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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Fairfax County School Board's brief in opposition underscores the need for this Court's review. The Board reframes this case as a factual dispute, repeating the arguments it made in two lower courts. Yet, there is no dispute of fact here. This case was decided on cross motions for summary judgment. The parties conceded that no disputes of material fact remained—the paper record speaks for itself.

Four federal judges considered the undisputed facts, and they wrote four separate opinions on how the law applies to those facts. The disagreement between the parties and among the lower court judges centers on fundamental questions of law. Even if the Board's argument on the merits were ultimately correct, the state of the disagreement itself demonstrates the need for certiorari. In the wake of this Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*), these questions have only become more urgent.[1] The Court should grant the Coalition for TJ's petition for certiorari to decide them.

I. This Case Presents Contested Legal Questions that Merit This Court's Review

This case squarely presents the question whether a school board violates the Equal Protection Clause when it uses race-neutral criteria to balance admissions by burdening students of a particular racial group and benefitting those in other racial groups. Subsumed within this question are purely

[1] The Board does not contest that this case involves an issue of national importance. Nor does it counter the Coalition's observation that universities have already taken note of the Fourth Circuit's decision—and that some view it as a roadmap to continue racial discrimination after *SFFA*.

legal issues that were disputed below. The disagreement between Judges Heytens and King on one side and Judges Rushing and Hilton on the other was driven by their views on (a) how to measure racial impact in an intentional discrimination claim; and (b) whether a school board acts with discriminatory intent when it chooses to implement admissions criteria for the purpose of readjusting the racial composition of a school. The answers to these questions are critical not just for the future of admissions after *SFFA*, but to ensure that the work of "eliminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206.

A. The Case Raises a Fundamental Dispute Over the Evidence Needed To Prove Discriminatory Intent

The Board's attempt to support the Fourth Circuit's decision highlights the fundamental legal question the Coalition asks the Court to decide—what is discriminatory intent? Echoing the majority below, the Board says that the Coalition's evidence does not establish that the Board sought to racially balance TJ (or even to change TJ's racial composition). Yet the dispute is not over what the Board did—the record is clear and undisputed—but whether what the Board did demonstrates its intent to discriminate against Asian Americans. That is the question of law this Court must decide.

The Board's points of agreement with the Fourth Circuit majority demonstrate the importance of this question. For example, although the Board says there is no dispute over the definition of racial balancing, it adopts a definition of racial balancing so narrow that it would exclude any race-neutral measure that did

not result in perfect proportional balance—regardless of the decisionmakers' intent. *See* Opposition at 15–16. On the other hand, the Coalition's theory is that discriminatory intent exists when facially race-neutral criteria are chosen *in furtherance of* racial balance—even when the demographic result might vary from year to year and might not result in a perfect match with the racial makeup of the community or the applicant pool. Petition at 20–21. From a legal standpoint, what matters is not that a precise balance is achieved, but that specific criteria are chosen in service of a racial balancing goal. Choosing criteria because it will assign benefits and burdens on the basis of race is how this Court has previously defined discriminatory intent. *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

The same goes for the Board's argument that there was no attempt made to readjust TJ along racial lines or to benefit other racial groups at the expense of Asian Americans. Opposition at 17–18. The Board simply asserts a different legal threshold for proving such things. After all, the record is clear that the entire impetus for the TJ admissions overhaul was anger over the school's racial makeup, and that all subsequent discussion was framed around how to increase the proportion of black and Hispanic students admitted to TJ. The district court found that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception." App. 106a. In the wake of this overwhelming and undisputed evidence of racial intent, the Board simply "refuses to look past the Policy's neutral varnish." App. 54a (Rushing, J., dissenting). But burying its collective head in the sand like an ostrich, *see Fisher v. Univ. of Tex. at Austin*,

570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting), does not erase the Board's clear purpose.

The Board's position is ultimately a confusing combination of three arguments: (1) direct animus against Asian Americans is required to prove discriminatory intent; (2) the Board didn't act with discriminatory intent because it sought to promote not only racial, but also geographic and socioeconomic diversity; and (3) the challenged criteria are a race-neutral alternative to overt discrimination. These are all disputed legal questions. For example, the Coalition argues that unlawful discrimination need not involve overt racial animus. *See* Petition at 22–23. And it maintains that this Court's precedents don't require that race be the sole motivating factor—only that the decision be "at least in part" based on race. *Feeney*, 442 U.S. at 279.

The Board's position that race-neutral alternatives are per se lawful has never been accepted—especially where those very criteria are being challenged as discriminatory. Its argument is nonsensical. After all, a race-neutral alternative is an *alternative* to racial discrimination that must be considered before actual discrimination can be narrowly tailored to further a compelling interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Here, the question is not whether the Board's criteria may be adopted as an alternative to overt racial classifications, but whether the criteria themselves are discriminatory. The Board cites no authority that facially race-neutral policies are exempt from *Arlington Heights* scrutiny because they are facially race-neutral. Nor has it argued that the admissions criteria satisfy strict scrutiny.

Ultimately, this case comes down to the legal question of what constitutes discriminatory intent. The Board and the Fourth Circuit majority promote a vision that would permit school boards to set a goal of racial balance and then implement criteria designed to promote that goal, so long as they also discuss other types of diversity and don't use overt racial classifications. The Coalition, Judge Rushing, and the district court promote a straightforward reading of *Arlington Heights* and *Feeney* in line with this Court's recent admonition that "'[w]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *SFFA*, 600 U.S. at 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). The Court should grant the Coalition's petition to decide between these competing visions of the equal protection guarantee.

B. The Dispute Over the Legal Standard for Measuring Racial Impact Is Squarely Presented

The starting point of the Coalition's argument is that the Board's admissions overhaul adversely affected Asian-American students, making it substantially more difficult for them to get into TJ. The district court agreed. It recognized both that a substantial drop in the proportion of Asian Americans admitted to TJ occurred, and that selected criteria—like the 1.5% middle school guarantee—"force[] Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools." App. 98a. The Fourth Circuit majority rejected this holding precisely

because Asian Americans still "do better in securing admission to TJ than students from any other racial or ethnic group." App. 33a. The parties and the judges below fundamentally disagree on whether an intentional discrimination claim could *ever* succeed under these circumstances. This is a legal dispute, not a factual one.

The Board attempts to paper over this disagreement by focusing myopically on the Fourth Circuit's criticism of the year-over-year metric. *See* Opposition at 28–29. Yet even there, the majority rejected the Coalition's position not because of any factual deficiency, but because the court thought it did not bear on whether "Asian American students face proportionally more difficulty in securing admission to TJ than do students from other racial or ethnic groups." App. 31a. Why not? Because the majority applied a different legal standard than did the dissent or the district court. Specifically, the majority required a showing not just that Asian-American students were disproportionately burdened by the Board's criteria, but also that they ultimately performed worse than members of other racial groups. *See* App. 33a. In short, Judge Rushing was correct that, under the majority's rule, "governments are free to pass facially neutral laws explicitly motivated by racial discrimination, as long as the law's negative effect on the targeted racial group pushes it no lower than other racial groups." App. 79a–80a (Rushing, J., dissenting).

Because the Fourth Circuit's analysis would permit intentional discrimination up to the point racial balance is achieved, it warrants this Court's

review in the context of whether the Board's actions here violated the Equal Protection Clause.[2]

II. The Board Misrepresents the Record and History of the Case

The Board attempts to minimize the importance of this case and create the impression that the facts are unfavorable to the Coalition. These efforts are unconvincing. The undisputed facts contained within the record overwhelmingly show the Board's racial purpose. As the Board's opposition consists almost entirely of its gloss on the undisputed facts, Petitioner provides this brief rebuttal.[3]

- The Board says that the six feeder middle schools that sent the most Asian-American students to TJ don't have substantially more Asian Americans than other non-feeder middle schools. Opposition at 9. But

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[2] The Board also focuses on supposedly missing evidence of causation. The Board itself attributed the change in the racial makeup of TJ to the challenged policy, and the policy's effects can be plainly observed in the data. *See* App. 97a–99a; JA0554–59 (ECF No. 36-2 in case no. 22-1280 (4th Cir.)). This is not a case where a "robust causation" requirement is needed to ensure that disparate impact liability does not lead to racial quotas. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015) Disparate impact is just one piece of the puzzle in an intentional discrimination case—a "starting point" towards answering the ultimate question whether the Board acted with discriminatory intent. *See Vill. of Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252, 266 (1977).

[3] This is an abbreviated rejoinder to the Board's brief in opposition. As the district court found, the undisputed evidence "leaves little doubt" that the Board's "decision to overhaul the TJ admissions process was racially motivated." App. 99a.

the Board ignores that the students *who chose to apply to TJ* from the feeder schools were overwhelmingly Asian American—and the Board knew this as it crafted its policy. *See* JA2800 (ECF No. 36-6 in case No. 22-1280 (4th Cir.)) (Board members receiving email containing "data on TJ admissions for all FCPS middle schools, including for ethnicity and FRM status.").[4] In the year immediately before the challenged criteria went into effect, ***84%*** of the offers extended to students from these six schools went to Asian-American students. App. 71a–72a; *see also* JA072 (tables synthesizing individual data).

- The Board points to the small increase in Asian-American students admitted to TJ from middle schools traditionally under-represented among TJ students. Opposition at 11. But that only highlights the impact the chosen criteria had on Asian-American students overall, as the additional 24 Asian-American students from these schools did not come close to making up for the drastic reduction of Asian-American students from the feeder schools. *See* JA072. Despite an increase in overall class size—and an increase in Asian-American students admitted from the non-feeder schools—56 fewer Asian-American students gained admission to TJ. JA557, 562.

[4] Cites to "JA" refer to the parties' joint appendix in the Fourth Circuit.

- The Board repeatedly asserts that it had no idea whether the criteria it adopted would lead to a drop in Asian-American enrollment, because its racial modeling and projections were undertaken only for earlier proposals. *See* Opposition at 9, 21. It goes as far as to say the Coalition's position is "made up." *Id.* at 9. Yet it is the Board's spin on the record that defies reality. By the time it adopted the final policy, the Board knew that the 1.5% middle school guarantee would fall harshly on the heavily Asian-American applicants from the feeder schools. Its staff had already investigated the racial effect of the proposed Experience Factors. *See* JA0176–77, 2800. And staff had modeled several proposals to test their projected racial effect. *See* JA1930–74 (white paper replete with modeling of various proposals); JA1206–32 (staff presentation to the Board including modeling on the merit lottery proposal). So although staff lacked the specific information needed to model the exact policy the Board ultimately enacted, *see* JA1246, the Board had all the data necessary to predict the policy's racial effect, *see* App. 64a–70a (Rushing, J., dissenting).[5]
- The Board also says that it could not have intended to racially balance TJ because it

[5] The policy as adopted was effectively a last second modification by the Board of one of staff's proposed plans. The final version of the policy was not known to anyone until just before the Board meeting where it was adopted. *See* App. 93a, 104a–105a.

rejected different plans that would have produced a "better" racial balance. Opposition at 21. But the share of Asian-American students admitted to TJ under the adopted criteria dropped the same amount—19 percentage points—as was projected under one of the replacement plans the Board rejected—the confusingly-named "merit lottery."[6] JA1226. In any event, whether the Board could have chosen a different policy that had a greater racial impact doesn't mean the policy it chose lacked a racial purpose. Ultimately, the Board members were interested in remaking TJ's racial demographics, but disagreed on how to do so while balancing other considerations. *See* JA0406 (Board member McLaughlin questioning "will chance give us the diversity we are after?"), JA430 (Board member Omeish, who voted in favor of a lottery, supported the "proposal towards greater *equity*, to be clearly distinguished from *equality*").

- The Board presents the subsequent fluctuation of Asian-American admission rates—which is not in the record—as undercutting the Coalition's arguments. Yet even the figures the Board presents are

[6] The "merit lottery" was presented as a tool to accomplish racial balancing. *See* App. 65a–67a; JA0753–55. It incorporated "regional pathways" that limited the number of offers from each of five Fairfax County regions to 70. JA0750–51. Three of the regions included two feeder schools each, which is part of how the plan would have substantially limited Asian-American enrollment at TJ. *Id.*

substantially below average for Asian-American representation at TJ in previous years. More importantly, however, the Coalition never argued or expected that the school's demographics would stay unchanged. That is why the Coalition showed that *even within the same applicant pool*, the 1.5% set aside and experience factor bonuses disproportionally burden Asian-American students. *See also* JA2915 (only 27.2% of the students who received the bonus points for attending an underrepresented middle school were Asian American).

- The Board argues that the Coalition "waived" some portion of its argument because the Coalition presented its own proposal to the Board that would have increased black and Hispanic enrollment at TJ. Opposition at 18–19. Of course, the Coalition's own proposal—presented without legal advice—is irrelevant to whether the *Board's* policy was adopted for a racial purpose. In any case, the Coalition was trying to do whatever it could to save TJ's merit-based admissions process. The Coalition testified that the "second-look" proposal was not its "optimal position." JA2789. It preferred "some variation of what was originally in place, with the standardized test," but proposed the "second-look" solution as an attempt at "compromise" in response to the merit lottery proposal. JA2788–89.

- The Board says that the Coalition "reaffirmed" at argument below "that an intent to increase Black and Hispanic representation would not itself render a race-neutral admissions policy unconstitutional." Opposition at 19. This is true, but it does not hurt the Coalition. The mere intent to increase black and Hispanic enrollment only violates the Equal Protection Clause if the means chosen are designed to treat applicants differently based on race. For example, the Board removed the $100 application fee for TJ. Even if it did so to increase black and Hispanic enrollment, it is implausible that having all applicants pay $0 discriminates against anyone.

- Finally, the Board argues that the statements of individual Board members don't matter because they aren't statements by the full Board. This is directly contrary to *Arlington Heights*, which says that, in proving discriminatory intent, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268.

In the end, although all *Arlington Heights* cases involve a deep dive into the facts, the record here is clear and undisputed. This Court need only decide which reading of the Equal Protection Clause and the relevant precedents is correct. The Board's treatment

of the facts should not obscure that clearly presented legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

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