No. 21A590

IN THE

Supreme Court of the United States

COALITION FOR TJ,

APPLICANT,

V.

FAIRFAX COUNTY SCHOOL BOARD,

RESPONDENT.

To the Honorable John G. Roberts, Jr., Chief Justice
and Circuit Justice for the Fourth Circuit

AMICUS BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF APPLICANT

Daniel R. Suhr
Counsel of Record
Jeffrey J. Jennings
LIBERTY JUSTICE CENTER
440 N. Wells St., Suite 200
Chicago, IL 60654
(312) 263-7668
dsuhr@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

April 11, 2022

INTEREST OF AMICUS

Liberty Justice Center is counsel to plaintiffs in two cases in the Fourth Circuit applying an *Arlington Heights* analysis to racially motivated policies. In the first, LJC represents three families in Loudoun County Public Schools who are challenging a leadership program initially only open to students of color but now facially open to all students. *Menders v. Loudoun County School Board*, No. 22-1168 (4th Cir.). In the second, LJC represents the Catholic Diocese of Charleston and South Carolina Independent Colleges & Universities, Inc., the trade association for nonpublic institutions of higher learning in the Palmetto State, in a challenge to the South Carolina Constitution's Blaine Amendment. *Bishop of Charleston v. Adams*, No. 22-1175 (4th Cir.).

In both cases, the plaintiffs and defendants disagree about the standard set in *Arlington Heights*. And in *Menders* in particular, the school argued, and the district court ruled, that the goal of helping students of color did not constitute an intent to discriminate against white students. As a result, LJC has a substantial interest on behalf of its clients in this Court's resolution of this application.[1]

SUMMARY OF THE ARGUMENT

The Coalition is correct that this Court should grant review in its case. Appl. 11-14. Quite simply, courts cannot apply one standard for *Arlington Heights* to laws they

[1] Counsel for Amicus authored this this brief independent of any counsel for any party and bore the entire cost of production. *See* Rule 37.6. Counsel secured consent from both parties, though obviously was not able to provide ten-day notice given the expedited nature of the application.

like and another to laws they do not. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring). Courts must play it straight and disregard any policy outcomes of their rulings when applying the *Arlington Heights* analysis. *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977).

Political actors of all stripes use the *Arlington Heights* approach to attack laws they do not like and believe were motivated by racial or religious animus (though *Arlington Heights* was a racial prejudice case, this Court subsequently adopted its factors for discerning religious animus in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)). For examples, challenges alleging racial or religious motivation have been brought against laws on immigration, election integrity, felon disenfranchisement, and redistricting; and motivating policies barring public funding to faith-based schools, requiring diversity quotas (as in the Applicant's case), or targeting people of faith, especially over matters of sexuality.

A strict standard of proof and a presumption of good faith for governmental actors will frustrate challengers of all laws or government policies. A generous standard of proof and a skepticism of governmental motives will encourage challengers of all laws or government policies. But regardless, the Court cannot apply Constitutional analysis that is strict to some laws motivated by racial or religious animus, while applying a generous analysis to others. We must have *equal* justice under law.

ARGUMENT

Numerous courts have used the *Arlington Heights* framework to strike down or enjoin laws in recent years. Some set the bar low to find racial prejudice behind election integrity or voter identification laws. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1041 (9th Cir. 2020), *rev'd Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (plaintiffs must show "racial discrimination was *a* motivating factor."); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) ("Challengers need not show that discriminatory purpose was the 'sole' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'"). Other courts see racial or religious prejudice behind immigration policy decisions, even if the evidence proffered was not directly connected to those decisions. *See New York v. United States DOC*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018) ("NGO Plaintiffs identify several statements made by President Trump himself in the months before and after Secretary Ross announced his decision that, while not pertaining directly to that decision, could be construed to reveal a general animus toward immigrants of color."); *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276 (E.D.N.Y. 2018) (similar). Some older immigration statutes are equally vulnerable, even after numerous amendments. *See United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 U.S. Dist. LEXIS 155741, at *62 (D. Nev. Aug. 18, 2021).

In these cases, circumstantial or indirect evidence is sufficient, and courts are permitted to pierce the veil of neutral explanations made on the record to find the racial animus lurking beneath. *See, e.g., La Union del Pueblo Entero v. Ross*, 771 F. App'x 323, 324-25 (4th Cir. 2019) (Wynn, J., concurring) ("[T]he district court should

keep in mind that 'discriminatory intent *need not be proved by direct evidence*.'" (quoting *Rogers v. Lodge*, 458 U.S. 613, 618 (1982)) (emphasis original to Judge Wynn)). "[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this." *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).

Yet there are other times when the standard of evidence is quite high, and judicial restraint is in full force: "To prevail on the merits of their constitutional challenges, these Challengers must prove that [the law] was passed with discriminatory intent and has an actual discriminatory impact." *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020). And in conducting that analysis, "the district court *must* afford the state legislature a presumption of good faith" and show "judicial deference to the legislature." *Id.* at 303. *Accord Bos. Parent Coal. V. Sch. Comm. of Bos.*, No. 21-10330-WGY, 2021 U.S. Dist. LEXIS 189566, at *33 (D. Mass. Oct. 1, 2021) ("where the governmental action is facially race neutral and uniformly applied, good faith is presumed in the absence of a showing to the contrary that the action has a disparate impact . . ." (cleaned up)).

In decisions such as these, disparate impact is worded as a requirement, not one of several nonexhaustive factors that are considered holistically. *See, e.g., Bishop of Charleston v. Adams*, No. 2:21-cv-1093-BHH, 2022 U.S. Dist. LEXIS 24090, at *29-30 (D.S.C. Feb. 10, 2022) ("Plaintiffs' failure of proof about discriminatory impact dooms their claims. This is because courts in this context have generally required plaintiffs to prove both intentional discrimination against an identifiable group and an actual discriminatory effect on that group." (cleaned up)). Yet in other instances, "proof of disproportionate impact is but one factor to consider 'in the totality of the circumstances'; it is not 'the sole touchstone' of the claim." *Coal. For TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 U.S. App. LEXIS 8682, at *23 (4th Cir. Mar. 31, 2022) (Rushing, J., dissenting) (quoting *McCrory*, 831 F.3d at 231).

Courts cannot approach prior opinions or legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Precedent from this Court and the Courts of Appeals provides some passages useful for those who wish to be skeptical and strike down laws, and other passages for those who want to presume good faith and uphold laws. But the rule of law is a law of rules, A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989), and the Applicants are correct that this Court's review is necessary to establish a uniform rule to minimize opportunities for judicial freelancing.

This clarity is especially important in the education context, where courts perceive a benign goal of racial inclusion as justifying a policy of racial exclusion. In Amicus's

case on behalf of parents in Loudoun County Public Schools (neighbors to the Fairfax schools at issue in this application), the parents challenge a student leadership program which was originally open only to students of color. The district court found that it was "not plausible" that "these initiatives are intended to be at the expense of white students or are intended to disadvantage white students, but rather to promote a more inclusive educational environment by addressing discrimination and the lingering effects of past discrimination." *Menders v. Loudoun Cnty. Sch. Bd.*, No. 1:21-cv-669 (AJT/TCB), 2022 U.S. Dist. LEXIS 10157, at *18 (E.D. Va. Jan. 22, 2022).

But a program that applies only to specific races triggers strict scrutiny regardless of whether it was animated by benevolent or malevolent feelings toward the races involved. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). White people can be victims of race-based discrimination because of their exclusions from a governmental program, even if the program was intended to provide a positive benefit to people of color whose racial groups had experienced past discrimination. *Id.*

This Court has said straightforwardly several times that it will not extend "relaxed judicial scrutiny" for explicit racial preferences that have a "benign" or "remedial" effect. *See Parents Involved in Cmty. Sch.*, 551 U.S. 701, 759-60 (2007) (plurality); *Shaw v. Reno*, 509 U.S. 630, 653 (1993); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989). This case presents a needed vehicle for this Court to definitively apply these precedents to a different doctrine, *Arlington Heights*: facially neutral laws motivated by a benign or remedial racist intention are just as unconstitutional as those motivated by racist animus or prejudice.

Again, the Applicant is correct in its claim that this Court's review is likely to remind lower courts that the *Arlington Heights'* analysis for racial discrimination applies to discrimination that has a benign intention as much as an insidious motive.

CONCLUSION

The first burden the Applicant must bear is to show is that its "case could and very likely would be reviewed here upon final disposition in the court of appeals." Application at 10 (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). The Applicant is correct in its assessment of the need for this Court's attention to the underlying issue of how the *Arlington Heights* test is applied in lower courts.

Respectfully submitted,

Daniel R. Suhr
Counsel of Record
Jeffrey J. Jennings
LIBERTY JUSTICE CENTER
440 N. Wells St., Suite 200
Chicago, IL 60654
(312) 263-7668
dsuhr@libertyjusticecenter.org

April 11, 2022