

No. 26-12

In the Supreme Court of the United States

ASSOCIATION FOR EDUCATION FAIRNESS,
Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR STUDENTS FOR FAIR
ADMISSIONS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

Students for Fair Admissions (SFFA) is a nonprofit dedicated to defending human and civil rights secured by law, including the right to be free from discrimination on the basis of race in higher-education admissions. SFFA is a membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional. SFFA was the plaintiff in the landmark case challenging the use of race in admissions by Harvard College and the University of North Carolina. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).*

Students for Fair Admissions is one of the most important civil rights cases in the Supreme Court’s history. It reaffirmed one of our country’s “foundational principle[s]—the absolute equality of all citizens of the United States politically and civilly before their own laws.” *Id.* at 201 (citation modified). The Court recognized that all “racial discrimination in public education”—including race-based admissions programs practiced at many universities—is illegal under the Constitution and Title VI. *Id.* at 204, 230–31; *see id.* at 198 n.2. As the Court explained, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the

* Under Rule 37.2, the parties’ counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

doctrine of equality.” *Id.* at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). There is thus no room for “benign” racial preferences: “Eliminating racial discrimination means eliminating all of it.” *Id.* at 206.

Because the admissions policies at issue below and in similar cases reflect a broader effort by schools to evade *Students for Fair Admissions* and perpetuate racial discrimination, *amicus* has a strong interest in this case.

SUMMARY OF THE ARGUMENT

Under the theory adopted by the Fourth and First Circuits, an equal-protection intentional-discrimination claim requires claimants to show disparate impact measured by relative group representation at a single point in time. Comparing the government’s current policy to its previous policy is, under this theory, irrelevant. So even if public schools gerrymander admissions criteria expressly to disfavor a racial group—and that gerrymandering succeeds in driving down admission of members of that racial group—no equal protection violation exists if that group’s admission still outpaces its share of the underlying population.

That theory is nonsensical. Consider this historical example: “[I]n the 1920s, Harvard began moving away from ‘test scores’ and toward ‘plac[ing] greater emphasis on character, fitness, and other subjective criteria.’” *Students for Fair Admissions*, 600 U.S. at 298 (Gorsuch, J., concurring). “President A. Lawrence Lowell and other university leaders had become ‘alarmed by the growing number of Jewish students

who were testing in,’ and they sought some way to cap the number of Jewish students without “stat[ing] frankly” that they were “directly excluding all [Jews] beyond a certain percentage.”” *Id.* The Jewish share of Harvard’s freshman class fell from 28% in 1925 to under 15% and remained around 14–16% for years.¹ In 1927, Jews constituted 3.58% of the national population and 5.32% of Massachusetts’s population.² So the population-parity theory would have treated the policy as conclusively nondiscriminatory even though it was designed to—and did—sharply reduce Jewish admissions.

The Second and Third Circuits rightly rejected such “convoluted disparate impact analyses [that] dilute the Equal Protection Clause’s force.” *Sargent v. Sch. Dist. of Philadelphia*, 165 F.4th 727, 749 (3d Cir. 2026). The Third Circuit expressly “disagree[d] with the First and Fourth Circuits’ approaches to the discriminatory impact inquiry and reject[ed] their framework.” *Id.* According to that court, “the Equal Protection Clause’s mandate” of equality is not negated “simply because a court determines one racial

¹ Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 172–73 (2005). Harvard also adopted a facially neutral “top-seventh” plan that facilitated the admission of students ranked in the highest seventh of their classes at schools that did not ordinarily prepare students for Harvard’s entrance examinations; the plan was designed to attract “a new group of men from the West and South.” *Id.* at 101. When the plan unexpectedly opened another avenue for Jewish students, Harvard later excluded applicants from high schools in Long Island, eastern New York, and New Jersey from the plan. *Id.* at 171–72.

² H.S. Linfield, *Jewish Population in the United States, 1927*, at 101–03, *Am. Jewish Year Book*, <https://perma.cc/8GDE-DLMT>.

group is, in its view, sufficiently successful.” *Id.*; see also *Chinese Am. Citizens All. of Greater New York v. Adams*, 116 F.4th 161, 173 (2d Cir. 2024).

This Court should reject the contrary approach the Fourth and First Circuits use. From the day that *Students for Fair Admissions* was decided, colleges and universities—and, as here, public schools broadly—have tried to evade that decision’s mandate of racial equality. This defiance has been explicit and—in at least some cases—apparently successful. Schools have openly looked for racial proxies to enable continued racial discrimination under the guise of purportedly race-neutral criteria. And the very schools that offered sky-is-falling predictions before *Students for Fair Admissions* about supposedly certain effects on student diversity have mysteriously seen no change in racial demographics.

The Fourth and First Circuits’ approach largely insulates the use of racial proxies from review, so long as the proxy is not used to the total exclusion of genuinely race-neutral criteria. Because this Court has long held that “[w]hat cannot be done directly cannot be done indirectly”—and long rejected the use of racial proxies—it should grant certiorari and address the confusion in the lower courts on this issue. *Students for Fair Admissions*, 600 U.S. at 230.

REASONS FOR GRANTING THE WRIT

I. The Court has long rejected the use of racial proxies.

Under longstanding precedent, “[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an

extraordinary justification.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). “This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.” *Id.*

The Court has applied this rule many times to invalidate ostensibly race-neutral laws. For instance, in *Columbus Board of Education v. Penick*, the Court held unconstitutional ostensibly race-neutral school board policies, including the “use of optional attendance zones, discontinuous attendance areas, . . . boundary changes[,] and the selection of sites for new school construction.” 443 U.S. 449, 461–62 (1979). The Court explained that these policies “had the foreseeable and anticipated effect of maintaining the racial separation of the schools.” *Id.* at 462. And, the Court emphasized, “[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor . . . which may be considered by a court in determining whether an inference of segregative intent should be drawn.” *Id.* at 465 (citation modified); *see also Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 201 (1973) (“concentrating Negroes in certain schools by structuring attendance zones or designating ‘feeder’ schools” can violate the Equal Protection Clause); Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *Fordham Urb. L.J.* 1519, 1525 (2003) (noting that many Jim Crow laws, such as “[p]oll taxes, grandfather clauses, and property tests,” were “ostensibly race-neutral”).

Similarly, in *Hunter v. Underwood*, the Court held that a provision in the Alabama Constitution disenfranchising citizens convicted of “crimes of moral turpitude” violated the Equal Protection Clause. 471 U.S. 222, 227 (1985). The Court noted that the provision “on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes or a crime falling within one of the catchall provisions.” *Id.* But the Court found “the evidence of discriminatory impact indisputable”—that the provision “had disfranchised approximately ten times as many blacks as whites.” *Id.* And the “delegates to the all-white convention” that adopted the provision “were not secretive about their purpose”: “to establish white supremacy in this State.” *Id.* at 229.

Likewise, in *Rice v. Cayetano*, the Court invalidated a Hawaii provision that conditioned the right to vote for governing members of a state agency based on ancestry. 528 U.S. 495 (2000). The Court emphasized that “[a]ncestry can be a proxy for race,” and Hawaii “has used ancestry as a racial definition and for a racial purpose.” *Id.* at 514–15.

In sum, while facial classifications based on race are presumptively unconstitutional, “[a]nother way you can offend the Constitution is by devising a proxy mechanism with the purpose of . . . achieving the same results that the impermissible classification would.” Tr. of Oral Arg. 14, *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, No. 21-707 (U.S. Oct. 31, 2022) (Kagan, J.). And “[i]t is all too easy to evade formal, facial constraints because there will always be some characteristics other than skin color and ethnic background which African

Americans, whites, Hispanics, and Asians exhibit in different proportions.”³ When the government intentionally uses some proxy to discriminate based on race, it violates the Constitution.

II. Despite *Students for Fair Admissions*, schools are using proxies to discriminate based on race.

Though this Court in *Students for Fair Admissions* rightly held that “[e]liminating racial discrimination means eliminating all of it,” 600 U.S. at 206, schools have been trying since the day of that decision to use proxies to achieve forbidden discrimination.

A. *Students for Fair Admissions* required race neutrality in admissions.

In *Students for Fair Admissions*, the Court struck down Harvard’s and UNC’s use of race as a factor in admissions, holding that those schools’ “admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause” because they “lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.” 600 U.S. at 230. The Equal Protection Clause was ratified, the Court explained, to forbid “any distinctions of law based on race or color.” *Id.* at 202. The Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), had sanctioned a limited use of race in college admissions. *Students for Fair Admissions* held that this practice

³ Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 Mich. J. Race & L. 277, 283 (2007).

could not continue, returning the Court's constitutional jurisprudence to the original principle "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States," 600 U.S. at 202 (citation modified).

Of course, because the college admissions process involves consideration of complex and overlapping factors, it can be hard to distinguish impermissible reliance on race from reliance on related but permissible factors. For example, the Court held that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *Id.* at 231. Though such considerations are *related* to race in some sense, they do not involve consideration of race for race's sake, since a student of *any* race might similarly discuss such experiences.

Nonetheless, the Court emphasized that "universities may not simply establish through application essays or other means the regime we hold unlawful today":

What 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. . . . In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Id. at 230–31 (citation modified).

Though *Students for Fair Admissions* did not itself spell out how to discern the substance of race discrimination from the shadows under which universities might attempt to shroud their admissions practices, settled constitutional doctrine—applied in the cases discussed above—answers this question. When a defendant in an equal protection challenge attempts to disguise its unconstitutional use of race, courts consider “whether invidious discriminatory purpose was a motivating factor” in the defendant’s conduct through “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Such evidence includes “[t]he historical background of the decision,” “[t]he specific sequence of events leading up to the challenged decision,” “contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports,” and whether the decision “bears more heavily on one race than another.” *Id.* at 266–68. Under this doctrine, “[a] facially neutral law” is presumptively unconstitutional “if it can be proved that the law was motivated by a racial purpose or object.” *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citation modified).

B. Schools are increasingly using racial proxies in admissions.

Since *Students for Fair Admissions*, many schools dedicated to the use of race in admissions have sought some way to consider race clandestinely. The day *Students for Fair Admissions* was decided, the president of the American Council on Education said that it “may have taken away one arrow in our quiver,

but it cannot dictate our institutional missions or prevent us from providing access and equity.”⁴ Indeed, “the initial response to *SFFA* from colleges and universities was one of outward determination to continue to seek diversity” based on skin color.⁵

To enable this defiance, an academic cottage industry formed to gin up purported justifications for deliberate but “neutral” racial discrimination. *See, e.g.*, Deborah Hellman, *Diversity by Facially Neutral Means*, 110 Va. L. Rev. 1901, 1946 (2024) (arguing that “a university may deliberately adopt facially neutral policies to increase the enrollment of minority students,” and “[s]uch policies do not involve race-based differential treatment”); Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 Tex. L. Rev. 123, 125 (2023) (arguing that after *Students for Fair Admissions*, “colleges are functionally able to make admissions decisions on the basis of race”; “[t]hey must only . . . make sure they adequately cover their tracks”); Kim Forde-Mazrui, *Alternative Action After SFFA*, 76 Stan. L. Rev. Online 149, 150 (2024) (exploring “policies that use race-neutral means to achieve the types of racial ends traditionally pursued through race-based affirmative action”).

Many colleges and universities apparently have implemented such racial proxies in admissions. To be

⁴ Am. Council on Educ., *Statement by ACE President Ted Mitchell on the Supreme Court’s Race in Admissions Ruling* (June 29, 2023), <https://perma.cc/6WYZ-JMMS>.

⁵ Nancy Leong, *Diversity Messaging After Affirmative Action*, 109 Minn. L. Rev. 1059, 1090 (2025) (collecting examples).

clear, these proxies are *not* simple economic measures. Studies have found too weak a link between class and race for class to work as a racial proxy: there are about “two and a half times as many” “poor white people in America [compared to] poor black people.”⁶ So “race-proxy proponents deploy” a bait-and-switch, “swap[ping] ‘low income’ for ‘socioeconomically disadvantaged,’ and ‘poor’ for ‘marginalized class’”—thereby “smuggl[ing] in concepts that can serve as proxies for race.”⁷

Start with Yale. “Yale College’s class of 2028, the first admitted post-affirmative action, saw stable racial demographics,” even though Yale had argued in *Students for Fair Admissions* that race-conscious policies were necessary “to obtain [a] diverse student body.”⁸ After the decision, “Yale’s admissions office implemented several changes,” most notably “the Opportunity Atlas.”⁹ “The Opportunity Atlas estimates children’s adult outcomes, such as average earnings and incarceration rates, by parental income, *race* and gender, based on census data.”¹⁰

⁶ Naomi Schaefer Riley, *College Board Games*, Commentary (Sept. 2025), <https://perma.cc/J29Y-6D4Q>.

⁷ Wai Wah Chin, “Socioeconomic Preferences” Are Just Pretexts for Affirmative Action, *City J.* (Oct. 30, 2025), <https://perma.cc/4ZWR-JENJ>.

⁸ Hailey Talbert, *Analysis: Could This New Admissions Tool Explain Yale’s Post-Affirmative Action Racial Demographics?*, *Yale Daily News* (July 21, 2026) (quoting *Amici Br. of Brown Univ. et al.* 25, *Students for Fair Admissions*, Nos. 20-1199 & 21-707 (U.S. Aug. 1, 2022), <https://perma.cc/7QW6-NBSH>).

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

Not only do the Atlas’s data and outputs expressly include race, but race is used as the basis for even purportedly neutral criteria. Much of the data come from “statistically modeled estimates that consider the historical racial and ethnic composition of [particular] neighborhoods to calculate characteristics like incarceration rates, as opposed to direct measurements of incarceration rates.”¹¹ In other words, the data assign high incarceration rates to predominantly black areas—then feign race neutrality because they supposedly focus on incarceration rates. It is race all the way down.

Unsurprisingly, analysts found that “the use of block-level data from the Opportunity Atlas” enabled the school to target “historically Black neighborhoods in metropolitan areas.”¹² “[C]andidates applying from neighborhoods that had more Black residents might receive very different scoring in admissions compared to applicants from a neighborhood that historically had more white or Asian residents.”¹³

Naturally, a Stanford law professor insisted “that he believes the tool complies with the *Students For Fair Admissions* decision”—and, what’s more, that “it is arguably required that all selective universities do something like it.”¹⁴ The co-director of the group that made the Atlas insisted that “even though race is a component of the Opportunity Insights data, the way it is used by schools does not supply information about

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

race.”¹⁵ Yet according to the group’s own factsheet, “[t]he Opportunity Atlas allows users to filter data by demographic subgroups such as race.”¹⁶ Courts “are not required to exhibit a naiveté from which ordinary citizens are free.” *Trump v. Cook*, 146 S. Ct. 2234, 2249 (2026).

Yale’s “Opportunity Atlas” worked in conjunction with a tool used until recently by “[s]cores of schools.”¹⁷ The College Board—the entity that operates the SAT—created a numeric metric called the Landscape score to provide “consistent high school and neighborhood information for all applicants to help admissions officers fully consider every student, no matter where they live.”¹⁸ This Landscape score was the mean of six variables: college attendance, household structure, median family income, housing stability, education level, and crime.¹⁹ All but college attendance (from aggregate College Board and National Student Clearinghouse data) and crime (from FBI and local agency statistics) came from the U.S. Census Bureau’s annual American Community Survey.²⁰

¹⁵ Stephanie Saul & Dana Goldstein, *College Board Cancels Tool for Finding Low-Income High Achievers*, N.Y. Times (Sept. 4, 2025).

¹⁶ Opportunity Insights, *The Opportunity Atlas* (Aug. 2025), <https://perma.cc/W89N-DV8G>.

¹⁷ Saul & Goldstein, *supra* note 15.

¹⁸ College Board, *Landscape*, <https://bit.ly/4fxLgEr> (archived Dec. 14, 2024).

¹⁹ College Board, *Landscape Comprehensive Data and Methodology Overview*, <https://bit.ly/44HPwMw> (archived Dec. 12, 2024).

²⁰ *Id.*

The Landscape score appeared designed as a proxy for race in defiance of *Students for Fair Admissions*. The household structure and housing stability variables are both averages of a few finely selected census datasets, including “Percentage of families with a female householder, no male householder, [and] at least one child under 18 years of age.” The Census Bureau has itself explained, in its description of this measure, that “Black households were significantly more likely to be family households maintained by women without a spouse present.”²¹ And the College Board included a qualification limiting this variable to households that “are in poverty” to even more finely target black communities.²²

Similarly, the “crime” variable measures the “relative risk of being a victim of a crime” averaged across seven crimes: murder, rape, robbery, assault, burglary, theft, and motor vehicle theft.²³ For all seven of these crimes, the black perpetration rate outpaces the overall black crime perpetration rate, suggesting that predominantly black communities are more likely to be victimized by the crimes that the College Board surgically selected.²⁴

The history of the Landscape score provides further evidence that it is impermissibly designed as

²¹ Paul F. Hemez et al., *America’s Families and Living Arrangements: 2022*, U.S. Census Bureau, <https://perma.cc/R9D2-A54K>.

²² *Landscape Comprehensive Data and Methodology Overview*, *supra* note 19.

²³ *Id.*

²⁴ See FBI, *Crime in the United States: 2019*, tbl. 43A, <https://bit.ly/4wVAtLo>.

a proxy for race. The College Board initially announced plans for a 1–100 “adversity score,” which served as a not-so-subtle proxy for race to boost nonwhite matriculation. As reported by NPR, “The adversity score did not account for a student’s race, but schools that used the tool in pilot testing reported that the socioeconomic data helped boost nonwhite enrollment.”²⁵

The College Board rebranded the initiative as a “Landscape” score during the then-ongoing *Students for Fair Admissions* litigation.²⁶ In 2025, the College Board dropped the score entirely after review by SFFA.²⁷ “[T]he College Board quietly notified schools that it was eliminating the tool,” “provid[ing] little explanation for its decision.”²⁸

The Department of Justice has recently concluded that Yale’s School of Medicine “continues to intentionally discriminate against applicants based on their race.”²⁹ DOJ noted a Yale admissions presentation that “draws a roadmap for using racial proxies to circumvent *Harvard*’s prohibition on racial discrimination.”³⁰ Specifically, Yale seems to be aping a program at the University of California-Davis’s medical school that “double adjust[s] [a] socioeconomic

²⁵ Bobby Allyn, *College Board Drops Its ‘Adversity Score’ For Each Student After Backlash*, NPR (Aug. 27, 2019), <https://perma.cc/YA9Z-94C4>.

²⁶ Saul & Goldstein, *supra* note 15.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Letter from Harmeet K. Dhillon to Peter Spivack (May 14, 2026), <https://perma.cc/C6BR-2725>.

³⁰ *Id.*

advantage bonus in order to obtain an increase from 10.7% to 22.7%” in “Underrepresented Minorities.”³¹

That program—which DOJ also just found to be unlawful³²—operates similarly to the Landscape score. The program “adjust[s] applicant GPA and MCAT scores for [socioeconomic data],” using eight supposedly “race-blind” variables to intentionally obtain “a proxy for race.”³³ Barely hiding its discrimination, the admissions program even produced a chart “analyzing each of the socioeconomic factors” to show how highly correlated each is with “underrepresented minorities in medicine.”³⁴

Other schools that declared that ending race-conscious admissions would doom their diversity efforts have also miraculously seen little effect. “Princeton modified its essay question,” “asking students to ‘reflect on how [their] lived experiences will impact the conversations [they] will have in the classroom, the dining hall or other campus spaces.’”³⁵

DOJ has recognized that criteria like “lived experience” can “function as proxies for protected characteristics.”³⁶ And “of the *U.S. News and World Report*’s top 65 colleges and universities, 43 had essay prompts addressing diversity, identity, or adversity in

³¹ *Id.*

³² Letter from Harmeet K. Dhillon to Brian Stimson (June 10, 2026), <https://perma.cc/V5VG-M8EA>.

³³ *Id.*

³⁴ *Id.*

³⁵ Talbert, *supra* note 8.

³⁶ Off. of the Att’y Gen., *Memorandum for All Federal Agencies* (July 29, 2025), <https://perma.cc/4A3N-C8SB>.

the” application cycle after *Students for Fair Admissions*.³⁷

“Duke is no longer giving essays and standardized testing scores numerical ratings in the undergraduate admissions process.”³⁸ Rather than “assuming that the essay is an accurate reflection of the student’s actual writing ability,” “the admissions office now values essays that give ‘insight into who the unique person is whose application we’re reading.’”³⁹ Duke claims that *Students for Fair Admissions* “was absolutely not a factor in” these changes.⁴⁰

“Columbia Law School opted for a less subtle approach when it required (in a short-lived move) that applicants submit a 90-second video ‘addressing a question chosen at random’—a stratagem baldly calculated to let admissions staff determine the applicant’s race.”⁴¹

In short, significant evidence shows that colleges and universities are using proxies for race to continue their unlawful racial discrimination in admissions. Unsurprisingly, K-12 schools are following suit, as this case and related ones show. These schools generally share the race-based ideologies of higher education, and mirroring the discrimination of elite

³⁷ Frederick M. Hess & Greg Fournier, *Don’t Trust Colleges on Race-Based Admission*, Am. Enter. Inst. (June 24, 2024), <https://perma.cc/RHG3-32ZD>.

³⁸ Jazper Lu, *Duke No Longer Giving Numerical Rating to Standardized Testing, Essays in Undergraduate Admissions*, The Chronicle (Feb. 19, 2024), <https://perma.cc/LG6U-VWVD>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Hess & Fournier, *supra* note 37.

colleges increases the chances of sending students there. Again, it is race all the way down.

III. The Fourth and First Circuits’ approaches insulate racial proxies from review.

By forcing families who suffer racial discrimination from a purportedly neutral policy to show that the policy pushes acceptance of their racial group below its population percentage, the Fourth and First Circuits effectively foreclose judicial review of this discrimination. As Judge Rushing explained, governments would be “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.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 904 (4th Cir. 2023) (dissenting opinion).

The Fourth and First Circuits focus on “the group’s ‘success rate’ in gaining admission” *only* under the revised policy relative to other racial groups. *Id.* at 881 (majority opinion). They refuse to consider “a simple before-and-after comparison,” *id.* at 880, even though that is the type of comparison this Court used in *Students for Fair Admissions*, 600 U.S. at 218 (“Harvard’s consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard”).

The refusal of the Fourth and First Circuits to consider before-and-after comparisons is egregiously wrong. In the context of schools changing a policy intentionally for racial balance reasons, the simple before-and-after comparison is often going to be more

probative of discriminatory intent. As Justice Alito explained:

Under the old policy, each Asian-American applicant had a certain chance of admission. Under the new policy, that chance has been significantly reduced, while the chance of admission for members of other racial and ethnic groups has increased. Accordingly, the new admissions policy bore more heavily on Asian-American applicants.

Coal. for TJ v. Fairfax Cnty. Sch. Bd., 146 S. Ct. 541, 544 (2024) (dissenting from the denial of certiorari).

By contrast, in this context the Fourth and First Circuits’ preferred metric is largely “meaningless.” *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 621 (1974).⁴² Those courts care only if a racial group’s admissions representation is less than its population (or applicant⁴³) proportion. But “this is not a case in which it can be assumed that all [students] are fungible for purposes of determining whether members of a particular class have been unlawfully excluded.” *Id.* at 620. These courts err in assuming that “in the absence of discrimination, an institution’s racial makeup would mirror that of

⁴² In other contexts, of course, “aggregate disparate impact might still be strong evidence of a constitutional violation,” but it should not be “a prerequisite” in every case regardless of the particular claims at issue. *Sargent*, 165 F.4th at 749.

⁴³ For the denominator, the First Circuit has considered both “eligible school-age population” and the narrower applicant population. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 59 (1st Cir. 2023). The same flaws apply to either.

society.” *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 554 (2015) (Thomas, J., dissenting). Admissions representation under a truly race-neutral process could diverge from population averages, as such “disparities are products of . . . the complexities of human existence.” *Id.* at 555.

Thus, that Asian applicants remain disproportionately represented under an anti-Asian policy cannot disprove discrimination—just as Harvard’s Jewish enrollment percentage in the 1920s did not erase the intentional discrimination behind its admissions policies. Absent any theory of why Asian (or any other group’s) admissions *should* mirror population representation, it makes little sense to focus on that metric, especially given an express—and accomplished—goal to decrease that group’s admissions. As Judge Hilton explained in the *Thomas Jefferson* case, “Everybody knows the policy is not race-neutral and that it’s designed to affect the racial composition.” Tr. of Motions Hearing 27–28, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296 (E.D. Va. May 21, 2021) (citation modified). When families show discriminatory intent and a disparate impact from a policy change, they have an equal protection claim.

The Fourth and First Circuits’ test permits intentional racial discrimination to evade review. Because the “error” below continues to “metastasize[],” the Court’s review is needed. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 145 S. Ct. 15, 17 (2024) (Alito, J., dissenting).

CONCLUSION

For these reasons, the Court should grant certiorari.

Respectfully submitted,

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