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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fairfax County School Board (the Board) adopted a new admissions policy for Thomas Jefferson High School for Science and Technology (TJ), a highly selective public high school whose students previously were drawn overwhelmingly from just eight of the County's 26 middle schools and rarely included economically disadvantaged students. The new policy removes socioeconomic barriers to application and admission by, among other things, eliminating the application fee and awarding points to applicants whose families qualify for free and reduced-price meals. It removes both socioeconomic and geographic barriers to admission by allocating seats to each public middle school for its highest-evaluated applicants. The new policy is both race neutral and race blind. It was not designed to produce, and did not in fact produce, a student population that approximates the racial demographics of Fairfax County or any other predetermined racial balance. The question presented is:

Whether the court of appeals correctly held that, based on the undisputed record evidence, petitioner failed to demonstrate that the Board adopted TJ's new admissions policy with the invidious discriminatory purpose of decreasing admission of Asian-American students.

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INTRODUCTION

Thomas Jefferson High School for Science and Technology is a public school located in Fairfax County, Virginia that provides advanced studies and requires students to apply for admission. Pet. App. 11a. In 2020, the Fairfax County School Board adopted a new admissions policy for TJ. The new policy is race-neutral and race-blind. It seeks to mitigate socioeconomic obstacles faced by students of all races and to ensure that high-performing students at *all* County public middle schools—not merely those attending the few "feeder" schools that serve the County's more affluent communities—have a fair shot at attending TJ. Every applicant is evaluated as an individual. No applicant receives a preference, or suffers a detriment, on account of the applicant's race. The policy was not designed to achieve any sort of aggregate racial balance. In fact, in conjunction with the new policy, the Board adopted a resolution requiring that the TJ admissions process "use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance, or targets." JA673, JA2224. And the policy did not in fact result in a student body that matches the demographics of the County, maintains predetermined percentages of any racial group, or otherwise reflects racial balance of any sort.

Reading the petition for certiorari, one would not know any of that. But those undisputed facts formed the basis of the court of appeals' rejection of petitioner's Fourteenth Amendment challenge to the Board's admission plan. And those undisputed facts provide more than enough reason to deny the petition for certiorari. This case simply does not provide any occasion to decide whether a public school may employ

race-neutral criteria for the purpose of achieving racial balance because—as the court of appeals held—the admissions policy for TJ does not seek, cannot be manipulated to achieve, and did not produce racial balance of any kind. Nor, as the court of appeals also concluded, is there any record evidence supporting petitioner's reckless charge that the Board changed TJ's admissions policy for the purpose of discriminating against Asian Americans. To the contrary, the numbers of Asian-American students from poor families and less affluent areas of the County who obtained admission to TJ under the new policy was orders of magnitude higher than under the prior admissions system.

The petition for certiorari should be denied.

STATEMENT

A. Factual Background

1. The Fairfax County Public Schools system (FCPS) is operated by the Board, a public body comprising 12 elected members. JA40.[1] The Board possesses sole decision-making authority with respect to TJ's admissions policy.

The Board altered TJ's admissions process in 2020. Previously, to be eligible to apply, students needed a minimum GPA of 3.0 and had to be enrolled in algebra or higher math. Applicants were required to pay a $100 fee and take three standardized tests. Students who scored well enough on those tests were administered a second round of tests, involving writing

[1] "JA" citations refer to the joint appendix filed in the court of appeals.

prompts, and asked to submit two teacher recommendations. Admission was offered to applicants based on a "holistic review" of their materials. Pet. App. 12a.

That admissions process consistently resulted in an admitted class made up disproportionately of students from a small subset of the County's middle schools located in its more affluent areas. In the four years before 2020, *87%* of the County's share of TJ's admitted students came from eight middle schools (which petitioner refers to as "feeder schools")—out of 26 middle schools in the County. JA673-674. In 2020, those "feeder schools" sent 15-82 students to TJ each, while fifteen other middle schools in the County sent fewer than four students each. *Ibid.*; JA3203-3254. Varying outcomes for middle schools known as Advanced Academic Program (AAP) Level IV Centers provide a particularly stark illustration of the admissions skew. AAP Centers are magnet programs that offer advanced coursework to highly qualified students. JA839. Eight of the AAP Centers are "feeder schools." But five other AAP Centers, which generally served lower-income areas, sent very few students (one or two per year) to TJ—even though their students also were high-performing and had benefited from advanced coursework. JA3906.

During the same five-year period, fewer than 2% of TJ's admitted students qualified for Free or Reduced-price Meals (FRM), even though FRM students make up 29.3% of FCPS's student body. JA294. Less than 1% of admitted students were English language learners (ELL), even though 27.4% of FCPS students are ELL. JA294, JA615. Finally, "just a few" admitted students identified as Black, Latino, or multiracial. Pet. App. 12a. Some years, the number of admitted Black students was "too small for reporting" under

laws protecting student privacy, meaning there were ten or fewer such students in a class of approximately 480 students. Pet. App. 13a; *id*. at 51a (Heytens, J., concurring); see JA562-563, JA566-567, JA671.

2. a. In the spring of 2020, the Board began considering changes to TJ's admissions policy. Petitioner asserts (Pet. 4, 11) that the Board's purpose in altering TJ's admissions policy was "racial balancing." That contention lacks any foundation in the record.

Throughout the process of evaluating the admissions policy, individual Board members pointed to the existing policy's socioeconomic and geographic skew. JA2338-2340 (importance of having a "pipeline [to TJ] in every single one of our middle schools"); JA2340 (seeking "academically exceptional" students in "all FCPS schools"); JA2918 (describing one Board member's belief that the prior admissions plan discriminated against low-income students, including low-income Asian-American students); JA616-617; JA800 (TJ had historically admitted very few economically disadvantaged students).

Some Board members also, as petitioner highlights (Pet. 8), expressed concern about the paucity of Black and Hispanic admitted students. But petitioner does not mention that those same Board members emphasized that the policy should address socioeconomic and geographic obstacles that they believed were disproportionately impeding those students. JA404, JA840, JA2369. As one Board member put it, a focus on reducing such obstacles would "result in a change in demographics" to include "more students that are FRM, ELL," or "black[or] Hispanic." JA404. That same Board member also observed that geographic diversity—that is, ensuring that all middle schools could send students to TJ—was an important goal in itself,

as highly qualified students at schools that rarely sent students to TJ often did not bother to apply, thinking they had no chance to be admitted. JA840.

Beginning in September 2020, the Board conducted a series of meetings (including public meetings) and other forms of community outreach focused on TJ's admissions process. Petitioner, an organization composed of parents of TJ students, participated in those meetings and submitted its own admissions proposal.

The Board first addressed those aspects of the admissions process that were creating "potential barriers" and sought to replace them with measures of academic aptitude that would reduce the socioeconomic and geographic skew of the prior approach. JA708, JA404. Those included the $100 application fee, which imposed a financial hurdle for high-performing low-income students; the standardized testing requirement, which disadvantaged students "who could not afford [the] expensive test-preparation services" used by their more affluent peers; and the teacher-recommendation requirement, which "favored students from the small number of middle schools sending the most students to TJ, as teachers from underrepresented schools had less experience and success in advocating admission for their students." JA709; Pet. App. 16a; JA617, JA1138. As a first step, the Board voted to eliminate those components of the process. JA908.

The Board then considered alternative proposals that would identify exceptional students without reimposing the same socioeconomic and geographic barriers. Petitioner bases its allegations of intentional discrimination (Pet. 7-9) almost exclusively on the facts related to the first such proposal considered by the Board, a "merit lottery" that the Board voted down.

The merit lottery was proposed by Dr. Brabrand, Superintendent of FCPS, who neither served on the Board nor acted as decision-maker with respect to the policy. In addition to eliminating the barriers described above, the primary attribute of Brabrand's proposal was that academically-eligible students would be randomly selected for admission from regional groups corresponding to where they lived. Pet. App. 16a. At the meeting during which he proposed the merit lottery, Brabrand also presented the Board with models predicting the effect the lottery would have on the socioeconomic, English Language Learner (ELL) and racial demographics of the admitted student population. JA308-310.

The merit lottery idea proved controversial. Pet. App. 16a-17a. At the initial meeting to consider it, Board members worried that "kids who are truly highly exceptional will not get in" to TJ. JA842. Board members expressed concern that the proposal would, as petitioner now puts it (Pet. 8), "drastically cut" Asian-American admissions. Pet. App. 48a-49a (Heytens, J., concurring); JA2918. The Board voted to reject the proposal. A second "hybrid" lottery proposal, which relied primarily on a lottery but reserved some seats for a holistic analysis, was rejected as well. JA670-JA672.

Petitioner was one of the groups that opposed the lottery proposal. The principal concern expressed by petitioner was that "[a]ll racial minorities will lose in the new lottery system" and that "Whites will be the biggest winners." JA886. In lieu of a lottery, petitioner proposed a race-conscious plan that awarded an automatic preference to Black and Hispanic applicants based solely on their race. Pet. App. 17a n.3;

JA895. Petitioner's proposal also would have addressed the geographic skew of the prior system by allowing each middle school to choose its top students, and it had provisions addressing socioeconomic barriers as well. JA724-725.

Over the next ten weeks, the Board also considered a "holistic" plan proposed by Superintendent Brabrand that served as the basis for the policy ultimately adopted. The "holistic" proposal allocated seats to geographic regions, and awarded seats within each region based on written submissions including a problem-solving essay, and four "Experience Factors": (i) eligibility for FRM; (ii) status as an ELL; (iii) eligibility for special education services; and (iv) attendance at a historically "underrepresented" public middle school, that is, a school that had traditionally sent few students to TJ. JA619-620, JA528, JA622-623, JA1139.

In December 2020, following months of discussion, the Board approved a modified version of the holistic proposal ("the Policy"). Pet. App. 18a-19a. Instead of allocating seats based on geographic regions, the Policy guarantees each of the County's twenty-six middle schools seats in the incoming TJ class equal to 1.5% of that school's eighth-grade population. Those seats are reserved for each school's highest-evaluated students. Students are evaluated based on their GPA (which must be 3.5 or higher, up from 3.0 under the old policy) and two written assessments. They also receive points for each of the Experience Factors they possess. An additional 100 seats are set aside for the highest-evaluated applicants overall, regardless of where they attend middle school.

The Policy is race-neutral. *Ibid*. The Board mandated that "[t]he admission process must use only

race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance, or targets." JA2224; Pet. App. 18a-19a; JA673. And the Policy is race-blind: evaluators do not know any applicant's name, gender, race or ethnicity, so they cannot monitor the racial composition of the admitted class as they make admissions decisions, or otherwise predict what the class's racial make-up will be. JA673. Upon voting for the Policy, Board members emphasized that it would remove socioeconomic and geographic obstacles. E.g., JA2340, JA2342, JA2346, JA2352, JA2375.

b. Petitioner characterizes (Pet. 9-11) the Policy as motivated by a desire to decrease Asian-American enrollment. That characterization is false for the reasons explained by the court of appeals and discussed further *infra*. Indeed, petitioner pervasively mischaracterizes the record.

Citing the dissenting opinion below, petitioner asserts (Pet. 9 (citing Pet. App. 67a)) that the Policy's Experience Factors were designed to "level the playing field" by removing advantages enjoyed by "White and Asian candidates." But the portion of the record cited by the dissent to support that claim actually says that the Experience Factors were intended to "level the playing field" by ameliorating socioeconomic, language, disability, and geographic obstacles. An FCPS employee noted that the previous policy's *teacher-recommendation* and *testing* requirements—whose elimination petitioner never challenged in this litigation—favored more affluent candidates (who tended to be white or Asian), and then explained that the proposed Experience Factors would ameliorate *socioeconomic* obstacles to admission. JA176-177 (discussing impact on "more" and "less" "privileged" applicants).

Petitioner also asserts (Pet. 9) that the Board designed the Experience Factors with the assistance of demographic data that allowed them to predict how the factors would change TJ's racial demographics. But the Board never received *any* modeling on how the Experience Factors or holistic plan would affect TJ's demographics. JA624, JA1140; Pet. App. 49a (Heytens, J., concurring). No such data existed, and neither the Board nor admissions officials ever attempted to investigate the question. JA2919, JA145. Indeed, petitioner conceded below that "it was very difficult to project the outcome of what would happen" under the new admissions plan. JA2602 (counsel for petitioner). Petitioner's contrary claim in this Court is simply made up.

Petitioner also suggests (Pet. 9-10) that the Board designed the 1.5% allocation to all public schools in order to disadvantage feeder schools, which would in turn disadvantage Asian-American applicants, because the "overwhelming majority" of students applying to TJ from feeder schools were Asian-American. Once again, petitioner misstates the record. Petitioner's allegation of discriminatory intent depends on the assumption that feeder schools could be used as a proxy for Asian-American applicants—*i.e.*, that reducing the seats available to feeder schools would necessarily reduce the number of Asian-American students admitted. That assumption is easily disproved: many nonfeeder schools had Asian-American student and applicant populations comparable to those of the feeder schools. Pet. App. 33a n.5; Resp. C.A. Br. 33-35; Resp. C.A. Reply 10-11. What is more, Asian Americans were a substantial portion of the population (approximately 20%) at *most* County middle schools, Resp. C.A. Br. 33-35 (citing JA2905-2909). So Asian Americans at non-feeder schools stood to *benefit*

from allocating seats to those schools, which they did, see *infra*. In all events, the Board never attempted "to predict how the 1.5% plan would affect the racial makeup of students admitted to TJ." JA624.

Petitioner next claims (Pet. 10), again citing the dissent below, Pet. App. 73a, that "the Board intentionally chose to allocate these [1.5% allocation] seats by attending school, rather than zoned school * * * [to] further the goal of limiting Asian-American enrollment." But the email exchange on which the dissent relied states that the policy treats applicants as being students of the school they actually attend, not the school for which they are zoned, because if zoned schools were used, some schools "would never have any kids who physically attend the school get in" to TJ. JA323-324, JA330. That, as the email explained, would undermine the Board's goal of ensuring that students from all County middle schools would have the opportunity to attend TJ. *Ibid*.

3. In 2021, the first year under the new TJ admissions policy, nearly 3,500 students applied, approximately a thousand more than in 2020. JA673-674. Applications from historically underrepresented schools soared, in some instances doubling from years prior. Resp. C.A. Br. 31; compare JA2990-3060 with JA3203-3254. For the first time in at least fifteen years, students from all 26 County public middle schools were offered admission, and the students offered admission included much higher proportions of low-income students, ELL students, and female students than previous years. Pet. App. 19a-20a. The average GPA for admitted students (3.953) remained virtually unchanged from the prior year. JA674-JA675.

In the five years preceding the Policy's adoption, Asian Americans received between 65% and 75% of all

offers of TJ admission, a percentage that fluctuated by as much as 10% per year.[2] In 2020, the last year under the old policy, Asian Americans received 73% of offers. In 2021, the first year under the Policy, Asian Americans received 54% of offers. Data for subsequent years, though not in the record, is publicly available and was discussed before the court of appeals. In 2022, Asian Americans received 60% of offers,[3] and in 2023, 62%.[4] Resp. C.A. Reply Br. 6-7. Of particular note, Asian-American students from disadvantaged backgrounds benefited substantially from the Policy: the number of low-income (FRM) Asian-American admittees increased from just *one* student in 2020 to *fifty-one* in 2021 (more than the total number of Black students admitted under the Policy). Pet. App. 20a. The number of admissions offers to Asian-American students attending nonfeeder middle schools historically underrepresented at TJ increased six-fold. *Ibid.*

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[2] In 2019, Asian Americans comprised 19.5% of the FCPS student body population, Pet. App. 37a n.6, a percentage that has decreased over the last few years. See Virginia Department of Education School Quality Profiles, Fairfax County Public Schools (2023), available at https://schoolquality.virginia.gov/divisions/fairfax-county-public-schools#desktopTabs-3 (2022 Fall Membership data indicating 19% of students enrolled at FCPS in 2019 were Asian).

[3] See Fairfax County Public Schools, *Thomas Jefferson High School Continues to Increase Access for All* (June 30, 2022), available at https://www.fcps.edu/news/thomas-jefferson-high-school-continues-increase-access-all.

[4] See Fairfax County Public Schools, Class of 2027 Continues to Reflect Expanded Access to Thomas Jefferson High School for Science and Technology (2023), available at https://www.fcps.edu/node/47920.

B. Procedural Background

1. In March 2021, petitioner sued the Board and Dr. Brabrand under 42 U.S.C. 1983, alleging that the Policy violates the Equal Protection Clause because it was adopted with the specific intent to discriminate against Asian Americans. Pet. App. 21a. Because the policy is race neutral, this Court's decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), required petitioner to demonstrate that the policy was motivated by an invidious intent to disfavor Asian Americans—that is, the Board enacted it "because of," and not "merely 'in spite of,'" an alleged adverse impact on Asian Americans. *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

2. On cross-motions for summary judgment, the district court granted summary judgment to petitioner. Pet. App. 21a-22a. The court held that the Board acted with discriminatory intent against Asian Americans because, in the court's view, the Board sought to achieve "racial balance" by increasing representation of Black and Hispanic students. *Id*. at 23a. The district court ordered that the Board cease using the Policy. *Id*. at 85a.

The Board sought, and the court of appeals granted, a stay pending appeal. Pet. App. 24a. Petitioner filed an emergency application to vacate the stay, which this Court denied. Justices Thomas, Alito, and Gorsuch dissented. See 142 S. Ct. 2672 (2022).

3. The court of appeals reversed. Pet. App. 1a-84a.

Applying *Arlington Heights*, the court of appeals concluded that "we have a complete failure of proof concerning" any intent on the part of the Board to engage in racial balancing or otherwise to decrease

Asian-American admissions. Pet. App. 43a (internal quotation marks omitted). Based on the undisputed record, the court concluded that petitioner's evidence "neither individually nor collectively * * * reveal[ed] any intent to adjust TJ's student population along racial lines," *id*. at 38a, and "the undisputed facts show only that the Board intended to improve the overall socioeconomic and geographic diversity of TJ's student body," *id*. at 42a. The court relied on the Policy's race-neutral, race-blind design; the lack of any evidence that the Board used proxies for race; and petitioner's failure to proffer anything more than a few statements by individual Board members and non-decisionmakers suggesting concern about the low numbers of Black and Hispanic applicants admitted to TJ under the previous policy. Finally, the court noted that even if the Board had adopted race-neutral measures in order to improve racial diversity, this Court had repeatedly "declined to find [that practice] constitutionally suspect." *Id*. at 41a (citing cases).

The court of appeals also rejected petitioner's contention that the year-to-year decrease in Asian-American admissions in the Policy's first year demonstrated an actionable disparate impact on Asian Americans. The court explained that a single year-to-year decrease, without more, does not establish that Asian Americans suffered a disadvantage relative to other races, or that the Policy *caused* any such impact. Pet. App. 28a-34a.

Judge Heytens concurred, emphasizing that petitioner had failed to sustain its burden of proving discriminatory intent. Pet. App. 48a (Heytens, J., concurring). Judge Heytens also observed that by proposing a race-conscious policy expressly designed to increase Black and Hispanic admissions, petitioner had

"waived" any argument that it would be unconstitutional for the Board to "hope[]" that one consequence of removing socioeconomic and geographic barriers would be that Black and Hispanic students would have more success in gaining admission. *Id*. at 51a. He also pointed out that the argument was inconsistent with this Court's longstanding precedent approving race-neutral means of increasing diversity. *Id*. at 52a.

Judge Rushing dissented. Pet. App. 53a-84a. She disagreed with the majority's evaluation of the record evidence, and would have held that petitioner "has established race was a factor that motivated the Board." *Id*. at 82a.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER A PUBLIC ENTITY'S USE OF FACIALLY RACE-NEUTRAL ADMISSIONS CRITERIA TO ACHIEVE RACIAL BALANCE VIOLATES THE FOURTEENTH AMENDMENT.

Petitioner seeks review of an issue that is not presented in this case. The court of appeals did not hold, or even imply, that a public entity may use "facially race-neutral admissions criteria to achieve racial balance" without violating the Equal Protection Clause. Pet. 13; Pet. i. Rather, the court held that petitioner had failed to proffer *any* evidence that the Board adopted the Policy to achieve racial balance or otherwise discriminate against Asian Americans. Petitioner's dissatisfaction with the court of appeals' case-specific conclusions about the summary judgment record—conclusions that were in all events manifestly correct—does not provide a reason for granting review.

A. This Case Does not Involve Race-Neutral Measures Adopted with Discriminatory Intent to Achieve Racial Balance or Disadvantage Asian-Americans.

1. The Fourth Circuit did not "endorse[] * * * racial balancing." Pet. 21. What the court of appeals held was that "the facts assembled by the district court fall well short of supporting its conclusion that the Board was motivated by impermissible 'racial balancing' when it adopted the challenged admissions policy." Pet. App. 37a.

There is no dispute in this case as to what constitutes impermissible "racial balancing." Petitioner and the court of appeals define it the same way: "when a school seeks to admit an approximate proportion of each racial group based on the group's representation in a larger population," or otherwise seeks to admit a predetermined percentage of any racial group. Pet. 19-20; accord Pet. App. 37a (citing *Fisher* v. *University of Texas at Austin*, 570 U.S. 297, 311 (2013) ("*Fisher I*")); see also *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 143 S. Ct. 2141, 2170-72 (2023) (noting Harvard's goal of maintaining particular levels of admissions for specified racial groups); *ibid.* (noting the University of North Carolina's goal of "percentage enrollment within the undergraduate student body" equal to "their percentage within the general population in North Carolina").

The court of appeals concluded that the Policy does not seek, and could not be manipulated to achieve, any such impermissible racial balancing. Because the Policy is race neutral on its face, the court of appeals applied the familiar *Arlington Heights* framework to determine whether it was nonetheless motivated by an

impermissible discriminatory intent. Pet. App. 35a (citing *Arlington Heights*, 429 U.S. at 265-266; *Washington* v. *Davis*, 426 U.S. 229, 239 (1976)). After evaluating each of the *Arlington Heights* factors, the court of appeals concluded that "the record is devoid of" evidence raising an inference of intent to engage in racial balancing. Pet. App. 36a. The court emphasized the Board's rejection of proposals that would have been likely to produce a closer demographic approximation of the applicant population, *id*. at 39a; the Policy's race-blind design, which makes it impossible for admissions officials to predict the racial composition of the admitted class in advance or to monitor and adjust racial percentages during the admissions process, *id*. at 36a; and the absence of evidence establishing an intent on the part of the Board to achieve racial balance, *id*. at 38a-39a. The substantial fluctuation in Asian-American admission rates in subsequent years further confirms that the Policy was not intended to, and did not, produce any predetermined admission rates for Asian-American students or another racial group. See p. 11, *supra*.

Far from "shield[ing] from liability intentional action designed to" achieve racial "parity with * * * the applicant pool or larger population," Pet. 21, therefore, the court of appeals simply held that petitioner failed to establish that any such "intentional action" occurred.

2. By the same token, the court of appeals did not "excuse[] 'benign' discrimination" in favor of Black and Hispanic students, (Pet. 21 (capitalization altered)), or "bypass[] the 'zero-sum' nature of admissions and fail[] to recognize that tilting the playing field in favor of certain groups necessarily tips it against other groups." Pet. 22.

What the court of appeals instead did was conclude that petitioner's evidence "neither individually nor collectively * * * reveal[ed] any intent to adjust TJ's student population along racial lines," Pet. App. 38a, and that "the undisputed facts show only that the Board intended to improve the overall socioeconomic and geographic diversity of TJ's student body," *id*. at 42a. The court further explained that there was no evidence that the Board had used the race-neutral socioeconomic and geographic considerations as a *proxy* for race so as to disadvantage Asian-American applicants. *Id*. at 37a; *id*. at 49a (Heytens, J., concurring) (explaining lack of evidence that the Board was engaged in a "surreptitious pretextual bid" to discriminate against Asian Americans through geographic and socioeconomic proxies).

To be sure, the court of appeals observed that petitioner's "zero-sum" argument "has been pointedly rejected by the Supreme Court." Pet. App. 40a. But that statement was (and remains) correct. This Court has repeatedly held that race-neutral measures are a permissible way of fostering diversity, even under conditions that could be described as "zero sum." See *Fisher* v. *University of Texas at Austin*, 579 U.S. 365, 437 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting); *Fisher I,* 570 U.S. at 333 (Thomas, J., concurring); *Tex. Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (governments may "increase the opportunities available to minority business" to obtain government contracts through race-neutral measures such as altered bidding rules); *id*. at 526 (Scalia, J., concurring in the judgment); *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in

part and concurring in judgment). Thus, even if the Board had intended to increase opportunities for Black and Hispanic students through race-neutral means, the Fourth Circuit broke no new ground in opining that such a purpose would not be "constitutionally suspect." Pet. App. 41a.

The court of appeals' conclusion on that point is entirely consistent with this Court's decision in *Students for Fair Admissions*. There, the Court held that in light of the "zero-sum" nature of admissions, conferring express advantages based on race to applicants in certain racial groups necessarily means that "an individual's race is * * * a negative factor" for the individuals who did not receive the preference. 143 S. Ct. at 2169. That conclusion about race-*conscious* measures has no application to race-*neutral* measures like the Policy: here, despite the "zero-sum" nature of admissions, no applicant's race is *ever* a negative (or positive) factor in admissions decisions, because the policy is race neutral and race blind.

In all events, this case does not present any occasion to reconsider this Court's longstanding approval of race-neutral measures adopted for the purpose of increasing racial diversity, because (as the court of appeals held) the evidence did not permit any conclusion that the Board intended to benefit or disfavor any racial group or any individual applicant based on race. Petitioner's lengthy recitation of reasons given for admissions-policy changes in other school districts (Pet. 13-17) is therefore irrelevant, and does not suggest that review is warranted *in this case*. Whatever the purpose of policy changes in other districts, here the record foreclosed any inference of racial intent.

As if all that were not enough, petitioner has "waived" any argument that a desire to improve Black

and Hispanic representation would render the Policy unconstitutional. Pet. App. 51a-52a (Heytens, J., concurring). When the Board solicited public input on potential revisions to the admissions policy, petitioner proposed a policy that would "disproportionately" admit Black and Hispanic students by granting explicit racial preferences, and it criticized the lottery proposals because they would not admit enough Black and Hispanic students. *Id*. at 17a n.3; JA 2637-2638 (petitioner's mission includes increasing the representation of Black and Hispanic students at TJ). And at oral argument before the Fourth Circuit, petitioner reaffirmed that an intent to increase Black and Hispanic representation would not itself render a race-neutral admissions policy unconstitutional. Petitioner should not be heard to challenge race-neutral measures under the Fourteenth Amendment when petitioner itself urged the Board to adopt race-conscious admissions criteria for TJ and embraced the legitimacy of seeking to increase Black and Hispanic admissions. Cf. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

B. The court of appeals' case-specific application of the *Arlington Heights* framework was correct.

The Fourth Circuit correctly concluded that under *Arlington Heights* the undisputed evidence foreclosed any inference that the Board intended to engage in racial balancing or to reduce Asian-American admissions. Petitioner does not challenge the Fourth Circuit's holding that *Arlington Heights* supplies the proper analytical framework, or the court's articulation of that governing law. Petitioner just disagrees with the Fourth Circuit's fact-specific conclusions about the summary judgment record. Even more to

the point, petitioner's challenge to those fact-specific conclusions rests on unsupported and irresponsible accusations that the Board acted with animus toward Asian Americans—accusations that the court of appeals properly rejected because they are baseless.

1. The court of appeals held that the undisputed evidence precludes any inference that the Board acted with the intent to discriminate against Asian Americans. That holding was plainly correct.

The Board designed the Policy to remove socioeconomic and geographic obstacles to admission while ensuring that race would not be considered in the TJ admissions process. The Policy is race-blind: evaluators do not know any applicant's name, race or ethnicity, so they cannot predict or affect in advance the racial composition of the admitted class. JA697. Each applicant receives individualized consideration in which race plays no role. Underscoring this point, the Board mandated that the admissions process must never "seek to achieve any specific racial or ethnic mix, balance, or targets." *Ibid*. The Board thus designed a policy that could not be manipulated to achieve any sort of racial balance. The aspects of the Policy challenged by petitioner—the Experience Factors and 1.5% allocation—do not address race, but instead address socioeconomic barriers to admission, and ensure that TJ will be open to *all* schools in the County, not merely a few feeders serving affluent communities. An obvious conclusion follows: what the Board actually *did* is conclusive evidence of what it *intended* to do. The Policy's socioeconomic and geographic criteria reflect a decisionmaker focused on those considerations, not race.

To raise an inference of discriminatory intent, therefore, petitioner would have to prove that the

Board carried out an elaborate subterfuge, surreptitiously designing selection criteria to produce a predetermined racial balance. As the court of appeals correctly concluded, however, the Board did nothing of the sort.

The Board's decision to reject a merit lottery is particularly illuminating in this regard. Choosing among qualified applicants by lottery would be a race-neutral, race-blind—and presumptively constitutional—admissions method. And by definition such a system would be expected, over time, to result in admitted classes whose demographics would approximate the demographics of the population of qualified applicants. Yet, after two Board members expressed concern that a lottery system could negatively affect Asian-American students, the Board rejected the lottery. Pet. App. 48a-49a. In its stead, the Board adopted a proposal whose demographic impact it could neither predict nor control. Those actions belie petitioner's charge of an intent to achieve racial balance.

Given the absence of any direct evidence, petitioner's racial balancing claim depends almost entirely on its accusation (Pet. 9-10) that the Board was "[a]rmed" with detailed demographic data that gave it the ability to design the Policy's race-neutral features so as to "limit[] Asian-American enrollment." But that is a fabrication. See p. 9, *supra*. The data to which petitioner and the dissent below repeatedly point was staff-produced demographic analysis of the *rejected* lottery proposals. Pet. App. 68a-72a; JA2976, JA461. The Board never possessed or sought demographic modeling predicting how the ultimately adopted components of the Policy would affect the composition of the admitted class. See p. 9, *supra*.

Nor could the demographic impact of the Policy be inferred from data about the rejected merit lottery. To reliably predict the demographic effects of the 1.5% allocation plan, the Board would have to know the demographic results the allocation would produce in each of the County's 26 middle schools. But the top 1.5% of eligible applicants at each middle school are selected individually based on GPA, written submissions, and the race-neutral Experience Factors (socioeconomic status, ELL, or special education)—and there was simply no way to predict in advance which students would apply, let alone rise to the top in the selection process. JA2919, JA145; Pet. App. 49a (Heytens, J., concurring).

In the same vein, there was no reason to think that the 1.5% allocation would systematically disadvantage Asian-American students given the substantial percentages of such students at most of the County's twenty-six middle schools. See p. 9, *supra*. Petitioner responds by claiming that the Board adopted the 1.5% allocation in order to disadvantage feeder schools and thereby reduce Asian-American admissions, on the theory that feeder schools were a proxy for Asian Americans. But that is false. In fact, the Policy resulted in many more Asian-American students being admitted from the eighteen non-feeder schools than in the past, as well as many more Asian-American students from poor families—which is hardly what one would expect from a policy designed to discriminate against Asian Americans. See pp. 9-11, *supra*.

For similar reasons, there is no merit to petitioner's assertion (Pet. 9-10) that the Board sought to harm Asian-American applicants by allocating slots on the basis of the school students actually attended rather than the school for which they were zoned. The Board

chose attended over zoned school for a common-sense reason: to ensure that *every* school could send students to TJ, an objective that would be undercut if the allocation of seats were based on where students were zoned rather than on the school they actually attended. See p. 10, *supra*. Petitioner itself embraced that point before the Board. Its proposal guaranteed slots based on *attended* school in order to foster geographic diversity. JA894-895. Petitioner is thus challenging as unconstitutional the very thing that it proposed during deliberations over how to change TJ's admissions process.

In all events, petitioner's attended-school argument is misconceived. Petitioner asserts that the choice of attended rather than zoned schools would translate into a disadvantage for students at AAP Centers, which would in turn disadvantage Asian-American applicants because the AAP Centers were feeder schools, and reducing admissions from feeder schools was simply a way to reduce Asian-American admissions. Pet. 9-10. But that is wrong. See p. 3, *supra*. The percentage of Asian-American students at many other County middle schools is comparable to their percentages at feeder schools. And petitioner fails to account for the fact that all Asian-American students at the five AAP Centers that were not feeder schools, some of which had substantial Asian-American populations, benefitted from the 1.5% allocation plan. JA2905-2906, JA3906. Petitioner's convoluted contention that the Board intentionally disadvantaged AAP Centers in order to harm Asian-Americans thus amounts to nothing.

The bottom line is that the Board adopted an admissions policy whose racial impact was unpredictable—and unpredicted—and then took additional steps

to ensure that that the Policy could not be manipulated to achieve racial balancing. Those are not the actions of a decision-maker intent on racial balancing. Quite the opposite. The court of appeals therefore correctly held that the Board's *actions* "directly and forcibly" foreclose any contention that the Board intended to racially balance TJ's admissions or otherwise decrease Asian-American admissions. Pet. App. 36a.

2. Given the overwhelming record evidence refuting petitioner's allegation of racial bias, in the final analysis the only thing petitioner can point to as supporting a contrary inference is a smattering of out-of-context quotations and its own baseless characterizations of the record. The court of appeals correctly concluded that petitioner's evidentiary contentions "f[e]ll well short." Pet. App. 37a.

The principal evidence that petitioner trumpets is evidence of a kind that this Court routinely dismisses as nonprobative. Petitioner cites (Pet. 8) statements from two (of twelve) Board members individually expressing concern with the under-representation of Black and Hispanic students at TJ. But "[e]ven when an argument about legislative motive is backed by statements made by legislators who voted for a law, [this Court has] been reluctant to attribute those motives to the legislative body as a whole." *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022); *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968). And any such attribution would be particularly inappropriate here. The Board members quoted by petitioner made clear that they advocated reducing socioeconomic and geographic obstacles to admission, in the *hope* that doing so would foster greater racial diversity. JA435, JA404, JA2369. And petitioner ig-

nores the many statements by individual Board members expressing that their primary objective was to address socioeconomic and geographic obstacles, and their desire to ensure that any policy change did not inadvertently harm Asian-American students.[5] J.A. 616-617; see also JA2339-2340, JA2368-2369; JA2918-2919; Pet. App. 48a-49a (Heytens, J., concurring).

The *sole* statement that petitioner has been able to identify that was made by the Board itself (Pet. 4-5) is the Board's inclusion in a required annual diversity report to the governor that "the goal is to have TJ's demographics represent the NOVA region." JA909. But the document further explained that "demographics," included "race, ethnicity, gender, English Language Learners (ELLs), geography, socioeconomic status, prior school and cultural experiences, and other unique skills and experiences," and that TJ's "long-term diversity goal is to increase the broad diversity that represents all participating jurisdictions." JA1073. That single anodyne statement cannot possibly justify the conclusion that, months later, the Board adopted the Policy in order to *match* TJ's racial demographics to the region—particularly when *nothing* about the Policy's adoption or design (not to mention

[5] Faced with the paucity of statements indicating any racial intent on the Board's part, petitioner points to (Pet. 7-8) a few scattered statements by *non*-Board members who had no role in the decisionmaking process to attempt to show discriminatory intent. Pet. App. 47a (Heytens, J., concurring). The statements are irrelevant and cannot raise any inference as to the *Board's* intent. See *Arlington Heights*, 429 U.S. at 268; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.").

the actual admissions results) supports any such inference.

Finally, petitioner complains that the Policy was the product of a rushed process. As the court of appeals observed, however, that argument makes "little sense" in light of the four months of Board deliberation, replete with public board meetings, solicitation of public comments, and interactions with the community. Pet. App. 15a-18a, 38a. Relatedly, petitioner also complains (Pet. 10) that the Board adopted the 1.5% allocation aspect of the Policy at the "last minute." But the Board had considered community feedback on multiple proposals that included seat allocation based on FCPS's geographic regions composed of multiple schools, and the Board, concerned that a "regional" approach would not alleviate the lack of middle-school diversity, had asked staff instead to develop a "school-based" approach in October, shortly after the process began. JA618, JA883. Most importantly, none of the evidence the Coalition cites even remotely suggests that the Board was manipulating its processes to hide discriminatory intent.

The court of appeals therefore correctly concluded that "the undisputed facts show only that the Board intended to improve the overall socioeconomic and geographic diversity of TJ's student body." Pet. App. 42a; *id*. at 37a-39a; JA411. At most, the court held, the Board "may have been able to discern" that changes to the admissions policy that were meant to reduce socioeconomic and geographic obstacles might increase admission of black and Hispanic students and "might * * * impact" admission of Asian-American students. Pet. App. 41a. But this Court has repeatedly held that "mere 'awareness of consequences' is not sufficient for proving a discriminatory purpose." *Id*. at

40a (citing *Feeney*, 442 U.S. at 279). The court of appeals thus applied settled precedent in light of its conclusion that the evidence did not show any intent to favor or disfavor any racial group. Petitioner's quarrel with the court's conclusions about the evidence in this case boils down to a request for error correction that does not warrant certiorari.

II. THE COURT OF APPEALS' HOLDING THAT PETITIONER FAILED TO DEMONSTRATE ACTIONABLE DISPARATE IMPACT UNDER *ARLINGTON HEIGHTS* DOES NOT WARRANT REVIEW.

Petitioner also asserts that the court of appeals held that racial balancing raised no Fourteenth Amendment issue so long as the affected group's percentage of offers exceeds its percentage of the applicant pool. But the decision holds nothing of the sort. The court of appeals simply rejected petitioner's argument that the decline in Asian-American admissions in the Policy's first year, standing alone, made out a case of unconstitutional disparate impact. The court straightforwardly applied *Arlington Heights*, which instructs courts to examine whether a challenged policy "bears more heavily on one race than another," 429 U.S. at 266 (citation omitted), and concluded that petitioner had failed to adduce evidence demonstrating actionable disparate impact. That decision is correct, and it does not conflict with the decision of any other court of appeals. And in all events, because the court of appeals held that petitioner failed to demonstrate discriminatory intent, and that question does not warrant review, see Part I, *supra*, a ruling in petitioner's favor with respect to how disparate impact should be defined in the abstract would not change the outcome. This Court's review is therefore unwarranted.

A. The court of appeals' disparate-impact holding provides no independent basis for review.

1. Petitioner contends (Pet. 24) that this Court should grant review to consider the court of appeals' purported holding that a party cannot demonstrate discriminatory intent based on disparate impact absent "a showing that under the new policy, the percentage of admitted students who are Asian American is less than the percentage of applicants who are Asian American." But the court did not announce any categorical rule that a racial group cannot suffer a disparate impact if its share of the admittee pool exceeds its share of the applicant pool. Far from it.

Instead, the court rejected petitioner's argument that a single-year decline in Asian-American admitted students was sufficient to demonstrate a disparate impact *attributable to* the Policy from which discriminatory intent could be inferred without more. Pet. App. 31a ("The district court thus erred in applying a *strictly temporal* method for assessing racially disparate impact.") (emphasis added). That holding follows from *Arlington Heights*, which explains that assessing disparate impact requires determining whether the Policy "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266. As the court of appeals explained, that standard by its terms requires a "relative inquiry" into whether the Policy makes it more difficult for Asian Americans to gain admission than for other groups. Pet. App. 32a.

And, as the court further explained, petitioner's exclusive reliance on the drop in Asian-American admissions in the Policy's first year, Pet. C.A. Br. 20, overlooked two critical points. First, the year-to-year drop

could not establish that the Policy "bears more heavily" on Asian Americans unless petitioner proved that the Policy actually *caused* the decline. See Pet. App. 29a-30a (discussing unreliability of year-over-year comparison in context of election laws where voting levels depend on "highly sensitive * * * factors likely to vary from election to election."); *Tex. Dep't of Hous. and Community Affairs*, 576 U.S. at 542. Second, and relatedly, petitioner bore the burden of explaining how the Policy imposed more "difficulty" in gaining admission on Asian Americans than on students of other races. Pet. App. 31a. As to those points, the court explained, petitioner was unable to draw any connection establishing that the challenged features of the Policy disadvantaged Asian-American applicants. *Id*. at 33a.

The court thus did not hold that a racial group can be targeted for discriminatory treatment in an admissions process so long as the group's percentage of admissions remains above its percentage of applicants. To be sure, the court noted that Asian Americans were admitted in a greater proportion than their share of the applicant pool. Pet. App. 32a. But all the court concluded was that, without more, the single-year drop in admissions for Asian Americans did not justify the inference that the Policy reflected intentional discrimination against them. See *ibid*. This Court's precedents strongly support that conclusion. *Wards Cove Packing Co.,* v. *Atonio*, 490 U.S. 642, 650 (1989); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 (1977). Contrary to petitioner's argument, the court did not treat the applicant-admittee comparison as the *sole* dispositive consideration; if it had, it would have had no need to address the many other circumstances that the court deemed relevant to whether the

Policy bore more heavily on Asian Americans. Pet. App. 32a-33a.

For that reason, petitioner is wrong to rely (Pet. 21) on the dissenting judge's characterization of the decision below as excusing policy changes made with "discriminatory purpose, as long as no other racial group succeeded at a higher rate." Pet. App. 80a; see *Students for Fair Admissions,* 143 S. Ct. at 2176 ("[a] dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion"). As the dissent's formulation demonstrates, the Equal Protection Clause inquiry focuses on discriminatory *intent*. If there were evidence that the Board intended to discriminate against Asian Americans or achieve a predetermined racial balance—there was none—this would be a very different case. Inferring discrimination based on disparate impact under *Arlington Heights* would be both inapposite and unnecessary in the presence of such evidence.

2. Petitioner's challenge to the court of appeals' disparate-impact analysis does not warrant review for an additional reason: reversing that holding would not alter the outcome. As petitioner acknowledges (Pet. 26), "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264-265. "[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980).

Given the lack of evidence that the Board intended to engage in racial balancing, the court of appeals correctly held that petitioner could not prevail even "if the challenged admissions policy actually imposed a disparate impact on Asian-American applicants to TJ,"

because "the undisputed facts would preclude [petitioner] from proving that the impact was driven by an invidious discriminatory intent." Pet. App. 34a. The court's fact-specific conclusion as to discriminatory intent does not warrant review for the reasons stated above. A ruling from this Court in petitioner's favor on disparate impact therefore would not affect the outcome of this case.

B. The court of appeals correctly held that petitioner failed to demonstrate that the Policy caused any disparate impact on Asian Americans.

The court of appeals also correctly concluded that petitioner's sole purported evidence of disparate impact—the year-to-year drop in Asian-American admissions—did not in fact demonstrate disparate impact under *Arlington Heights*. The court reached that fact-specific conclusion after considering the totality of evidence in the record.

Petitioner's myopic focus on the one-time before-and-after snapshot of admissions rates creates a misleading picture of the Policy's impact. The Policy significantly increased admission of low-income Asian Americans and those attending underrepresented schools, demonstrating that the Policy had just the effect of ameliorating socioeconomic and school-related disadvantages—for students of *all* races—that the Board hoped. Pet. App. 32a. In addition, looking beyond the one-time comparison revealed that the Asian-American share of admissions under the Policy did not deviate significantly from fluctuations in the years *before* the Policy. See p. 11, supra. And the fact that (even looking only at 2021) Asian Americans' share of the admittee pool exceeded their share of the applicant pool further demonstrated that the Policy did not have

the stark impact that petitioner suggested. So, too, did the fact that Asian Americans' acceptance rate in 2021 was well within its typical range—19.48% in 2021 under the Policy, compared to 16.8% to 25% between 2004 and 2020. See Resp. C.A. Br. 29.

More to the point, petitioner did not even *attempt* to establish that the one-year decrease in Asian-American admissions was actually caused by the Policy's Experience Factors or 1.5% allocation—and those were the only features of the Policy that petitioner challenged. The court of appeals' insistence on "isolating [whether the Policy was] the operative factor," Pet. App. 30a, reflects black-letter equal protection law. *Tex. Dep't of Hous. & Community Affairs*, 576 U.S. at 542 (a disparate impact claim "must fail" without such evidence); *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2346-2347 (2021). It is also common sense: as petitioner conceded below (Pet. C.A. Br. 26-27), fluctuations in school admissions demographics are "reasonably expected" because the applicant pool is composed of completely different individuals each year, and there is no reason to assume that a particular racial group should have the same proportion of admitted students every year.

Indeed, in 2021, the first year the Policy was implemented, the applicant pool markedly differed from earlier years. Students submitted roughly 36% (approximately 1,000) more applications, and many of those applications came from historically underrepresented schools. Asian Americans represented a significantly smaller portion of the applicant pool than in previous years. Yet petitioner made no effort to control for these obvious contributing factors to the 2021 demographics, thus failing to "get to first base" under well-established equal protection doctrine. *Boston*

Parent Coal. for Acad. Excellence Corp. v. *Sch. Comm. of City of Boston*, 996 F.3d 37, 46 (1st Cir. 2021); *Watson* v. *Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988).

Petitioner also failed to establish that the selection criteria it challenged caused any disadvantage to Asian-American students as a group. Pet. App. 33a. Petitioner first asserted that the 1.5% allocation disproportionately disadvantaged Asian Americans. Yet as the court of appeals correctly observed, that argument (like petitioner's discrimination-by-proxy argument) failed because the feeder schools most affected by the 1.5% allocation were not proxies for Asian-American applicants. Pet. App. 33a n.5; JA3203-3358; see p. 9, *supra*. Petitioner also emphasized the underrepresented schools Experience Factor, but that factor could not have materially burdened Asian Americans (or even students from feeder schools of all races) because, as petitioner does not dispute, that factor made a difference in only *seven* out of 550 seats.[6] JA2903, JA554.

C. There is no conflict among the courts of appeals.

Petitioner also seeks to manufacture a circuit conflict by contending that the Fourth Circuit departed from the decisions of other courts of appeals in holding that the one-year drop in Asian-American admissions was not independently sufficient to establish discriminatory disparate impact. In fact, however, every

[6] That factor affects admissions decisions only with respect to the 100 seats not allocated to any middle school. For the allocated seats, the competing students all attend the same school and therefore a school's underrepresented status affects all applicants from the school equally.

court of appeals to address whether disparate impact may be shown based only on a year-to-year comparison has agreed with the Fourth Circuit. Those courts have reasoned that such fluctuations do not in themselves establish (1) a disproportionate disadvantage (2) caused by the change in policy. See *Boston Parent Coal.*, 996 F.3d at 46; *Hayden* v. *County of Nassau*, 180 F.3d 42, 51-52 (2d Cir. 1999); *Lewis* v. *Ascension Parish School Board*, 806 F.3d 344, 360-361 (5th Cir. 2015).

Contrary to petitioner's contention, the Third and Ninth Circuits do not hold otherwise. The Third Circuit's decision in *Pryor* v. *National Collegiate Athletic Ass'n*, 288 F.3d 548 (3rd Cir. 2002), did not even concern the showing necessary to establish disparate impact. The court held only that the plaintiff had plausibly alleged discriminatory intent where the NCAA imposed a policy that it knew, based on studies and projections, would reduce the number of qualifying Black athletes. *Id.* at 552, 564-565. The Ninth Circuit's decision in *Pacific Shores Properties, LLC* v. *City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), is also inapposite. There, the court considered an ordinance that imposed new restrictions on group homes, and held that the ordinance's effect of reducing the number of group homes by 40% was one piece of evidence that helped create a triable issue of fact as to discriminatory intent. *Id.* at 1162. But there was no question that the challenged ordinance caused the adverse effect, because that case did not involve an admissions policy that acts on an entirely different set of applicants every year. *Pacific Shores* thus merely reflects the fact that the evidence necessary to demonstrate disparate impact varies with the circumstances of the case. That is simply a product of the fact-specific nature of the *Arlington Heights* analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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