

No. _____

In the Supreme Court of the United States

ASSOCIATION FOR EDUCATION FAIRNESS,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION;

DR. THOMAS W. TAYLOR, SUPERINTENDENT,

Respondents.

*On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit*

PETITION FOR WRIT OF CERTIORARI

GLENN E. ROPER
Pacific Legal Foundation
1745 Shea Center Drive
Suite 400
Highlands Ranch, CO 80129

CHRISTOPHER M. KIESER
Counsel of Record
JOSHUA M. THOMPSON
ERIN E. WILCOX
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
916.419.7111
ckieser@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

Whether a plaintiff alleging that a school district implemented facially-neutral admissions criteria for a racially discriminatory purpose must show that the criteria produced a disparate impact on the targeted racial group before a court may consider evidence of discriminatory intent.

LIST OF ALL PARTIES

Petitioner Association for Education Fairness was the Plaintiff in the U.S. District Court for the District of Maryland, and the Appellant before the U.S. Court of Appeals for the Fourth Circuit.

Respondent Montgomery County Board of Education was a Defendant in the district court and an Appellee in the Fourth Circuit.

Dr. Monifa B. McKnight was the Superintendent of the Montgomery County Board of Education and Defendant at the time the complaint was filed in the district court. Dr. McKnight was then replaced by Respondent Dr. Monique Felder, Interim Superintendent, as an Appellee in the Fourth Circuit. The current superintendent is Dr. Thomas W. Taylor, who began his tenure on July 1, 2024. The caption is updated with Dr. Taylor as a respondent.

CORPORATE DISCLOSURE STATEMENT

Petitioner Association for Education Fairness has no parent corporations and no publicly held company owns 10% or more of Petitioner's stock.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Association for Education Fairness v. Montgomery County Board of Education, No. 23-1068, 2026 WL 281028 (4th Cir. Feb. 3, 2026).

Association for Education Fairness v. Montgomery County Board of Education, No. 23-1068, 88 F.4th 495 (4th Cir. Dec. 8, 2023).

Association for Education Fairness v. Montgomery County Board of Education, No. 8:20-cv-02540-PX, 617 F. Supp. 3d 358 (D. Md. Jul. 29, 2022), amended Aug. 4, 2022.

Association for Education Fairness v. Montgomery County Board of Education, No. 8:20-cv-02540-PX, 560 F. Supp. 3d 929 (D. Md. Sep. 15, 2021).

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PETITION FOR WRIT OF CERTIORARI

This case presents an important and recurring question about the role of disparate impact in proving intentional discrimination under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). School districts across the country have overhauled admissions criteria for competitive public schools after concluding that existing systems produced undesirable racial enrollment patterns. As challenges to those admissions changes have reached the Courts of Appeal, the circuits have divided sharply over whether a plaintiff may proceed with an Equal Protection claim alleging intentional discrimination without pleading that the challenged policy reduces the targeted racial group's representation below a particular aggregate benchmark.

In the First and Fourth Circuits, a challenger does not even get off the ground without a showing that the admissions criteria suppressed the targeted group's enrollment at least below the group's share of the applicant pool. *Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Boston*, 89 F.4th 46, 58 (1st Cir. 2023); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 881-82 (4th Cir. 2023). Challengers in the Second and Third Circuits, on the other hand, can prove intentional discrimination without such a stark showing of aggregate "underrepresentation." *Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 171-72 (2d Cir. 2024) (CACAGNY); *Sargent v. Sch. Dist. of Phila.*, 165 F.4th 727, 749-50 (3d Cir. 2026). Because the Equal Protection Clause protects individuals, not racial groups, these courts have focused on the effects of

challenged policies on particular persons rather than aggregate racial benchmarks.

As the circuit split deepens, this Court’s intervention is necessary. These cases involve five of the largest school districts in America. Other major cities have either tried or considered similar plans. Yet the governing constitutional standard now depends on geography. Evidence sufficient to establish an Equal Protection claim in some circuits is legally irrelevant in others. If “[e]liminating racial discrimination means eliminating all of it,” this cannot stand. *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (*SFFA*). The Court should grant this petition, resolve the split, and restore national uniformity to this fundamental area of constitutional law.

OPINIONS BELOW

The decision of the Fourth Circuit is not reported. It is available at 2026 WL 281028 and reprinted at App. 1a-5a. The decision of the district court is available at 617 F. Supp. 3d 358 and reprinted at App. 6a-38a.

JURISDICTION

The Fourth Circuit issued a final decision on February 3, 2026. App. 1a-5a. Chief Justice Roberts granted an application to extend the time to file a petition for a writ of certiorari until July 3, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that no State shall “deny to any person within its jurisdiction the

equal protection of the laws.” U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Montgomery County’s Magnet Middle School Programs

Montgomery County Public Schools (MCPS) is one of the largest public school districts in America. App. 40a. For decades, it has maintained a wide variety of choice and magnet programs throughout its K-12 offerings. MCPS launched a magnet program designed for gifted middle school students more than 40 years ago with a county-wide math, science, and technology (STEM) program at Takoma Park Middle School. App. 46a. Today, there are four magnet middle school centers—two each serving the Upcounty and Downcounty geographic regions, with each region having a STEM and Humanities magnet program.¹ App. 46a-47a. These programs provide students with “unique academic experiences that are not readily available in home schools.” App. 47a. As a result, admission to the magnet middle school program has always been highly competitive. App. 7a (the magnet middle school programs are “highly selective and academically rigorous”).

As the population of Montgomery County grew in the 1990s, the racial composition of the magnet programs became a salient issue for the school district. App. 45a-48a. MCPS even instituted a race-

¹ The Takoma Park program now serves as the Downcounty STEM magnet, while the Downcounty Humanities program is at Eastern Middle School, Upcounty STEM at Roberto Clemente Middle School, and Upcounty Humanities at Martin Luther King Jr. Middle School. App. 46a-47a.

based transfer policy for its noncompetitive elementary magnet program. App. 45a. But when a white student denied a transfer challenged it, the Fourth Circuit invalidated it as unconstitutional “racial balancing.” *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Public Schs.*, 197 F.3d 123, 128 (4th Cir. 1999). *Eisenberg* ended the school district’s attempt to use explicit racial classifications to achieve racial balancing in MCPS’ magnet programs.

Despite ongoing complaints from some quarters,² the broadly merit-based admissions criteria changed little over the next 15 years. App. 47a-48a. Admissions decisions considered only a student’s grades, his or her score on the Cognitive Abilities Test (CogAT), and teacher recommendations. App. 59a. But during this time, the demographics of both Montgomery County and the magnet middle school program substantially shifted. By 2013-14, the Asian-American share of the County’s population had increased and Asian-American students made up nearly half of the enrollment in the four magnet middle school programs. App. 48a.

The substantial increase in Asian-American enrollment in the magnet programs seemingly triggered more concern from MCPS. After all, it was only then that MCPS sought the help of the consulting firm Metis Associates to perform a “comprehensive study” of its special academic programs to determine whether “all students have equitable access to [magnet] programs, especially in light of the

² For example, in 2005, a parent group known as African American Parents of Magnet School Applicants asked MCPS to disband the magnet middle school programs due to the lack of racial balance. App. 47a.

continuing growth of MCPS student enrollment and the changing demographics of the region.” App. 48a-49a.

B. The Metis Report and Admissions Overhaul

The study became the Metis Report.³ Made public in March 2016, the Report concluded that “[t]here are significant racial and socioeconomic disparities in the enrollment and acceptance rates to academically selective programs, which suggest a need to revise the criteria and process used to select students for these programs.” App. 49a. It focused on the underrepresentation of black and Hispanic students in the magnet programs—and the consequent “overrepresentation” of Asian Americans. App. 50a. To fix this supposed problem, Metis recommended changing the admissions criteria for competitive programs like the magnet middle schools, suggesting “broadening the definition of gifted to include non-cognitive measures such as motivation and persistence, using group-specific norms that benchmark student performance against school peers with comparable backgrounds, [and] offering automatic admissions for students in the top 5-10% of sending elementary or middle schools.” *Ibid.*

MCPS moved quickly to implement the Metis Report’s suggestions. App. 51a-52a. As the Board of Education discussed overhauling admissions to the magnet programs, Board members were clear that they sought racial balance. One Board member expressed concern over the “substantial under-

³ The Metis Report was incorporated by reference in the complaint. It is available here: <https://tinyurl.com/rsup43zp>.

representation of students of color” in the competitive magnet programs and hoped “that programs will become more diverse and be more reflective of our student population.” App. 57a-58a. Another was even more explicit, emphasizing that MCPS should care about “not simply . . . creating opportunity and having that be blind and neutral but in fact ensuring there were controls so that in fact those choices could reflect the community that we live in and to address some of the disparities that exist.” App. 56a. He warned that “[i]f we expand blindly we are going to end up in the same place ten years from now, fifteen years from now, or whatever, because privilege is not going to go away but our ability to create those controls is what is going to help us to define what we want those programs to look like.” App. 57a.

The Board delegated the task of overhauling the admissions criteria to then-superintendent Dr. Jack Smith. App. 82a-83a. Over the next few years Superintendent Smith implemented what he called the “field test.” App. 58a-59a. The field test employed admissions controls designed to achieve the Board’s racial balancing goals: namely, peer grouping and local norming. Peer grouping made it more difficult for students at high-performing elementary schools to get into the magnet programs on the theory that they had academic peers at their home schools, App. 60a, while local norming eliminated the CogAT as an across-the-board metric, effectively giving bonus points to students at schools with a higher free-and-reduced-price lunch percentage. App. 67a.

Asian-American students in Montgomery County are clustered at a few high-performing elementary schools, App. 60a, 67a, so it was no surprise that these controls worked together to tank Asian-American

enrollment in the magnet programs. The Asian-American share of invitees to both Upcounty programs dropped by half, while at the Takoma Park Downcounty STEM program, Asian Americans were 45.6% of invitees in the three years before the field test, but just 31.5% in the three field test years. App. 75a-76a. Asian-American parents expressed concern about the stark drop in Asian-American children earning seats in the magnet programs, but Board members and MCPS officials were more concerned that the field test didn't do *more* to achieve racial balance. App. 64a-66a.

C. The Lawsuit and the Pivot to the Lottery

The Association for Education Fairness (AFEF), an organization of Montgomery County parents formed to advocate for merit-based admissions to MCPS's choice programs, sued the Board on behalf of many members with children intending to apply to the magnet programs. App. 42a-44a. AFEF argued that the field test was implemented to discriminate against Asian-American students by limiting their opportunity to attend the magnet middle school programs. The district court initially denied the Board's motion to dismiss. It held first that "no real dispute exists that the field test criteria disproportionately affected Asian American students" because "the acceptance rate for Asian American students has dropped at each of the programs." *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 560 F. Supp. 3d 929, 952 (D. Md. 2021). The district court then held that AFEF's complaint "makes plausible that the County acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representa-

tion of certain racial groups in the middle school magnet programs to align with district-wide enrollment data.” *Id.* at 953.

But in the midst of the COVID-19 pandemic, MCPS was already in the process of changing the criteria again. App. 77a. As opposed to the public process that accompanied the Metis Report and implementation of the field test, this round of changes took place entirely in private. App. 77a-78a. What emerged was an admissions lottery. MCPS ditched the competitive admissions process that existed before, including the CogAT, and replaced it with a lottery open to any student scoring in the 85th percentile or better on the relevant Measures of Academic Progress (MAP) assessment. App. 78a. But these percentiles, too, are locally normed, making it disproportionately much harder for Asian-American students clustered in high-performing, low-poverty elementary schools to access the lottery. App. 78a-79a. Indeed, AFEF eventually obtained data demonstrating this in detail.⁴ Accounting for local norming so that all students’ scores are compared to everyone else in the district, students in the band of lowest-poverty schools (where Asian-American students are disproportionately clustered) had to achieve a 93rd percentile score on the MAP-Math to qualify for the STEM program

⁴ AFEF submitted this data in support of its Rule 60(b) motion for relief from the judgment. *See* ECF Nos. 102-1, 102-2, 102-3 in case 8:20-cv-02540-PX (D. Md.). The data is not relevant to the question before the Court because it does not change the fact that AFEF cannot satisfy the Fourth Circuit’s aggregate benchmark. But it would be relevant on remand if the Court were to reject the Fourth Circuit’s rule.

lottery, while students from the highest-poverty band only had to achieve a 60th percentile score.⁵

The results were no better for Asian-American students than under the field test. Indeed, Asian-American students did worse than under the field test when it came to admissions to the two STEM magnet programs. App. 79a. So AFEF amended its complaint to challenge the lottery as implemented to discriminate against Asian-American applicants. This time, though, the district court granted the Board's motion to dismiss. The district court latched onto a new theory of disparate impact, which at that point had only been advanced in an opinion concurring with the grant of a stay pending appeal in *Coalition for TJ*. App. 22a-26a. Under that theory, AFEF could not demonstrate disparate impact—and therefore, could not prevail—unless it could plead that the share of Asian-American students admitted under the lottery was lower than the Asian-American share of the applicant pool for the magnet programs. App. 24a, 26a. Because the substantial drop in Asian-American enrollment did not meet that benchmark, the district court dismissed AFEF's complaint.⁶ App. 26a.

⁵ ECF No. 102-3 at 2.

⁶ Despite its initial holding that AFEF had pleaded the field test was enacted with discriminatory intent, the district court also held AFEF had not pleaded that the lottery was sufficiently related to the field test such that it was still plausible that MCPS chose the lottery for a discriminatory purpose. App. 26a-36a. AFEF argued that the Board's actions during the field test era combined with the lottery's continued impact on Asian-American applicants made it at least plausible that the lottery was simply the successor of the field test. But this dispute is not before the Court because the Fourth Circuit did not pass on it. App. 3a-4a.

Before briefing in the Fourth Circuit, that court decided *Coalition for TJ*, which adopted the applicant pool benchmark the district court had relied on to dismiss AFEF's complaint. 68 F.4th at 881. Recognizing the binding circuit precedent, AFEF briefed the question on appeal to preserve it for a petition for a writ of certiorari to this Court. Following *Coalition for TJ*, the Fourth Circuit affirmed the judgment solely based on AFEF's failure to plead that the lottery had sufficient disparate impact on Asian-American students in the aggregate. App. 3a-4a.

This petition followed.

REASONS FOR GRANTING THE PETITION

Parent groups have twice before asked this Court to decide whether those challenging admissions criteria for competitive public schools must satisfy an aggregate disparate-impact benchmark before courts may consider evidence of discriminatory intent. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 545 (2024) (mem.); *Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Boston*, 145 S. Ct. 15 (2024) (mem.). Since the question was last presented, the conflict among the circuits has become both deeper and more explicit. The Second and Third Circuits have now rejected the First and Fourth Circuits' approach, creating an acknowledged and outcome-determinative division over a recurring question of equal-protection law. This case presents an ideal vehicle to resolve that conflict.

I. The Circuit Split Over Disparate Impact In *Arlington Heights* Cases Is Deepening

The circuits are now squarely divided over whether plaintiffs alleging that a school district implemented admissions criteria to discriminate on the basis of race must satisfy an aggregate disparate-impact benchmark before courts may consider evidence of discriminatory intent.

Coalition for TJ was the first of these cases to reach this Court. There, the district court granted summary judgment to an organization of parents after finding that the school board’s overhaul of the admissions criteria for Thomas Jefferson High School for Science & Technology in Fairfax County, Virginia “disproportionately deprived” Asian-American applicants “of a level playing field in competing for” seats. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022). A divided Fourth Circuit panel reversed, holding that the criteria could not possibly discriminate against Asian Americans because “Asian American applicants were . . . the only racial or ethnic group to receive offers notably in excess of its share of the applicant pool in 2021.” 68 F.4th at 881.

The parent group sought a writ of certiorari in this Court, arguing that Fourth Circuit’s applicant pool comparator was out of step with how other circuits evaluated disparate impact in *Arlington Heights* cases. See Petition for Writ of Certiorari, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, at 23-27.⁷ But because *Coalition for TJ* was the first such case to reach the Court of Appeals, the group could not

⁷ The petition is available here: <https://tinyurl.com/47x4je3x>.

point to any contrary decisions in the K-12 admissions context. Nevertheless, Justices Alito and Thomas urged the Court to grant the petition because the Fourth Circuit’s applicant pool benchmark “effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups.” *Coal. for TJ*, 146 S. Ct. at 545 (Alito, J., dissenting from denial of certiorari). Citing the First Circuit’s then-recent *Boston Parent Coalition* decision, the dissenters warned that if the Court did not decide the issue, the Fourth Circuit’s reasoning would spread and continue to be used “as a blueprint for evading *SFFA*.” *Id.* at 545-46.

Boston Parent Coalition became the second petition on this issue. As Justice Alito noted, the First Circuit in that case relied on *Coalition for TJ* to uphold Boston’s overhaul of admissions criteria for its three competitive Exam Schools. *Boston Parent Coal.*, 89 F.4th at 57-58. The court rejected the organization’s claim solely because it could not show aggregate disparate impact relative to a population comparator. That was true, even though the district court had found that “[t]hree of the seven School Committee members harbored some form of *racial animus*,” and the plan was “chosen precisely because of [its] effect on racial demographics.” *Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Boston*, No. 21-cv-10330, 2021 WL 4489840, at *15 (D. Mass. Oct. 1, 2021) (emphasis added). This was precisely what Justice Alito and Judge Rushing, dissenting in *Coalition for TJ*, had predicted: intentional discrimination excused because it did not work well enough to hit an arbitrary benchmark. *See Coal. for TJ*, 68 F.4th at 904 (Rushing, J., dissenting)

(an aggregate comparator means “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”).

Shortly after the Boston parent group filed its petition with this Court, the Second Circuit heeded these concerns and opened a clear circuit split. *CACAGNY* involved admissions to New York City’s competitive Specialized High Schools. A civil rights group alleged that the city expanded and gerrymandered eligibility for a special admissions pathway designed for low-income students in an attempt to exclude Asian-American applicants. 116 F.4th at 166-67. Yet the plan did not work as intended, and the number of Asian-American students admitted actually *increased* in some years under the new plan. *Id.* at 168-69.

The Second Circuit held this was no bar to an intentional discrimination claim. It rejected the need to meet an aggregate benchmark as a prerequisite to proving an intentional discrimination claim. Instead, the Second Circuit reasoned that “a racially-motivated, facially neutral policy that excludes some individuals from a government program based on their race is not immunized from strict scrutiny because it underperforms in an unconstitutional mission with respect to a targeted racial group in the aggregate.” *Id.* at 173. In short, the court flatly rejected the First and Fourth Circuits’ focus on aggregate performance in favor of this Court’s instruction that the Equal Protection Clause protects individuals, not groups. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

Citing *CACAGNY*, the Boston parent group filed a supplemental brief detailing the circuit split.⁸ But the Court denied the petition, with Justices Alito and Thomas again dissenting. The dissenters lamented that the “Fourth Circuit’s error” had “metastasized and spread to the First Circuit” and “rendered legally irrelevant graphic direct evidence that Committee members harbored racial animus toward members of victimized racial groups.” *Boston Parent Coal.*, 145 S. Ct. at 17-18 (Alito, J., dissenting from denial of certiorari). Justices Alito and Thomas also pointed out that a circuit split exists over whether *any* showing of disparate impact is necessary to prevail in an *Arlington Heights* case. *Id.* at 17 n.2. And in a statement respecting the denial of certiorari, Justice Gorsuch echoed the dissent’s “significant concerns about the First Circuit’s analysis” and urged “lower courts facing future similar cases” to consider the dissent’s reasoning. *Id.* at 15 (Gorsuch, J., respecting the denial of certiorari).

Since that denial, the circuit split has only deepened. This year, the Third Circuit sided with *CACAGNY*, explicitly rejecting the First and Fourth Circuits’ analysis. *Sargent*, 165 F.4th at 747-50. Like the other cases, *Sargent* involved an overhaul of competitive school admissions criteria that the challengers alleged was designed to discriminate against particular racial groups, this time in Philadelphia. Evidence showed a substantial drop in the share of white and Asian-American students admitted to the schools. *Id.* at 744. The court rejected

⁸ The supplemental brief is available here: <https://tinyurl.com/4bsuayau>.

the district court’s reliance on aggregate benchmarks, as well as appeals to *Coalition for TJ* and *Boston Parent Coalition*, holding instead that “while evidence of an aggregate discriminatory impact may satisfy the ‘discriminatory impact’ inquiry, it is not the only permissible form of proof.” *Id.* at 750.

What is more, there is ongoing litigation over a subsequent plan in Boston.⁹ The district court there recently held that the First Circuit’s *Boston Parent Coalition* decision actually requires an even starker showing of aggregate impact, driving the targeted group’s share not just below its share of the applicant pool but the district’s *school-age population*. *Boston Parent Coal. for Acad. Excellence Corp. v. Boston Sch. Comm.*, No. 25-12015, 2026 WL 776160, at *2 (D. Mass. Mar. 19, 2026). So even among the circuits that require challengers to hit an aggregate impact benchmark, there is disagreement over what that benchmark should be.¹⁰

Only this Court can resolve the conflict. Lower courts need to know whether challengers must show disparate impact to prevail in an *Arlington Heights* intentional discrimination claim. If a showing of disparate impact is necessary, lower courts need to know what must be shown. Otherwise, the constitutional standards will continue to differ sharply by geographic happenstance. In some places, one can win an Equal Protection claim with no evidence of

⁹ The *CACAGNY* case also remains pending at the district court after remand from the Second Circuit. 1:18-cv-11657 (S.D.N.Y.). Additionally, a separate challenge to the New York admissions criteria was recently filed. The plaintiff in that case is seeking a preliminary injunction. See ECF Nos. 14 & 15 in *Chen v. Mamdani*, No. 1:26-cv-03355 (S.D.N.Y.).

¹⁰ An appeal is pending in the First Circuit. No. 26-1285.

aggregate impact, while that same case would be dismissed in other places without even any inquiry into evidence of discriminatory intent. This situation cannot continue indefinitely. The Court should grant the petition.

II. Use Of Aggregate Comparators To Evaluate Disparate Impact Undermines This Court’s Equal Protection Precedent

Little is more certain in this Court’s equal-protection precedent than that racial balancing is “patently unconstitutional.” *SFFA*, 600 U.S. at 223 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)). This principle led the Court to reject the universities’ appeal to the benefits of a diverse student body in *SFFA* because, in the end, the schools’ pursuit of diversity was simply racial balancing by another name. *See id.* at 221-24; *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007) (plurality opinion) (“While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.”). Racial balancing is racial discrimination.

The Fourth Circuit’s population benchmark immunizes the same sort of balancing so long as it is done by proxy. The purpose of the *Arlington Heights* inquiry is to “[d]etermin[e] whether invidious discriminatory purpose was a motivating factor” in the government’s facially race-neutral decision-making. *Arlington Heights*, 429 U.S. at 266. If it is, the government must satisfy strict scrutiny just the same as if it used an explicit racial classification.

Miller, 515 U.S. at 913. But under the Fourth Circuit’s rule, if the government shows that it achieved perfect racial balance relative to the applicant pool, it wins, even if there is evidence that the government intentionally discriminated against a racial group to get there. See *Coal. for TJ*, 68 F.4th at 903 (Rushing, J., dissenting). Perversely, the population benchmark allows the government to use racial balance as a *defense* to a claim of intentional discrimination.

Under the applicant pool benchmark, the government can set specific racial targets, hit them, and avoid even an inquiry into discriminatory intent so long as it employs a facially-neutral proxy instead of an explicit racial classification. This directly undermines not only the Court’s longstanding prohibition on racial balancing, but also its assurances that so-called “benign” racial discrimination receives the same strict judicial skepticism. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). *SFFA* was clear that “[e]liminating racial discrimination means eliminating all of it,” and “[w]hat cannot be done directly cannot be done indirectly.” *SFFA*, 600 U.S. at 206, 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). A threshold population benchmark contradicts both precepts, permitting some racial discrimination so long as it is done through a proxy. “That is racial balancing by another name and is undoubtedly unconstitutional.” *Boston Parent Coal.*, 145 S. Ct. at 18 (Alito, J., dissenting from denial of certiorari).

It’s also inconsistent with the basic premise that equal protection is a personal right. Requiring an aggregate showing of disparate impact is incompatible

with the Constitution’s “simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class.” *Miller*, 515 U.S. at 911 (quoting *Metro. Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (internal quotation marks omitted))). If the government discriminates against an individual because of his race, the government is not treating him as an individual if, to prove that discrimination, it forces him to show that enough *other* people of his racial group were also treated unfavorably. See *CACAGNY*, 116 F.4th at 177; *Boston Parent Coal.*, 145 S. Ct. at 17 (Alito, J., dissenting from denial of certiorari). By conditioning an intentional-discrimination claim on a showing of aggregate underrepresentation, the First and Fourth Circuits transform an individual constitutional guarantee into a group-based inquiry.

The rule these circuits apply transforms disparate impact from a piece of evidence relevant to intent into a gatekeeping requirement that forecloses any inquiry into intent at all. The result is a rule that marginalizes the *Arlington Heights* inquiry, permits racial balancing by proxy, treats equal protection as a group right rather than an individual one, and insulates some forms of intentional discrimination from judicial review. Such a rule “defies law and logic.” *Coal. for TJ*, 146 S. Ct. at 545 (Alito, J., dissenting from denial of certiorari).

III. This Is A Clean Vehicle To Decide A Recurring Issue Of National Importance

The criteria used to admit students to competitive public schools are of substantial importance to many families, particularly in the Nation’s largest school

districts. These schools provide exceptional educational opportunities to students who might otherwise lack access to comparable academic programs. *See id.* at 541 (noting that Thomas Jefferson High School “has exceptional resources, including 13 on-campus research laboratories and a student-produced scientific research journal, and it features a rigorous curriculum”). In recent years, a number of school districts have revised admissions criteria after concluding that existing systems produced undesirable racial enrollment outcomes. Those changes have generated recurring litigation raising fundamental questions about the role race may play in public-school admissions. The Court’s intervention would provide much-needed guidance to school districts, students, and lower courts.

This case comes here after the grant of a motion to dismiss, with allegations that a district court initially found sufficient to plead discriminatory intent. 560 F. Supp. 3d at 953. Because the applicant pool benchmark is precedential in the Fourth Circuit after *Coalition for TJ*, the Fourth Circuit did not consider AFEF’s argument that it pleaded enough under *Arlington Heights* to survive a motion to dismiss the second time as well. App. 3a-4a. It instead affirmed solely on the ground that the challenged criteria did not suppress Asian-American enrollment enough to satisfy the Fourth Circuit’s new disparate impact threshold. *Ibid.*

That makes the case ideally suited for review. In this posture, the Court can simply decide the question presented and then remand the case to the Fourth Circuit to reconsider under whatever standard the Court ultimately adopts. It need not inquire into the allegations of intent at all, as the only question is

whether the Fourth Circuit should have to *consider* those allegations.

The conflict between the circuits is now mature, acknowledged, and outcome determinative. The First and Fourth Circuits require plaintiffs to satisfy an aggregate-impact threshold before courts may consider evidence of discriminatory intent; the Second and Third Circuits do not. As additional challenges to admissions policies continue to play out, the constitutional standard governing intentional-discrimination claims increasingly depends on geography rather than law. This Court's intervention is needed to restore national uniformity to a fundamental question of equal-protection doctrine.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

GLENN E. ROPER
Pacific Legal Foundation
1745 Shea Center Drive
Suite 400

Highlands Ranch, CO 80129

CHRISTOPHER M. KIESER
Counsel of Record

JOSHUA M. THOMPSON

ERIN E. WILCOX

Pacific Legal Foundation

555 Capitol Mall

Suite 1290

Sacramento, CA 95814

916.419.7111

ckieser@pacificlegal.org

Counsel for Petitioner

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