

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 a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF IN OPPOSITION

STEVEN F. BARLEY
HOGAN LOVELLS
CADWALADER US LLP
100 International Drive
Baltimore, MD 21202

JO-ANN TAMILA SAGAR
Counsel of Record
KATHERINE T. MCKAY
HOGAN LOVELLS
CADWALADER US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jo-ann.sagar@hlc.com

Counsel for Respondents

QUESTION PRESENTED

In response to the COVID-19 pandemic, Montgomery County Public Schools implemented a new admissions policy for its magnet middle schools. In prior years, the admissions process had relied on an in-person aptitude exam. But the challenges of the pandemic, and the school district's attendant shift away from in-person instruction, made it impossible for the district to use the exam. Instead, the school district decided to rely on a race-neutral, race-blind lottery to select students for admission.

A group of parents sued, claiming that the lottery violates their right to Equal Protection. The district court disagreed, *both* because the group failed to plead facts sufficient to establish that the lottery disparately impacts Asian-American students, Pet. App. 21, *and* because “[t]he Amended Complaint makes plain that the aptly-named Pandemic Plan emerged as a solution to the obstacles presented by COVID-19,” “not to address racial disparities of the magnet middle school student body,” *id.* at 33a, 35a. The Fourth Circuit agreed. *Id.* at 3a-4a. The question presented is:

Whether the court of appeals correctly held that a plaintiff challenging a school district's facially neutral, lottery-based admissions program failed to state a claim for invidious discrimination based on the allegations in the complaint.

**CORPORATE DISCLOSURE
STATEMENT**

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents Montgomery County Board of Education and Dr. Thomas W. Taylor certify that they are not publicly held corporations or other publicly held entities. To the best of Respondents' knowledge, there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

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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BRIEF IN OPPOSITION

INTRODUCTION

Montgomery County Public Schools offers accelerated and enriched instruction for highly able middle-school students. Petitioner Association for Education Fairness (AFEf) originally sued Respondents Montgomery County Board of Education and its superintendent (together, MCPS) to challenge changes that MCPS had made in the admissions process for the middle school magnet programs in 2017.

However, while the parties were litigating that challenge, the COVID-19 pandemic forced MCPS to change the admissions process. MCPS chose a lottery-

based process, known as the Pandemic Plan, to replace the old admissions process, known as the Field Test. And when it became clear that MCPS would not return to the old admissions process even after the schools returned to in-person instruction, AFEF amended its complaint to challenge the lottery-based Pandemic Plan. The District Court concluded that the amended complaint failed to state a claim and dismissed it. The Fourth Circuit agreed.

AFEF now asks this Court to grant certiorari so that the Court may resolve a purported circuit split over “disparate impact in [*Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)] cases,” Pet. 11 (capitalization modified), and hold that “a court may consider evidence of discriminatory intent” even if the plaintiff cannot “show that the criteria produced a disparate impact,” *id.* at i. But that question is not implicated here.

The District Court did not end its analysis after concluding that AFEF had failed to show a disparate impact. The District Court went on to consider AFEF’s allegations of discriminatory intent. And as the District Court explained, AFEF’s amended complaint did not plausibly allege that MCPS adopted the Pandemic Plan with discriminatory purpose. The amended complaint does not claim that any MCPS official involved with the Pandemic Plan made any comments or statements evincing a discriminatory intent. The amended complaint does not point to evidence that MCPS adopted the Pandemic Plan in service of an explicit or implicit policy of racial balancing. To the contrary, the amended complaint *concedes* that MCPS adopted the Pandemic Plan in response to COVID-19, which made the prior admissions policy impossible to administer.

So, instead, AFEF's petition for certiorari focuses on MCPS's prior admissions process for the middle school magnet programs. But that process had different criteria than the Pandemic Plan. It was adopted by different officials for different reasons. And it is no longer in effect. AFEF cannot manufacture a cert-worthy dispute by repackaging stale allegations about a superseded policy as a challenge to a materially different one.

As AFEF's focus on a superseded policy makes clear, this case is an exceptionally poor vehicle for this Court to consider how equal protection challenges apply to the K-12 admissions context. The question presented is not outcome-determinative. The facts underlying the Pandemic Plan are unremarkable. This case would come out the same way in every circuit. And the decision below is correct. Indeed, it is difficult to even conceptualize how a lottery-based admissions policy—adopted in response to an unforeseeable global pandemic—could intentionally discriminate on the basis of race. The petition for certiorari should be denied.

STATEMENT OF THE CASE

A. MCPS Provides Enrichment Opportunities For Highly Able Middle School Students.

Montgomery County Public Schools serves over 156,000 students in 211 schools. *See* Montgomery County Public Schools, *About Us*, <https://perma.cc/3HTL-2W2J> (last visited Aug. 27, 2026). And MCPS hopes to help each of those students reach their full academic potential. *Id.* In MCPS schools, “[a]ll students will receive a solid academic foundation, grounded in strong critical thinking skills,

with opportunities to enhance and enrich their learning.” *Id.*

To further its mission, MCPS offers enrichment programs to high-achieving middle school students. *See* Pet. App. 8a-9a.¹ Many talented students receive enrichment at their local middle schools—that is, schools that serve the students in the school’s immediate geographic area. *See id.* at 17a. Others apply to and attend Montgomery County’s four magnet schools—specialized schools that serve the entire county. *See id.* at 9a, 17a. Over the years, MCPS has employed different admissions processes for the middle school magnet programs.

1. MCPS Implements The Field Test For Magnet Middle School Admissions.

Back in 2017, MCPS “field tested” a process that was recommended by an external consultant. *Ass’n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.* (“*AFEF I*”), 560 F. Supp. 3d 929, 936-939 (D. Md. 2021) (discussing the Metis Report). The Field Test differed in three respects from MCPS’s prior process.

First, MCPS decided to screen every student in the district for their academic potential, not just those students whose parents chose to apply to a magnet school. Pet. App. 59a. In prior processes, MCPS had relied on parents to put their children forward for enrichment. *Id.* at 12a, 59a. Under the Field Test process, however, MCPS reviewed all fifth graders’ report

¹ Because the District Court dismissed the complaint on a Rule 12 motion, Pet. App. 37a-38a, the Statement generally draws from the facts alleged in the operative complaint, the documents incorporated by reference in that complaint, and the District Court’s recitations of the alleged facts.

cards and standardized test scores, and MCPS proactively reached out to parents of high-performing students to invite their families to participate in the admissions process and encourage their children to take the aptitude exam. *Id.* This greatly expanded the number of students from high-poverty schools who were considered for admission to magnet programs. *See AFEF I*, 560 F. Supp. 3d at 939-940.

Second, MCPS decided to select students for magnet programs by comparing their academic performance to the performance of other students in school communities with similar economic circumstances. *Id.* at 941. This would be achieved through “locally norming” the student scores on an in-person exam, the Cognitive Abilities Test (“CogAT”). *Id.* That is, MCPS would not determine a student’s percentile score on the test by comparing a student’s scores to all test-takers nationally. MCPS chose instead to calculate percentile scores by reference to MCPS test-takers only. Students from schools with high poverty rates would be compared to other students from high-poverty schools. *See id.* And students from schools with low poverty rates would be compared to other students from low-poverty schools. *Id.*; Pet. App. 67a.²

Third, MCPS committed to ensuring that all highly able students receive the benefit of enrichment programs through access in a magnet program or through enrichment opportunities at a local middle school. *See* Pet. App. 17a. MCPS said it would consider “peer groups,” that is, a cohort of 20 or more students within the same school who were similarly high performing.

² MCPS determines poverty level by the proportion of students on free and reduced meals. D.Ct. ECF No. 102 at 3-4.

AFEF I, 560 F. Supp. 3d at 939. MCPS took the availability of peer groups into account because MCPS wanted to offer highly able students enrichment at their local middle schools where there were sufficient numbers to fill an advanced classroom. *See* Memorandum from Dr. Jack R. Smith, Superintendent of Schools to Members of the Board of Education 2 (Apr. 24, 2018) (cited in the amended complaint at Pet. App. 59 n.18).

2. The COVID-19 Pandemic Compels MCPS To Replace The Field Test With The Pandemic Plan.

The Field Test process was short-lived. MCPS used that process for only three years. *See* Pet. App. 12a-14a, 83a. “In March of 2020, COVID-19 upended all aspects of life, especially primary and secondary education.” *Id.* at 14a. The pandemic posed massive and systemic challenges for MCPS. And MCPS transitioned to virtual learning for all students. *See id.* at 15a.

The pandemic also forced MCPS to discontinue the Field Test. One of the Field Test’s admissions criteria was the in-person CogAT exam. *See id.* at 16a. MCPS was wary of administering the CogAT during the pandemic. *See id.* An in-person exam would have required bussing and assembling children to take a proctored test indoors, creating potential public health risks. *See id.* At the same time, MCPS believed it might not be feasible to administer the CogAT remotely. The company that develops the CogAT expressed concerns regarding the security and integrity of remote administration. *See id.*

The pandemic and the challenges surrounding the CogAT spurred MCPS to reevaluate its magnet school

screening and selection process. Every year, a working group of MCPS officials analyzes the prior year's admissions process and recommends modifications. *See id.* at 32a-33a. By July 2020—nearly two months before AFEF filed its lawsuit against MCPS—the unique challenges of the pandemic had led this group to recommend a new, lottery-based admissions process for the middle school magnet programs. *See id.* at 16a-17a.

The group believed that incorporating a lottery into the selection process would carry a number of benefits. *See id.* at 16a. A lottery would reduce the role of subjective, individualized decision-making. *Id.* A lottery would reduce the need for screeners to distinguish between students based on small, statistically insignificant differences in standardized test scores. *Id.* And in light of the pandemic, a lottery would be simpler to administer. *See id.*

MCPS accepted the working group's recommendations and announced a new lottery-based process for students entering middle school during the 2021-2022 school year. *Id.* This process—"the Pandemic Plan"—has two stages.

At the first stage, MCPS screens all students in order to identify those who demonstrate the potential to succeed in enriched instruction. *See id.* MCPS considers report-card grades, reading levels, locally normed test scores from two statewide standardized tests, and student services, such as whether a student receives free or reduced-price meals. *See id.* at 16a-17a. Unlike local norming under the Field Test, which considered whether an individual applicant would have a "peer group" at her local middle school, local norming under the Pandemic Plan simply translated a student's raw

test score into a percentile comparing her performance to other students from elementary schools of a similar poverty level. *See id.* at 14a; *AFEF I*, 560 F. Supp. 3d at 941. And unlike the Field Test, where local norming was part of the final admissions decision, under the Pandemic Plan local norming is only relevant at the threshold. *See Pet. App.* 17a; *AFEF I*, 560 F. Supp. 3d at 941.

At the second stage, MCPS uses a lottery to assign a student to receive enriched instruction at either a magnet school or her local school. *See Pet. App.* 17a. The assignment is random; there is no individualized assessment of student information. *See id.* Local norming has no bearing on the outcome of the lottery: Once a student is in the lottery pool, her standardized test score does not affect the results. Notably, MCPS guarantees enriched instruction to all students who demonstrate the potential to benefit from that instruction, either in a magnet school or in enriched courses at a local school. *See id.*

B. AFEF Initiates This Lawsuit Challenging The “Field Test” Admissions Process.

Petitioner AFEF describes itself as “an organization of Asian-American parents” of MCPS students who seek “transparency, integrity, and consistency in the selection process for MCPS’ magnet middle school programs.” *Id.* at 42a. In September 2020, AFEF brought this lawsuit against MCPS challenging the Field Test process. *AFEF I*, 560 F. Supp. 3d at 942-943. AFEF claimed that the Field Test violated the Equal Protection Clause by discriminating against Asian American students. *Id.* at 942. AFEF conceded that the Field Test was facially race neutral.

However, AFEF claimed that the Field Test was nevertheless discriminatory because of the “universal screening,” “peer group[ing]” and “local norming” aspects of the selection process. Pet. App. 83a. According to AFEF, those features made it so “Asian-American students [could not] compete on an equal footing for magnet program seats” because they had to compete against more applicants from more elementary schools, and were more likely to have a comparably high-performing “peer group” at their local schools. *Id.* at 40a, 60a-61a.

The District Court denied both of MCPS’s motions to dismiss the initial complaint. *AFEF I*, 560 F. Supp. 3d at 956. The court concluded that AFEF had plausibly alleged that the Field Test had been adopted with a discriminatory purpose. *Id.* In support, the District Court referenced certain findings and recommendations in the outside consultant’s report, statements by MCPS officials who had adopted the Field Test, and the County’s stated goal of “diversity.” *Id.* at 953-955. The District Court also concluded that the Field Test disproportionately impacted Asian-American students, who were accepted to the magnet schools at lower rates compared to under the prior policy. *Id.* at 952.

C. AFEF Amends Its Complaint To Challenge The “Pandemic Plan.”

In September 2021, MCPS announced that it would continue to use the Pandemic Plan even after MCPS had returned to in-person instruction. Pet. App. 17a. MCPS had considered moving to a lottery-based process even before the pandemic. The school district already uses lotteries for many other programs, includ-

ing its language immersion programs and career readiness programs. *See* D.Ct. ECF No. 27-3 at ¶¶ 25-35 (Franklin declaration, cited in the amended complaint at Pet. App. 77a). And after MCPS’s positive experience with using a lottery for the magnet middle school programs during the pandemic, MCPS decided to keep it. *Id.*

By this point, “MCPS leadership had changed almost completely.” Pet. App. 17a-18a. The superintendent who implemented the Field Test, Dr. Jack Smith, had retired. *Id.* And all but one of the board members identified in the initial complaint had been replaced. *Id.*

In December 2021, apparently recognizing that its challenge to the Field Test had become moot, AFEF filed an amended complaint that dropped that challenge and replaced it with a challenge to the Pandemic Plan. *See id.* at 18a, 39a-86a. AFEF now claimed that, because Asian-American students disproportionately attend MCPS’s low-poverty elementary schools, local norming made it more difficult for them to qualify for the lottery and ultimately obtain admission. *Id.* at 78a-79a. For evidence of the alleged discrimination, AFEF pointed to data showing that Asian Americans constituted a smaller percentage of admitted students at two of the magnet schools during the first year of the Pandemic Plan compared to the prior year, when MCPS still used the Field Test. *Id.* at 79a. (At the other two magnet schools, the proportion of Asian-American admitted students had increased. *See id.* at 79a; D.Ct. ECF Nos. 33 & 33-1.)

AFEF has conceded that the Pandemic Plan is “different in many respects” from the Field Test. Pet. App. 78a. Rightly so. The Pandemic Plan is nothing like the

Field Test. First, under the Pandemic Plan, MCPS uses a lottery at the selection stage, whereas under the Field Test, MCPS staff had selected students based on individualized evaluations. *Id.* at 58a-60a. Second, MCPS no longer engages in “peer grouping,” meaning that it no longer considers the instructional need for a student to attend a magnet school as opposed to receiving enrichment at his local school. *Id.* at 60a; *see id.* at 78a-79a. Third, under the Pandemic Plan, MCPS does not administer the CogAT; it instead considers the results of mandatory, statewide standardized tests. *Id.* at 78a. Fourth, MCPS now locally norms test scores at the screening stage instead of at the final selection stage. *Id.* at 67a, 78a-79a.

Despite these differences, the vast majority of the amended complaint rehashes the same allegations as the original complaint, again focusing on the Field Test and the report that preceded it. *See id.* at 45a-76a. The complaint does not point to even one allegedly discriminatory statement by any of the MCPS officials who developed and adopted the Pandemic Plan. It does not link the Pandemic Plan to any policy to increase diversity. And it does not assert that any student was categorically prevented from competing for any educational benefit on the basis of race.

D. The District Court Grants MCPS’s Motion To Dismiss.

MCPS moved to dismiss the amended complaint, *see id.* at 18a-19a, and the District Court granted MCPS’s motion in full. *Id.* at 7a-8a. Because AFEF had effectively conceded that the Pandemic Plan satisfies rational basis review, its amended complaint could only survive dismissal if the Plan triggered strict scrutiny. *Id.* at 20a. Applying this Court’s decision in *Arlington*

Heights, 429 U.S. 252, the court held that AFEF failed to plausibly allege either disparate impact on Asian-American students or discriminatory intent. Pet. App. 20a-36a.

First, the District Court held that AFEF failed to plead facts sufficient to establish that the Pandemic Plan disparately impacts Asian-American students. *Id.* at 21a-26a.

At two of the four magnet middle schools, the proportion of Asian Americans among admitted students actually *increased* in the first year the Pandemic Plan was implemented. Pet. App. 79a (citing D.Ct. ECF Nos. 33 & 33-1). AFEF alleged only a single-year decrease in the proportion of Asian-American students offered admission at the two other magnet middle schools. *Id.*

The District Court also compared the proportion of Asian-American students admitted to “their representation in the applicant pool.” *Id.* at 24a-25a. Under the Pandemic Plan, “the percentage of admitted Asian American students * * * substantially outpaces the percentage representation among all applicants.” *Id.* at 26a. The District Court concluded that there was no disproportionate burden on Asian-American applicants. *Id.*

Second, the District Court held that there were “no facts” in the amended complaint that could “give rise to the inference that the Pandemic Plan was implemented with discriminatory intent.” *Id.*

In reaching that decision, the District Court carefully considered the types of circumstantial evidence described in this Court’s decision in *Arlington Heights*, which guides courts in assessing whether a facially neutral policy has a discriminatory purpose.

Id. at 26a-35a; 429 U.S. at 266-268. These include whether the “historical background” of the policy reveals “invidious purposes”; whether officials departed from “the normal procedural sequence”; the legislative history, including statements by decisionmakers; and whether the policy “bears more heavily on one race than another.” *Arlington Heights*, 429 U.S. at 266-268 (citation omitted); *see also* Pet. App. 26a-27a.

With respect to “the events culminating in the Pandemic Plan,” the District Court noted that “it is undisputed that the Pandemic Plan bears little resemblance to” the Field Test. Pet. App. 27a. The Pandemic Plan was “created and adopted by” different officials than the Field Test “under the leadership of a new superintendent.” *Id.* And those officials chose admission by lottery for the express purpose of “scrubb[ing] the final selection of any value-based decisions, all of which could be far more vulnerable to implicit and explicit biases.” *Id.* at 28a.

“[A]s to the history leading to the Pandemic Plan,” the District Court found that “the Pandemic Plan came about because of COVID-19,” which “breaks any inference that the same impetus giving rise to the Field Test also animated the Pandemic Plan.” *Id.* at 28a, 31a. That was especially so given that “different decisionmakers created and implemented the Pandemic Plan.” *Id.* at 32a.

There were also no “departures” from the ordinary process. In adopting the Pandemic Plan, MCPS “did what it always does: create a plan, announce the plan, and implement the plan.” *Id.* at 33a. To the “extent there were any departures from the ordinary course of business,” those were attributable to the pandemic. *Id.*

Finally, the court concluded that the Pandemic Plan did not bear more heavily on Asian American students because they “maintain strong representation in the magnet programs relative to their composition in the applicant pool.” *Id.* at 34a. From this, it was implausible that Asian Americans were “systematically excluded from the magnet schools for no apparent reason.” *Id.*

The District Court noted that “AFEF essentially recognizes the weakness of its [discriminatory intent] claim” but “presses that ‘discovery’ is necessary to explore the ‘private’ motivations” of MCPS officials. *Id.* at 27a. The court, however, rejected AFEF’s request because “[t]he purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.” *Id.* (quoting *Hughes v. LaSalle Bank, N.A.*, No. 02-6384-MBMHBP, 2004 WL 414828, at *1 (S.D.N.Y. Mar. 4, 2004)). “[A]bsent any facts which make plausible that [MCPS]—explicitly or implicitly—intentionally aimed to rebalance the racial composition of the magnet programs, the Court cannot conclude that such a motivation is *plausible* as pleaded.” *Id.*

Having determined that AFEF failed to plausibly allege either disparate impact or discriminatory intent under *Arlington Heights*, the District Court granted MCPS’s motion to dismiss. Pet. App. 36a.

E. The Fourth Circuit Affirms The Dismissal.

AFEF appealed. Pet. App. 3a. It challenged the District Court’s discriminatory intent conclusion on just one ground, arguing that its allegations regarding the obsolete Field Test should have carried more weight. C.A. ECF No. 56 at 26-29. AFEF conceded that it could

not prevail on disparate impact but sought “to preserve its arguments for en banc or Supreme Court review.” *Id.* at 30-34 (capitalization modified).

In an unpublished per curiam opinion and without holding oral argument, the Fourth Circuit affirmed. Pet. App. 1a-5a. With respect to the District Court’s disparate impact finding, the Fourth Circuit noted that “AFEF concedes” that “the amended complaint does not plausibly allege that the challenged policy disparately impacts Asian-American students under the applicable standards for assessing disparate impact set forth in” *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864 (4th Cir. 2023), a prior Fourth Circuit case applying *Arlington Heights* in the K-12 admissions context. Pet. App. 3a-4a. “Under binding precedent, AFEF’s equal protection claim lacks an ‘essential element.’” *Id.* at 4a (quoting *Coal. for TJ*, 68 F.4th at 882).

The Fourth Circuit recognized that the District Court had dismissed the complaint on two independent and alternative grounds—(1) the amended complaint “did ‘not aver plausibly that the’ challenged policy ‘disparately impacts Asian American students,’”; *and* (2) the amended complaint “contained ‘no facts [that] give rise to the inference that the’ challenged policy was implemented with discriminatory intent.” *Id.* at 3a (quoting Pet. App. 26a). The Fourth Circuit did not question the District Court’s conclusion that AFEF had failed to plausibly allege discriminatory intent. *See generally id.* And the court concluded that

“no reversible error is present in the district court’s Rule 12(b)(6) dismissal ruling.” *Id.* at 4a.³

This petition followed.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED.

AFEF frames its petition for certiorari around a sequencing question: whether a plaintiff alleging racial discrimination in K-12 public school admissions *must* establish disparate impact “*before* a court may consider evidence of discriminatory intent.” Pet. i (emphasis added); *see also, e.g., id.* at 15-16. That question is not implicated here. The plaintiff here failed to establish disparate impact, and the District Court nevertheless *went on* to consider evidence of discriminatory intent—and found that AFEF had not plausibly alleged any facts that could show MCPS adopted the Pandemic Plan with a discriminatory purpose. AFEF did not meaningfully challenge that holding in its briefing below. Nor did the Fourth Circuit question it. Given that context, this case is an exceptionally poor vehicle to review the question presented.

³ The Fourth Circuit also held that AFEF’s challenge to the District Court’s denial of its Rule 60 motion was waived. Pet. App. 4a; *see* D.Ct. ECF No. 111. AFEF had moved for relief from the judgment based on information MCPS provided, in response to a public records request, about how it uses economic data to locally norm students’ test scores. D.Ct. ECF No. 102.

A. The Question Presented Is Not Outcome Determinative.

This Court should deny certiorari because the question presented is irrelevant to the ultimate outcome of this case. The District Court granted MCPS's motion to dismiss on a ground that is independent from the disparate impact claim that AFEF presses here. The District Court held that AFEF did not plausibly allege discriminatory intent, a necessary element of its claim under *Arlington Heights*. AFEF's suit would be subject to dismissal even if this Court granted certiorari and AFEF prevailed on the question presented.

1. *As The District Court Explained, None Of The Arlington Heights Factors—Individually Or Collectively—Makes It Plausible That MCPS Adopted The Pandemic Plan With Discriminatory Intent.*

Under *Arlington Heights*, “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” 429 U.S. at 265-266. Disparate impact alone is not enough. *Id.* at 264-265. This is because “purposeful discrimination is ‘the condition that offends the Constitution.’” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484 (1982) (emphasis added) (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)). For a plaintiff to establish discriminatory intent, it must show that the defendant enacted the challenged policy “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279.

To determine whether a plaintiff has adequately alleged discriminatory purpose, courts conduct a fact-intensive and sensitive inquiry into intent using a

nonexhaustive list of factors set forth in *Arlington Heights*: the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; any legislative or administrative history, including statements by the relevant decisionmakers; departures from the normal procedural sequence; and the disproportionate impact of the official action. See *Arlington Heights*, 429 U.S. at 266-268; e.g., *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220-221 (4th Cir. 2016); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1352 (2d Cir. 1991).

As the District Court explained, none of the *Arlington Heights* factors—individually or collectively—makes it plausible that MCPS adopted the Pandemic Plan with discriminatory intent. See *supra*, pp. 12-14. Start with the “historical background.” *Arlington Heights*, 429 U.S. at 267-268. The amended complaint affirmatively alleges that “the Pandemic Plan came about because of COVID-19.” Pet. App. 31a; see also *id.* at 41a. Like the District Court noted, there is very little relevant historical background because an “intervening event”—the COVID-19 pandemic—“breaks any inference that the same impetus giving rise to the Field Test also animated the Pandemic Plan.” *Id.* at 31a.

With respect to the “specific sequence of events leading up to” MCPS’s adoption of the Pandemic Plan and its “legislative or administrative history,” *Arlington Heights*, 429 U.S. at 267-268, the District Court correctly concluded that “the chain of events leading to the Pandemic Plan [is] devoid of discriminatory purpose,” Pet. App. 28a. COVID-19 made it impracticable and unsafe for MCPS to continue administering the

in-person CogAT exam. *See id.* at 16a, 27a-28a. MCPS devised the lottery-based Pandemic Plan in response to “impracticalities,” and because lotteries are transparent and easy to administer. *See id.* And the Pandemic Plan was so successful that MCPS decided to continue using the same process even after the COVID-19 pandemic ended.⁴ *Id.* at 17a.

There were also no “[d]epartures from the normal procedural sequence” that “afford evidence that improper purposes are playing a role.” *Arlington Heights*, 429 U.S. at 267. As the amended complaint acknowledges, MCPS followed its ordinary procedures. Pet. App. 77a. A group of school officials met to evaluate the prior year’s process and recommended modifications. *Id.* at 32a-33a. True, MCPS did not make its internal deliberations public or hold “public discussions in front of the Board of Education.” *Id.* at 77a. But AFEF did not allege that MCPS publicly disclosed its deliberations in prior years. *Id.* at 47a-48a, 58a-59a, 67a. Therefore, as the District Court explained, “nothing in the Amended Complaint supports the inference that MCPS created the Pandemic Plan * * * under cover of darkness.” *Id.* at 33a. Nor did AFEF point to *any* allegedly discriminatory statements by the MCPS officials who had selected and adopted the Pandemic Plan. *See id.* at 77a-80a.

⁴ And it has. As noted on MCPS’s website, it continued to use the Pandemic Plan admissions criteria and process through the most recent application cycle. Montgomery County Public Schools, *Regional Middle School Magnet (Criteria-Based) Admission Process: Overview & Frequently Asked Questions*, <https://perma.cc/2AXM-QWAF> (Jan. 15, 2026).

Finally, the alleged disparate impact on Asian American students that AFEF points to cannot independently establish discriminatory intent. *Arlington Heights*, 429 U.S. at 266 (disparate impact can only be a “starting point”). Disparate impact can imply discriminatory intent where “a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action.” *Id.* “But such cases are rare,” and require a “stark” pattern. *Id.* Here, where the challenged policy is not keyed to race, was adopted because of a global pandemic, and relies on a random lottery for ultimate selection, it is not plausible to consider Asian Americans systematically excluded from the magnet schools. Pet. App. 34a. This is not the “stark” pattern of disparate impact contemplated by *Arlington Heights*. 429 U.S. at 266.

2. *AFEF Cannot Rely On The Field Test Allegations To Condemn The Pandemic Plan.*

Lacking any reason to condemn the Pandemic Plan, AFEF leans heavily on the Field Test. The lion’s share of the amended complaint is devoted to recounting the circumstances surrounding the adoption of the Field Test. Pet. App. 48a-76a, 82a-84a. Only a few paragraphs of the amended complaint even relate to the Pandemic Plan at all. *See id.* at 77a-80a. And in the Fourth Circuit, AFEF argued only that the District Court’s analysis of the initial complaint challenging the Field Test should have again carried the day. C.A. ECF No. 56 at 27, 29; *see also* Pet. 19. But AFEF cannot rely on the historical background to prop up its claim for at least three reasons.

First, even proven past “discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Abbott v. Perez*, 585

U.S. 579, 603 (2018) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)). History alone is not dispositive in the absence of other evidence; the “ultimate question remains whether a discriminatory intent has been proved in a *given case*.” *Id.* (quoting *Mobile*, 446 U.S. at 74) (emphasis added); *see also McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) (historical evidence “has little probative value” unless it “is reasonably contemporaneous with the challenged decision”). Even if AFEF had proven past discrimination in connection with the Field Test, that still would not be enough to condemn the Pandemic Plan.

Second, here, AFEF had only *allegations*, not *proven* past discrimination. The District Court never found that MCPS had discriminatory intent in adopting the Field Test. It had only concluded that the initial complaint “*makes plausible* that the County acted with a discriminatory motive” when it adopted the Field Test. *AFEF I*, 560 F. Supp. 3d at 953 (emphasis added). The District Court specifically held that “[t]o ascertain the purposes of the changed criteria—whether they be race-conscious or race-driven—requires further factual development.” *Id.* at 956. But AFEF amended its complaint before that factual development could occur.

Third and finally, AFEF did not plausibly allege that the Pandemic Plan and the Field Test had a legally relevant nexus. The two policies have entirely different criteria; were adopted by different officials; and were adopted for different reasons. *See supra*, pp. 4-8. So any discriminatory taint from the Field Test is not connected to the Pandemic Plan.

All of this leads to only one conclusion: the operative complaint does not plausibly allege discriminatory intent. Without discriminatory intent, AFEF’s claim fails—regardless of the answer to the question presented in the petition for certiorari.

B. This Case Is Unremarkable.

1. Certiorari is also unwarranted because this case is unremarkable and of little significance. This case involves a race-neutral lottery adopted in response to a global pandemic. It is not the right fact pattern for this Court to take up the question presented.

First, and fundamentally, the Pandemic Plan does not use race at all. It does not treat race as a “plus factor[],” *Fisher v. University of Texas at Austin*, 570 U.S. 297, 305 (2013), or a “determinative tip,” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 195 (2023) (citation omitted). It does not even allow “application essays” where an applicant may discuss “how race affected his or her life” (which this Court approved of in *Students for Fair Admissions*). *Id.* at 230. There is not even the possibility of human-reviewer bias seeping into the process because there is no individualized review of student demographic information whatsoever. The process is completely “colorblind.” *Id.* at 210 (citation omitted).

Second, the Pandemic Plan was developed in response to the COVID-19 pandemic and the challenges that it imposed on in-person educational programming. *See supra*, pp. 6-7. No one disputes that. AFEF adduced no facts showing that MCPS’s adoption of the Pandemic Plan was motivated in any way by racial bias or racial balancing. *See* Pet. App. 26a, 77a-80a. AFEF has not pointed to even one statement by an

MCPS official that could plausibly suggest that any part of the Pandemic Plan was intended to achieve racial balancing by proxy. *Cf. Students for Fair Admissions*, 600 U.S. at 206, 220. Nor has AFEF explained how a lottery can possibly be manipulated to drive predetermined outcomes.

Third, the amended complaint largely focuses on the Field Test—an obsolete admissions process adopted by different officials that is *no longer at issue in this case*. See Pet. App. 45a-76a. The petition, too, emphasizes the Field Test and the external consultant’s report that preceded it. Pet. 4-8. But AFEF’s challenge to the Field Test is outside the scope of the amended complaint, and is not before this Court.

Fourth, AFEF’s only evidence of disparate impact under the Pandemic Plan was a one-year dip in the proportion of Asian Americans among selected students at two magnet schools. And that evidence must be measured against the fact that the proportion of Asian Americans among selected students actually *increased* at the two other magnet schools in the same year, under the same policy. See Pet. App. 79a; D.Ct. ECF Nos. 33 & 33-1.

Ultimately, the Pandemic Plan is a colorblind lottery that MCPS adopted in response to a global pandemic. Nothing about the Pandemic Plan, its history, or its purpose is offensive to the Constitution. If this Court is going to weigh in on how to apply *Arlington Heights* to K-12 admissions, this is simply the wrong fact pattern on which to do so.

2. This Court has twice denied certiorari in cases involving far more serious allegations of purposeful discrimination in K-12 admissions: *Boston Parent Coal-*

tion for Academic Excellence Corp. v. School Committee for City of Boston, 89 F.4th 46 (1st Cir. 2023) and *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864 (4th Cir. 2023).

The *Boston Parent* plaintiffs pointed to evidence of outright racism during the Boston School Committee’s consideration of the challenged admissions policy. 145 S. Ct. 15, 15-16 (2024) (Alito, J., dissenting from the denial of certiorari). In a public hearing, the committee chairperson mocked Asian names while two other committee members, in their own words, “almost laughed out loud.” *Id.* (citation omitted). The committee also expressly prioritized racial balancing. *Id.* The district court found that three of seven officials “harbored some form of racial animus” and that the admissions policy 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).

And *Coalition for TJ* involved recorded discussions where officials arguably expressed their desire to achieve racial balancing in public high-school admissions. 146 S. Ct. 541, 543 (2024) (Alito, J., dissenting from the denial of certiorari). The district court had found that “emails and text messages between Board members and high-ranking [school] officials” showed “the purpose of the Board’s admissions overhaul was to change the racial makeup” at the school “to the detriment of Asian-Americans.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809, at *9 (E.D. Va. Feb. 25, 2022).

If the allegations in *Boston Parent Coalition and Coalition for TJ* do not warrant this Court’s intervention, the same is obviously true here.

3. This Court also recently held in *Mullin v. Doe* that a group of plaintiffs were not likely to show that discriminatory intent “was a motivating factor in the [challenged] decision” under *Arlington Heights* even where decisionmakers had made clearly racist statements. *Mullin v. Doe*, 609 U.S. ___, 146 S. Ct. 2121, 2138-40 (2026). That was so, this Court explained, because there was also “a strong, race-neutral explanation” for the government’s decision. *Id.* at 2139.

In reaching a decision to terminate Haiti’s Temporary Protected Status, government officials had made statements including: “ ‘Why is it we only take people from shithole countries’ like ‘Haiti [and] Somalia’? ‘Why cannot we have some people from Norway [and] Sweden?’ ” *Id.* at 2149 (Kagan, J., dissenting). “Haitians, along with some others, are ‘poisoning the blood’ of our country.” *Id.* “Haiti is a ‘shithole country,’ which is ‘filthy, dirty, [and] disgusting.’ ” *Id.* And, “Haitians are ‘eating the dogs * * *. They’re eating the cats. They’re eating—they’re eating the pets of the people that live [in Springfield, Ohio].’ ” *Id.*

But this Court concluded that other possible rationales for the policy—including the “administration’s general stance on immigration”—showed that the termination was “race-neutral,” even if the statements may not have been. *Id.* at 2139 (majority opinion). “Viewing all the relevant evidence,” this Court held that “respondents are unlikely to prove that race was a motivating factor in the decision.” *Id.* at 2140.

There is nothing like those statements alleged here. AFEF has not pointed to a single allegedly racist

statement made by any official who had any role in adopting the Pandemic Plan. It has not alleged that officials sought to achieve racial balancing by adopting the Pandemic Plan.

But *even if* AFEF *could* point to such statements, they would not be persuasive for the same reason that the racist statements were not persuasive in *Mullin*: AFEF’s other allegations point to a clear, race-neutral motivation for the Pandemic Plan—COVID-19. So, as in *Mullin*, there is a “strong, race-neutral explanation” for the challenged policy, and AFEF cannot show that discriminatory intent was a motivating factor under *Arlington Heights*. 146 S. Ct. at 2139.

On these facts, the lower courts’ application of *Arlington Heights* and dismissal of AFEF’s claim was entirely unremarkable. This Court should deny certiorari.

C. This Case Does Not Extend *Coalition for TJ*.

Much of the petition attacks the Fourth Circuit’s decision in *Coalition for TJ*. See, e.g., Pet. 16-18. But AFEF fundamentally misunderstands that case. And, in any event, the Fourth Circuit’s decision in this case was unpublished and is non-precedential. To the extent this Court wants to revisit *Coalition for TJ*, this case is not the right vehicle for that reconsideration.

In *Coalition for TJ*, the Fourth Circuit considered an *Arlington Heights* challenge to a high school admissions policy. 68 F.4th at 871. The plaintiff’s disparate-impact evidence was a single-year dip in the proportion of Asian Americans among admitted students. *Id.* at 880. The court found the plaintiff’s evidence insufficient and granted summary judgment for the defendant. *Id.* at 887-888.

Coalition for TJ did not announce any categorical rule like AFEF claims. *Contra* Pet. 16-17. Rather, it applied the *Arlington Heights* standard to the specific policy at issue and concluded that the single-year dip was not sufficient—on its own—to show that the policy “bears more heavily” on Asian Americans relative to others. *Coal. for TJ*, 68 F.4th at 881 (citation omitted); *see also id.* (“The district court thus erred in applying a *strictly temporal* method for assessing racially disparate impact.” (emphasis added)). The plaintiff failed to introduce additional evidence that could have bolstered its claim. For example, the plaintiff did not show that the policy caused the single-year dip or that it imposed greater “difficulty” on Asian-American applicants. *Id.* at 880-881.

To be sure, the Fourth Circuit in *Coalition for TJ* explained that if the proportion of Asian Americans among selected students fell below the proportion of Asian Americans among applicants, that would be *stronger* evidence of disparate impact. Unlike the single-year dip, such evidence might even be adequate—on its own—to show that the policy “bears more heavily” on Asian Americans. *Id.* (citation omitted). The Fourth Circuit’s discussion follows directly from this Court’s precedents. *E.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-651 (1989); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *Arlington Heights*, 429 U.S. at 266. And it does not amount to a categorical rule. Explaining that certain evidence *could be sufficient* to show disparate impact is different from holding that such evidence is *necessary*.

The disparate impact allegations in AFEF’s amended complaint are similarly underwhelming.

AFEF alleges that there was a single-year dip in the proportion of Asian Americans among selected students at two out of the four magnet schools. Pet. App. 79a (citing D.Ct. ECF Nos. 33 & 33-1). At the two other magnet schools, the proportion of Asian Americans among selected students *increased* under the Pandemic Plan. *Id.*; D.Ct. ECF Nos. 33 & 33-1. The Fourth Circuit determined that AFEF failed to plausibly allege disparate impact “under the applicable standards for assessing disparate impact set forth in” *Coalition for TJ*. Pet. App. 3a-4a. In other words, the Fourth Circuit considered the single-year dip insufficient—on its own—to show that the policy “bears more heavily” on Asian Americans relative to others. That does not amount to a rule requiring “that the challenged policy reduces the targeted racial group’s representation below a particular aggregate benchmark.” *Contra* Pet. 1.

In any event, the Fourth Circuit’s opinion below is unpublished and cannot be cited as precedent. Pet. App. 2a, 5a. It does not entrench *Coalition for TJ*, let alone extend it. Courts considering equal protection claims within the Fourth Circuit are free to consider all of the evidence the plaintiffs present, as *Arlington Heights* instructs. This case does not change that.

II. THIS CASE DOES NOT IMPLICATE A SPLIT.

AFEF’s lead argument—that this case implicates an outcome-determinative circuit split—is flatly wrong. *Contra* Pet. 11-16. *First*, AFEF has not identified any split on the question presented. Each of the four court of appeals decisions AFEF discusses considers disparate impact necessary to trigger strict scrutiny of a facially neutral admissions policy. *Second*, this case would come out the same way in every circuit. The

Pandemic Plan selects students through a lottery, and there are no allegations that the lottery was adopted for a discriminatory purpose. *Supra*, pp. 8, 17-20. That is not intentional discrimination in any circuit.

A. The Decisions Cited In The Petition Agree That Disparate Impact Is Necessary To Trigger Strict Scrutiny Of A Facially Neutral Admissions Policy.

The petition asks this Court to determine whether a plaintiff like AFEF “must show that the [challenged policy] produced a disparate impact on the targeted racial group before a court may consider evidence of discriminatory intent.” Pet. i. In arguing that this question implicates a circuit split, AFEF cites to cases from the First, Second, Third, and Fourth Circuits where other plaintiffs have also challenged competitive school admissions criteria as intentionally discriminatory. Pet. 11-16 (citing *Coal. for TJ*, 68 F.4th 864; *Boston Parent Coal.*, 89 F.4th 46; *Chinese Am. Citizens All. of Greater N.Y. v. Adams* (“CACAGNY”), 116 F.4th 161 (2d Cir. 2024); and *Sargent v. Sch. Dist. of Philadelphia*, 165 F.4th 727 (3d Cir. 2026)). But those courts all agree that a plaintiff challenging a facially neutral policy under the Equal Protection Clause must show both discriminatory intent *and* disparate impact to trigger strict scrutiny. And none applies the rigid sequencing rule in the question presented.

Start with the strict scrutiny question. Each court that AFEF cites has stated that a plaintiff challenging a facially neutral policy under the Equal Protection Clause must show both discriminatory intent *and* disparate impact to trigger strict scrutiny:

- Per the First Circuit in *Boston Parent Coalition*: “[T]o successfully challenge the use of a facially neutral, and otherwise bona fide, selection criterion, [a plaintiff] must prove both improper intent and disparate impact.” 89 F.4th at 59.
- The Second Circuit in *CACAGNY* reaffirmed “the well-settled proposition that a plaintiff must prove both discriminatory effect and intent under *Arlington Heights*.” 116 F.4th at 174. That court went out of its way to emphasize that it did “not suggest that an equal protection claim challenging a facially neutral policy does not require a showing of discriminatory effect.” *Id.* at 173.
- The Third Circuit’s *Sargent* decision was the same. It explained that the law “requir[es] challengers to prove both discriminatory purpose and impact to trigger strict scrutiny of a policy that is facially neutral and applied evenhandedly.” *Sargent*, 165 F.4th at 739-740 (footnote omitted).
- And the Fourth Circuit, too, requires a plaintiff challenging a facially race-neutral policy to show “(1) that the policy exacts a disproportionate impact on a certain racial group, and (2) that such an impact is traceable to an ‘invidious’ discriminatory intent.” *Coal. for TJ*, 68 F.4th at 879; *see also, e.g., Lewis v. Ascension Parish Sch. Bd.*, 806 F.3d 344, 358-359 (5th Cir. 2015) (same).

These courts also agree on the sequencing. None has any sort of sequencing rule requiring a showing of disparate impact first. Courts in each circuit are free to

review the plaintiff's allegations of discriminatory purpose before, or in addition to, disparate impact:

- The First Circuit in its first *Boston Parent Coalition* decision found “no likely error in the district court’s conclusion that a discriminatory purpose did not motivate the Plan’s adoption” after separately evaluating the plaintiff’s evidence of disparate effect. *Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Boston*, 996 F.3d 37, 46-48 (1st Cir. 2021).
- The Second Circuit in *CACAGNY* assumed without deciding that the challenged decision was motivated by discriminatory intent, then nonetheless considered disparate impact. 116 F.4th at 176-177.
- The Third Circuit in *Sargent* first held that the evidence could support a finding of discriminatory intent and then proceeded to analyze whether the plaintiffs had created a material dispute on disparate impact. 165 F.4th at 743, 750.
- And the Fourth Circuit in *Coalition for TJ* analyzed whether the challenged admissions policy had a disparate impact, 68 F.4th at 879-882, and then separately determined that “the undisputed facts * * * preclude the Coalition from proving that the impact was driven by an invidious discriminatory intent.” *Id.* at 882-886.

AFEF has failed to identify a split on its own terms.

B. This Case Comes Out The Same In Each Circuit.

To the extent there is a split on how courts analyze equal protection claims in the K-12 admissions context, this case does not implicate it. This case would come out the same way in the First, Second, and Third Circuits. Each of those courts (and every other) requires a plaintiff to plausibly allege discriminatory purpose to trigger strict scrutiny of a facially neutral policy—like the lottery at issue here. *See supra*, p. 11. And the allegations in AFEF’s complaint do not make it plausible that MCPS adopted the Pandemic Plan with the specific purpose of discriminating against Asian-American students. *See supra*, pp. 17-20. Every circuit would affirm the dismissal of AFEF’s complaint on that basis.

Just look at the (very different) facts at issue in the Third Circuit’s *Sargent* decision. The plaintiffs there pointed to evidence including (1) the school district’s Anti-Racism Declaration, which established an intent to “uproot[]” the district’s existing policies and “center[] [its] work through the lens of racial equity”; (2) the district’s express goal of growing the percentage of black and Hispanic students qualified to attend specialized high schools by almost 20%, “making progress towards being proportional to [the] population as a whole”; and (3) statements from school board members including that being “colorblind” is “not a good thing” and that “race is always a consideration.” 165 F.4th at 733-736. The Third Circuit held that all of those statements and actions could, “taken together in context,” “support a finding that the School District adopted the Admissions Policy to achieve racial proportionality.” *Id.* at 743.

This case is nothing like that. AFEF has not pointed to a single statement by MCPS officials in connection with the Pandemic Plan, let alone one that is plausibly discriminatory. *See* Pet. App. 77a-80a. Nor has it alleged that MCPS has any kind of overarching racial-balancing policy like the school district in *Sargent*. *See id.* Without plausible allegations of discriminatory intent, AFEF's claim fails—in any circuit.

Even focusing only on AFEF's disparate-impact argument, it is highly unlikely that the aggregate before-and-after data AFEF has proffered would qualify as a plausible allegation of disparate impact in the Second or Third Circuits. Under the Pandemic Plan, the percentage of Asian American admittees *increased* at two out of the four magnet schools. *Id.* at 79a; D.Ct. ECF Nos. 33 & 33-1.

Again, consider *Sargent*, where the plaintiffs had evidence showing “a substantial drop in the share of white and Asian-American students admitted to the schools.” Pet. 14 (citing 165 F.4th at 744). There is no equivalent substantial decline here. And in *CACAGNY*, it was “undisputed” that the challenged admissions policy rendered some Asian American students categorically ineligible for one-fifth of the available seats. 116 F.4th at 165. AFEF does not claim that any student is categorically ineligible for a seat at the four magnet middle schools in MCPS.

Any split on how courts analyze equal protection claims in the K-12 admissions context is not implicated by this case.

III. THE DECISION BELOW IS CORRECT.

This Court should also deny certiorari because the Fourth Circuit correctly applied this Court's equal

protection principles to hold that AFEF did not plausibly allege a constitutional violation.

The Fourth Circuit correctly held that the amended complaint does not allege a disparate impact on Asian American students. *See* Pet. App. 3a-4a. The court grounded its disparate impact analysis in *Coalition for TJ*, 68 F.4th at 879-881, which straightforwardly applied this Court’s *Arlington Heights* framework. *See* Pet. App. 4a. There the Fourth Circuit explained that a plaintiff raising an “invidious racial discrimination” claim must show that the challenged state action “bears more heavily on one race than another.” 68 F.4th at 880 (quoting *Arlington Heights*, 429 U.S. at 265-266). By its terms, *Arlington Heights* requires a “relative inquiry” into whether the Pandemic Plan makes it more difficult for Asian Americans to gain admission than for other groups. *See id.* at 881.

AFEF did not allege any such relative difficulty. *See generally* Pet. App. 40a-86a; *see also id.* at 3a-4a (AFEF conceded that it did not allege a disparate impact on Asian-American students under the governing law in the Fourth Circuit); Pet. 10 (same). Nor could it: the share of Asian Americans admitted to each of the four magnet middle schools under the Pandemic Plan exceeded the share of Asian-American applicants. Pet. App. 25a. Indeed, Asian-American students have a higher success rate under the Pandemic Plan than any other racial group.

Importantly, the Fourth Circuit did not question the District Court’s holding that AFEF did not plausibly plead discriminatory intent—a necessary element of its equal protection claim. *Id.* at 3a-5a (“no reversible error is present in the district court’s Rule 12(b)(6) dismissal ruling”), 26a-36a. AFEF acknowledges that the

Pandemic Plan is “different in many respects from” the (allegedly tainted) Field Test. *See id.* at 78a; *see also id.* at 27a, 31a. Yet the amended complaint largely focuses on the Field Test, *see id.* at 45a-76a, and includes no allegations of any statements or conduct evincing discriminatory intent during the adoption of the Pandemic Plan, *id.* at 77a-80a.

AFEF also does not dispute that ultimate admissions decisions are random, *see id.* at 28a, or that the Pandemic Plan was implemented “because of COVID-19,” *id.* at 31a (citing *id.* at 77a, 78a). It is difficult to even conceptualize how a lottery-based admissions policy—adopted in response to an unforeseeable global pandemic—could intentionally discriminate on the basis of race. The Pandemic Plan is simply not the kind of school-admissions program that warrants this Court’s review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVEN F. BARLEY
HOGAN LOVELLS
CADWALADER US LLP
100 International Drive
Baltimore, MD 21202

JO-ANN TAMILA SAGAR
Counsel of Record
KATHERINE T. MCKAY
HOGAN LOVELLS
CADWALADER US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jo-ann.sagar@hlc.com

Counsel for Respondents

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