressed concern that a lottery "seems to leave too much to chance," asking: "will chance give us the diversity we are after?" App. 107a. Brabrand then proposed a revised merit lottery, including a holistic review of some applicants. App. 17a, 92a–93a. This revised proposal added "Experience Factors," which had the purported "advantage" of "statistically . . . provid[ing] some increase in admittance for underrepresented groups." App. 17a, 67a, 91a–92a.

During the October Board session, the Board took several votes—something it typically does not do during work sessions and which was not mentioned in the session's public description. App. 92a. It unanimously voted to direct Brabrand to eliminate the TJ admissions examination. *Ibid.* And it dictated that a diversity plan submitted to the Commonwealth "shall state that the goal is to have TJ's demographics represent [that of] the NOVA region." App. 62a, 92a. No public comment was permitted before either vote and no notice was given to the public that these votes would occur. *Ibid.*

In the subsequent weeks, FCPS staff released a white paper comparing a holistic option with Brabrand's hybrid merit lottery proposal. App. 104a. This white paper "included voluminous racial modeling and discussion of efforts to obtain racial diversity at TJ." *Ibid.* Brabrand then presented two plans to the

Board: the hybrid merit lottery and the holistic plan featured in the white paper. App. 104a–105a. This holistic method would consider a student's GPA, written submissions, and the "Experience Factors" (including "attendance at an underrepresented middle school"), and featured "regional pathways" setting geographic caps for offers. *Ibid.*

The Board accepted Brabrand's holistic proposal with one modification: the Board replaced the regional pathways with a provision setting aside seats for the top 1.5% of the 8th grade class at each public middle school. App. 105a. The Board voted in favor of that proposal, despite not having given prior public notice or an opportunity to comment on the 1.5% set-aside. *Ibid.* Board member McLaughlin abstained from voting in part due to the problematic process, explaining that she "could not recall a messier execution of Board-level work." *Ibid.*

After voting for this proposal, Board members remained unsure whether the 1.5% set-aside would be based on the school a student attended or the one she was zoned to attend. App. 105a–106a. This distinction is highly significant for the disproportionately Asian-American students attending gifted AAP centers rather than their zoned schools. See p.5, *supra*. Numerous stakeholders pointed out that basing the set-aside on the attending school would create "a 'special penalty' on students from traditionally low-performing regions who pursued placement at a feeder school." App. 73a. Students not attending AAP centers would have higher chances of admission, "not because [admissions officers] compared them [to AAP students] and thought them equally qualified, but because [they] never compared them at all." 4th.Cir.App. 0333. Basing the set-aside on the attending school would thus

"purposely [favor] academically weaker students . . . over the ones that FCPS has identified as needing Level IV [gifted] services." *Ibid.* This result "makes no sense," *ibid.*—apart from serving the purpose of racial balancing. In response, Brabrand insisted that the Board had voted for "attending school," which would produce "the geographic distribution the Board wanted." App. 94a.

As the Board knew, the structure of the 1.5% set-aside disadvantages the disproportionately Asian-American applicants from the top AAP centers. It burdens these applicants by forcing them to compete largely "against other applicants *from the same school*," rather than all other eligible students. Superintendent's Office, *Regulation 3355.15* at 5 (effective Nov. 9, 2021), https://tinyurl.com/w927zbyt (emphasis added). The set-aside leaves only about 100 of 550 total seats in each class unallocated. App. 72a–73a. These requirements "disproportionately force[] Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle school." App. 98a. And the inclusion of "Experience Factors" further disadvantages the disproportionately Asian-American applicants attending AAP centers at the "feeder schools." Those factors gave a preference to students attending middle schools "historically underrepresented" at TJ; approximately a quarter of such applicants were Asian-American, far lower than the overall percentage of Asian-American applicants. See 4th.Cir.App. 2915; *id.* at 2961; *id.* at 0094-95.

Just as the Board had predicted and intended, the new admissions policy drastically decreased the number of Asian-American students admitted to TJ. The proportion of offers extended to Asian-American

applicants in the five years prior to the policy change never fell below 65%, and was typically between 70% and 75%. App. 76a–77a. Indeed, 73% of the offers extended to the last class admitted under the previous, meritocratic system were extended to Asian-American applicants. *Ibid.* Only 54% of offers for the first class after the Board imposed the challenged admission policy were extended to Asian-American applicants; the school extended 56 fewer offers to Asian-American applicants for the class of 2025 despite the admitted class size increasing by 64 students. App. 77a.

Coalition for TJ sued, alleging that the new policy unconstitutionally discriminated against Asian-American applicants. The district court agreed, granting Coalition for TJ summary judgment and enjoining the Board from using the policy. App. 111a. A divided panel of the Fourth Circuit granted the Board's motion to stay the injunction. *Coalition for TJ* v. *Fairfax Cnty. Sch. Bd.*, 2022 WL 986994 (4th Cir. Mar. 31, 2022). The Coalition filed an emergency application with this Court, requesting that it vacate the stay. *Coalition for TJ* v. *Fairfax Cnty. Sch. Bd.*, 142 S. Ct. 2672 (2022). This Court denied the application. *Ibid.* Justices Thomas, Alito, and Gorsuch would have granted the application. *Ibid.*

The Fourth Circuit then reversed the district court over Judge Rushing's dissent, and remanded for entry of summary judgment in favor of the Board. App. 45a. The majority held "that the challenged admissions policy does not disparately impact Asian American students and that the Coalition cannot establish that the Board adopted its race-neutral policy with any discriminatory intent." App. 11a. The majority held it constitutionally irrelevant that the "Board . . . adopted the challenged admissions policy out of a

desire to increase the rates of Black and Hispanic student enrollment at TJ." App. 41a. Doing so, according to the majority, amounted "to improv[ing] racial diversity and inclusion by way of race-neutral measures"—"a practice that the Supreme Court has consistently declined to find constitutionally suspect." *Ibid.* The majority also held that there was no disparate impact because the "proper metric" is an "evaluation of a given racial or ethnic group's share of the number of applications to TJ versus that group's share of the offers extended." App. 31a. Under that metric, the majority held Asian-American applicants were not disadvantaged because "Asian American students accounted for 48.59% of the applications to TJ's class of 2025, but actually secured 54.36% of the admission offers made." App. 32a. Judge Heytens issued a separate concurrence, also contending that this Court has "repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means." App. 52a (Heytens, J., concurring).

Judge Rushing dissented. The dissent explained that despite the policy's "neutral varnish," "the evidence shows an undisputed racial motivation and an undeniable racial result." App. 54a. "By any metric, the new admissions Policy adversely—and disproportionately—affected the enrollment of Asian students at TJ." App. 76a–77a. "Perhaps most telling, Asian students were the only race to experience any decrease in admissions numbers while offers to all other races measured by the Board increased." App. 77a. Thus, "the new Policy bore not just *more* heavily on one race than another, it bore *exclusively* on one race." *Ibid* (quotation marks omitted). The Board "plainly stated its intention to craft an admissions policy for TJ that would reform the racial composition of the student body to reflect the racial demographics of the

district." App. 58a. And "in private discussions, some of the twelve Board members candidly admitted their belief that the process targeted Asian students." App. 74a.

The Coalition now seeks this Court's review.

ARGUMENT

I. The Fourth Circuit's decision is contrary to *SFFA* and raises critically important questions

The Fourth Circuit issued its ruling a month before this Court's decision in *SSFA*, and it is incompatible with *SFFA*'s analysis. *SSFA* held unconstitutional admissions policies that explicitly took into consideration applicants' race to ensure sufficient "representation of certain minority groups from year to year." *SFFA*, 143 S. Ct. at 2154–56, 2167 (quotation marks omitted). This Court invalidated those admissions policies for violating applicants' equal-protection rights.[3] *Id.* at 2176.

The Fourth Circuit's analysis below is contrary to *SFFA*'s reasoning in numerous respects. First, the Fourth Circuit rejected the Coalition's argument that the policy disadvantaged Asian-American applicants because "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." App. 39a–40a. Indeed, the Fourth Circuit held that this argument's "basic rationale has been pointedly rejected by the Supreme

[3] The challenge against Harvard raised a Title VI claim, but violations of the Equal Protection Clause amount to Title VI violations. *SFFA*, 143 S. Ct. at 2156 n.2.

Court." *Ibid.* But *SFFA* expressly adopted the same argument: that school admissions are "zero-sum," such that "[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 exemplifies what *SFFA* called "most troubling of all": "a judiciary that picks winners and losers based on the color of their skin." *Id.* at 2175. While the Fourth Circuit "would certainly not permit [admissions] programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the [policy] here continue." *Ibid.* In the Fourth Circuit's view, courts are "supposed to tell state actors when they have picked the right races to benefit." *Ibid.*; see also App. 41a (holding the Board "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"). That is not, as the Fourth Circuit believed, "a practice that the Supreme Court has consistently declined to find constitutionally suspect." App. 41a. Rather, the Fourth Circuit's holding that TJ may constitutionally seek to advantage particular racial groups reflects the same "remarkably wrong" view of "the judicial role" that *SFFA* rejected. 143 S. Ct. at 2175.

Second, the Fourth Circuit's holding that the intent to increase racial diversity cannot be unconstitutionally discriminatory because it is a "compelling state interest" is also contrary to *SFFA*'s analysis. App. 44a. *SFFA* held that the amorphous claimed "educational benefits of diversity"—including "produc[ing] engaged and productive citizens, . . . enhanc[ing] appreciation, respect, and empathy, or . . . train[ing] future leaders"—are not "compelling." 143

S. Ct. at 2167 (cleaned up) (explaining that those interests "are inescapably imponderable"). It condemned the position "that there is an inherent benefit in race *qua* race—in race for race's sake." *Id.* at 2170. It also rejected the schools' use of racial categories such as "grouping together all Asian students" and "Hispanic" students, holding that the use of these "arbitrary" and "plainly overbroad" categories "undermines" the purported state interest in "diversity." *Id.* at 2167–68. The Board here used the exact same flawed racial categories in seeking to increase "diversity" in TJ's "demographics." App. 108a, see pp.6–7, *supra*. Thus, the Fourth Circuit's analysis of the Board's purported interest in "diversity" is incompatible with *SFFA*.

Third, the Fourth Circuit's holding that TJ's policy had no discriminatory intent or disparate impact is at least in serious tension with *SFFA*'s analysis. In that case, Harvard's policy sought to avoid certain racial "group[s being] notably underrepresented" in comparison to prior classes, while the University of North Carolina sought to avoid a "percentage enrollment within the undergraduate student body [that] is lower than their percentage within the general population." 143 S. Ct. at 2171–72. *SFFA* held both those goals were invalid as "outright racial balancing," because they sought "some rough percentage of various racial groups," thus "treat[ing] citizens . . . as simply components of a racial . . . class." *Id.* at 2172. The Fourth Circuit's conclusion that the Board's policy here is not racial balancing, despite the voluminous evidence that the Board sought "rough percentage[s] of various racial groups," is inconsistent with this Court's reasoning. *Ibid.*; see App. 37a–39a; see pp.6–8, *supra*.

Further, the question of how the Equal Protection Clause applies to facially race-neutral admissions policies that are intended to promote racial "diversity" is a critically important one following *SFFA*. As schools around the country replace race-conscious policies with facially neutral ones, there is a high risk—as *SFFA* itself recognized—that they will simply "establish through . . . other means the regime we hold unlawful today," using proxies to maintain the same racial balance they can no longer impose "directly." 143 S. Ct. at 2176. For instance, the Department of Justice and Department of Education issued guidance about *SFFA*. Dep't of Justice & Dep't of Educ., *Questions and Answers Regarding the Supreme Court's Decision in* Students for Fair Admissions, Inc. *v.* Harvard College and University of North Carolina, DOJ (Aug. 14, 2023), https://tinyurl.com/yc3embdj. In it, the agencies instruct institutions of higher education on methods to maintain the same racial demographics of their student bodies. *Ibid.* One suggestion, for example, is that institutions use "admissions models and strategies that . . . offer admission to students based on attendance at certain secondary or post-secondary institutions." *Ibid.* Using that method, institutions could favor schools or organizations with a targeted racial composition to maintain their desired racial balance. See, *e.g.*, Columbia University, *HBCU Fellowship Program* (last visited Sept. 21, 2023), https://tinyurl.com/2vyr624j (providing admission to HBCU seniors or recent graduates to Columbia University School of Professional Studies full-time Master of Science program).

This Court should accordingly grant the petition to resolve this exceptionally important question, and to reaffirm that "[t]he Constitution deals with substance, not shadows." 143 S. Ct. at 2176 (cleaned up).

Alternatively, the Court should at least vacate the Fourth Circuit's ruling and remand for the Fourth Circuit to reconsider these issues in light of this Court's guidance in *SFFA*.

II. The Board's admissions policy subjects Asian-American students to unconstitutional racial discrimination under *Arlington Heights*

The petition should also be granted because the challenged policy violates the constitutional rights of Asian-American students. The challenged policy is "directed only to racial balance, pure and simple," an objective this Court "has repeatedly condemned as illegitimate." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (opinion of Roberts, C.J.); *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake.").

This Court has long held that a facially race-neutral law is unconstitutional where its purpose is invidious racial discrimination. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–74 (1886) (prohibiting discriminatory enforcement of facially neutral laws). Where used as tools of racial discrimination, facially neutral policies "are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." App. 56a (Rushing, J., dissenting) (quotation marks omitted); see *Arlington Heights*, 429 U.S. at 264–66. Policymakers cannot evade the Equal Protection Clause's "central mandate" of "racial neutrality in governmental decisionmaking" simply by concealing their discriminatory intent behind facially neutral proxies. *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995).

As *SFFA* put it, "[w]hat cannot be done directly cannot be done indirectly," because "[t]he prohibition against racial discrimination is levelled at the thing, not the name." 143 S. Ct. at 2176 (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

Courts will not invalidate a facially race-neutral law solely because it results in a racially disproportionate impact. *Arlington Heights*, 429 U.S. at 265. Instead, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265–66. For the intent to be discriminatory, the government must have enacted the challenged policy "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

Here, "[t]he specific sequence of events leading up to the challenged decision" reveals the Board's invidiously discriminatory purpose of achieving a preferred racial balance at the expense of Asian-American applicants. *Arlington Heights*, 429 U.S. at 267. First, the events that catalyzed the Board's actions—the protests following George Floyd's murder, and pressure from government officials to change the school's racial composition to match the demographics of the school system—confirm that the Board designed the challenged policy to balance the school's racial composition. See pp.5–6, *supra*. The Board has put forward no reason for changing the policy apart from increasing "diversity," and the record demonstrates that the "diversity" the Board wanted to achieve was racial. See pp.5–7, *supra*; see App. 108a (policy change intended to "increas[e] diversity through redefining merit").

Second, the Board's conduct deviated from its normal procedures. See *Arlington Heights*, 429 U.S. at 266–67 (deviations from normal procedures are evidence of discriminatory intent). Board members found the process "shoddy and rushed," remarking that they could not "recall a messier execution." App. 93a; see p.8, *supra*. The Board also adopted the 1.5% set-aside without prior public notice or opportunity for comment. See p.8, *supra*. Most glaringly, Board members did not even understand until *after* voting for the policy whether the 1.5% set-aside would be based on students' zoned or attending schools—and then deferred to Brabrand's insistence on using the attending schools, despite the serious concerns raised by stakeholders about unfairness to the disproportionately Asian-American applicants attending gifted centers. See pp.8–9, *supra*.

Third, the legislative history reveals that, just as in *Parents Involved*, "the goal established by the school board [was] attaining a level of diversity within the schools that approximates the district's overall demographics." 551 U.S. at 727 (opinion of Roberts, C.J.). Shortly before the Board began considering proposals to revamp the admissions policy, TJ's principal lamented that the school did not match the district's racial demographics. See p.6, *supra*. The Board itself declared a "goal" of having "TJ's demographics represent [that of] the NOVA region." See p.7, *supra*. Indeed, the Board rejected a lottery-based admissions system because of concerns that a lottery would "leave too much to chance" and might not achieve the racial balance the Board sought. App. 107a. The Board also closely considered the projected racial effects of changes to TJ's admissions policy, App. 63a–71a, including studying a white paper filled with racial modeling, App. 62a–63a. While the Fourth Circuit

asserted that this racial modeling was irrelevant because it did not model the exact proposal ultimately adopted, App. 39a, the data before the Board made clear the likely racial impact of its policy, App. 70a (Rushing, J., dissenting). Thus, just as in *Parents Involved*, "the goal established by the school board [was] attaining a level of diversity within the schools that approximates the district's overall demographics." 551 U.S. at 727 (opinion of Roberts, C.J.).

At the same time, Board members candidly (and, they believed, privately) recognized that "this process" "discriminated against" Asian-Americans and that "there has been anti [A]sian feel underlying some of this," "made . . . obvious" by Brabrand's "racist" and "demeaning" statements. App. 74a. Board members even acknowledged deliberate racism in the process. App. 74a (Pekarsky explaining that Brabrand "[c]ame right out of the gate blaming" Asian-Americans). Accordingly, the contemporaneous statements of the Superintendent and Board members make clear that the policy changes were intended, at least in part, to decrease admissions of Asian-American students. And, while the Board argued that it intended to increase admissions of Black and Hispanic applicants, in the "zero-sum" world of competitive school admissions, an intent to provide a benefit "to some applicants but not to others necessarily advantages the former group at the expense of the latter." *SFFA*, 143 S. Ct. at 2169.

Here, the new policy came at the expense solely of one group—Asian-American students. App. 77a (Rushing, J., dissenting). Under the new policy, the proportion of Asian-American applicants extended offers for the class of 2025 dropped 19% from the previous year, App. 77a (Rushing, J., dissenting), while offers extended to students of *every other* racial group

increased.[4] The challenged policy thus "bears more heavily on one race"—Asian-Americans—"than []other[s]." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); see pp.9–10, *supra*.

This Court has made clear that this sort of racial balancing for its own sake is "patently unconstitutional." *Fisher* v. *University of Tex. at Austin*, 570 U.S. 297, 311 (2013) (cleaned up); see also *SFFA*, 143 S. Ct. at 2172. The prohibition on racial balancing "is one of substance, not semantics"; racial balancing "is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved*, 551 U.S. at 732 (opinion of Roberts, C.J.); *SFFA*, 143 S. Ct. at 2166–67, 2171–72. While the Board chose facially neutral means to achieve its end, "racial balancing is no less pernicious if, instead of using a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent." *Coalition for TJ*, 2022 WL 986994, at *7 (Rushing, J., dissenting).

The Fourth Circuit's ruling to the contrary is irreconcilable with this Court's precedents and the commands of the Equal Protection Clause. The Fourth Circuit held that the "district court thus erred in . . . assessing racially disparate impact" by comparing the admissions "under [the] prior policy" to admissions under the new policy. App. 31a. Instead, the Fourth Circuit held, the "proper metric" was the "success rate" of Asian-American applicants: their "share of the number of applications to TJ versus that group's share

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[4] See Fairfax County Association for the Gifted, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM* (June 23, 2021), https://tinyurl.com/3pduh7ep.

of the offers extended." *Ibid.* Under that metric, the Fourth Circuit held the policy had no "disparate impact" because "Asian American students accounted for 48.59% of the applications to TJ's class of 2025, but actually secured 54.36% of the admission offers." App. 32a. In other words, the Fourth Circuit holds that a facially neutral policy *cannot* be racially discriminatory so long as the rate of offers to members of each racial group are at least equal to the group's proportion of the entire applicant pool.

This reasoning is hopelessly irreconcilable with the command of equal protection. For one thing, it would bless unadorned racial balancing for its own sake, which is "patently unconstitutional." *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003); see also *Fisher*, 570 U.S. at 311; *Parents Involved*, 551 U.S. at 723. Moreover, this theory would sanction a policy dangerously close to racial quotas, in which a school board would be free to engineer a system to align the number of offers extended to members of a particular racial group to the proportion that racial group comprised of the applicant pool. Such a system strikes "at the heart of the Constitution's guarantee of equal protection," which "command[s] that the Government must treat citizens as individuals, not as simply components of a racial . . . class." *Parents Involved*, 551 U.S. at 730 (opinion of Roberts, C.J.) (quoting *Miller*, 515 U.S. at 911) (brackets omitted); see *Grutter*, 539 U.S. at 334 ("[A] race-conscious admissions program cannot use a quota system—it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'" (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.) (brackets omitted)). And under the Fourth Circuit's ruling, schools could try to reimpose the pre-*SFFA* regime by

maintaining the success rate for applicants of certain "underrepresented" racial groups at the school's preferred levels—just so long as the policy has a facially neutral veneer and so long as offers are extended to disfavored racial groups at no less a rate than their share of the candidate pool. *SFFA*, 143 S. Ct. at 2171; see p.15, *supra*.

The Fourth Circuit also erred in holding that "Asian American students are [not] differently situated from others when it comes to the operation" of the admissions policy. App. 33a. Asian-American applicants are differently situated because they disproportionately attend a handful of gifted centers that have disproportionately high percentages of eligible applicants. See p.5, *supra*. These centers draw middle-school students from multiple schools who have scored highly on aptitude tests and offer them advanced classes. See *ibid*. The 1.5% set-aside thus "disproportionately forces Asian-American students to compete against more eligible and interested applicants" attending these top gifted centers, rather than competing against all students. App. 98a. There is no apparent reason for the Board to make it disproportionately difficult for students who attend these middle-school gifted centers to obtain admission to its magnet high school, apart from the Board's desire to change that school's racial composition. Indeed, the Board's racial-balancing policies were targeted at Asian-American applicants with such precision that it is difficult to account for them apart from their discriminatory purpose. The discriminatory effect of the policy—that it will "whiten [the] schools and kick ou[t] Asians"—was not an unfortunate byproduct; it was the policy's purpose. App. 74a.

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"It is a sordid business, this divvying us up by race." *League of Latin United Am. Citizens* v. *Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.). The sort of race-based exclusion from educational benefits intended by the Board "is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provokes resentment among those who believe that they have been wronged by the government's use of race." *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (brackets and quotation marks omitted). The Fourth Circuit's blessing of this discriminatory policy should not be permitted to stand.

CONCLUSION

This Court should grant the petition.

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