

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 UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

**BRIEF FOR THE STUDENTS WHO OPPOSE
RACIAL DISCRIMINATION, STANLEY ZHONG,
AND NAN ZHONG AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Students Who Oppose Racial Discrimination (“SWORD”) is a nonprofit civil-rights organization. It advocates equal treatment of students without regard to race and opposes the use of racial proxies in educational admissions. Stanley Zhong and Nan Zhong are individual litigants. Their civil-rights advocacy grew from their family’s experience with selective admissions systems.

Amici are litigating admissions cases against the University of California, University of Washington, University of Michigan, and Cornell University. Although the cases differ in institution, posture, and legal theory, all implicate the threshold issue here: may a court disregard evidence that facially neutral admissions practices were adopted for racial purposes because Asian-American students remain successful in the aggregate? Amici do not ask this Court to decide those cases. They matter only because they show that the issue recurs beyond selective K–12 admissions.

Justice Alito identified that connection in his *Coalition for TJ* dissent. He noted that, soon after *Students for Fair Admissions*, the dean of UC Berkeley School of Law and the University of Michigan’s general counsel advocated *TJ*-like race-neutral mechanisms. *Coalition for TJ*, 146 S. Ct. 541, 546 & n.9 (2024) (Alito, J., dissenting from denial of certiorari). Amici’s UC and Michigan cases make that

¹ Counsel of record for all parties timely received notice of amici’s intent to file this brief. No party or counsel authored the brief or contributed financially to its preparation or submission. No person other than amici or their counsel made such a contribution.

anticipated recurrence concrete, while leaving their merits to the courts where they are pending.

Amici’s University of Washington case arises in the Ninth Circuit, and their University of Michigan case in the Sixth. Defendants in the Washington case invoked *Coalition for TJ* and aggregate Asian-American representation in seeking dismissal; the district court allowed Stanley Zhong’s principal federal discrimination claims to proceed. Amici’s University of California and Cornell cases involve related admissions claims. Together, these cases show the issue is recurring and warrant a national rule on a narrow question: is aggregate comparative disadvantage by a racial group a prerequisite to judicial consideration of discriminatory intent?

SUMMARY OF ARGUMENT

The petition should be granted. The circuits are divided over an outcome-determinative question. The First and Fourth Circuits require a plaintiff challenging a facially neutral admissions policy to cross an aggregate-impact threshold before considering other evidence of discriminatory purpose. The Second and Third Circuits reject that prerequisite. The Third Circuit “respectfully disagree[d]” with the First and Fourth Circuits and “reject[ed] their framework.” *Sargent v. School District of Philadelphia*, 165 F.4th 727, 748–50 (3d Cir. 2026).

The split must be precise. Amici do not contend that discriminatory purpose alone completes an Equal Protection claim, that every demographic decline establishes injury, or that a before-and-after comparison is conclusive. A before-and-after reduction is one form of discriminatory impact; aggregate

comparative disadvantage is another. They are not interchangeable. A plaintiff must allege a real, identifiable disadvantage caused by the challenged policy. The narrower question is whether the plaintiff must also establish aggregate comparative disadvantage suffered by the racial group under a court-selected statistical framework before considering other evidence of purpose.

Arlington Heights supplies the governing framework. It calls for a sensitive, context-specific inquiry into all available evidence of purpose. Impact is important evidence. It is not a categorical gateway limited to one statistical measure. *Washington v. Davis* established a one-way insufficiency principle: disproportionate racial impact, standing alone, ordinarily does not prove unconstitutional purpose. The Fourth Circuit transformed that principle into a two-part gatekeeping rule. Under the rule below, a plaintiff must plausibly allege discriminatory purpose and aggregate comparative disadvantage under the court's chosen framework; without the latter, the court need not consider remaining evidence of purpose.

The gateway is also unworkable. A court must choose among population share, applicant share, a purportedly qualified pool, selection rates, past admissions, or a counterfactual outcome. Those measures answer different questions and can point in opposite directions. *Sargent* shows the circularity clearly: Philadelphia changed the criteria defining who was "qualified" and then relied on the racial composition of the resulting qualified pool to argue that the policy was neutral. Neutral selection within a pool cannot answer the constitutional question when the challenged criteria determine who enters it. A

policy cannot manufacture the denominator that insulates it from review.

The deeper problem is conceptual: equal protection protects individuals, not racial aggregates. Established civil-rights frameworks reinforce that principle. *McDonnell Douglas* does not govern AFEF's policy challenge, but it does not make the success of other members of a plaintiff's race a bar to individualized proof. *Swierkiewicz* warns against converting a flexible evidentiary method into a rigid pleading rule. And *Ames* rejected a circuit-created, group-based add-on demanding prescribed forms of proof from selected discrimination plaintiffs. *Ames v. Ohio Department of Youth Services*, 605 U.S. 303, 309–11 (2025).

Nothing in Amici's position threatens genuine race-neutral reform. Governments may remove socioeconomic barriers, broaden geographic access, improve transportation and outreach, and use neutral educational criteria. Knowing a reform may affect racial outcomes, or hoping it broadens participation, is not enough. The constitutional question arises when officials choose or manipulate neutral criteria because they expect them to burden an identified racial group or produce a preferred racial allocation by disadvantaging that group. Race-blind administration does not explain why the eligibility rules and selection architecture were adopted.

The issue is recurring in higher-education litigation. The competing rules may determine whether plaintiffs obtain discovery into internal records that reveal purpose. This case presents the threshold question. The district court rejected AFEF's intent allegations, but the Fourth Circuit neither adopted nor reviewed that alternative ground. It affirmed because binding circuit precedent made

aggregate impact an “essential element.” This Court can resolve that legal question and leave the unaddressed intent arguments for remand, as it did with unaddressed alternative grounds in *Ames*. The Court should grant review now.

ARGUMENT

I. THE FOURTH CIRCUIT INVERTS *DAVIS* AND *ARLINGTON HEIGHTS* BY MAKING AGGREGATE COMPARATIVE DISADVANTAGE A GATEWAY TO AN INTENTIONAL-DISCRIMINATION CLAIM.

Washington v. Davis holds that disproportionate racial impact, standing alone, ordinarily does not prove an Equal Protection violation. 426 U.S. 229, 239–42 (1976). *Arlington Heights* explains how discriminatory purpose may be proven. It requires a “sensitive inquiry” into all available direct and circumstantial evidence. It calls impact an “important starting point,” but “not the sole touchstone.” *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977).

For a facially neutral policy, the ultimate question is whether the decisionmaker acted “because of,” not merely “in spite of,” the policy’s adverse consequences for a racial group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Once discriminatory purpose is shown to have been a motivating factor, the burden shifts to the government to establish that it would have made the same decision without that purpose. *Arlington Heights*, 429 U.S. at 270–71 & n.21. *Davis* and *Arlington Heights* thus distinguish effect from purpose. Neither makes aggregate comparative disadvantage under a

prescribed statistical framework a prerequisite to considering other evidence of intent.

The Fourth Circuit did exactly that. Applying its published decision in *Coalition for TJ*, the panel held that AFEF’s claim lacked an “essential element” because the amended complaint did not plausibly allege disparate impact under the circuit’s aggregate-comparison framework. Pet. App. 3a–4a; *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864, 879–82 (4th Cir. 2023). The panel affirmed dismissal without deciding whether AFEF’s remaining allegations plausibly supported discriminatory purpose.

Respondents may answer that *Coalition for TJ* did not announce a universal per se rule under which a group can never suffer disparate impact whenever its share of offers exceeds its share of applications. That limited point is correct but does not answer the defect. The court called the applicant-to-offer comparison the “proper metric in these circumstances,” required comparison of each group’s admissions success, held that the Coalition was “obliged” to show Asian-American students faced proportionally greater difficulty, and stated that “[o]nly then” could disparate impact be evident. 68 F.4th at 879–80.

The majority declared that Asian-American students “as a class” experienced no material disadvantage, held an “essential element” absent, and explained that it “could end [its] analysis” before considering purpose. *Id.* at 881–82. Thus, Amici do not contend that the Fourth Circuit selected one denominator for every case. The defect is the aggregate comparative-disadvantage gateway: unless the group fares worse under the court’s chosen comparisons, other evidence of racial purpose cannot carry the claim.

The error is not that injury is unnecessary. Purpose alone is insufficient, and a plaintiff must allege a cognizable injury caused by the challenged policy. But individual injury and aggregate comparative disadvantage are different. An applicant may be burdened because of race even when other members of the same racial category remain successful. The Fourth Circuit uses group-wide demographics as the gate to an individual claim.

That produces an asymmetry. Under *Davis*, disparate impact alone is insufficient to establish discriminatory purpose. Under the Fourth Circuit’s rule, however, the absence of aggregate comparative disadvantage is sufficient to prevent the court from considering other evidence of discriminatory purpose. *Davis* limited what impact alone can prove; it did not make aggregate comparative disadvantage an indispensable element of every challenge to a facially neutral policy. Justice Alito identified the anomaly in *Boston Parent Coalition*. The lower courts had “mistakenly treated evidence of disparate impact as a necessary element” even though this Court had “never said as much.” 145 S. Ct. 15, 17 (2024) (Alito, J., dissenting from denial of certiorari).

The level-of-review stakes are explicit in *Coalition for TJ*. The Fourth Circuit stated that, under its framework, strict scrutiny applies only after a plaintiff demonstrates both disproportionate impact and discriminatory intent; otherwise a facially neutral policy receives rational-basis review. 68 F.4th at 878–79. The challenged gateway therefore does more than organize evidence: it can prevent a plaintiff from reaching the scrutiny applicable to purposeful racial discrimination merely because the targeted group remains sufficiently successful in the aggregate. Amici challenge that antecedent barrier, not the

requirement that a plaintiff prove an actual injury and discriminatory purpose.

The circuit conflict is explicit. The Second Circuit held that a racially motivated facially neutral policy is not immunized because it “underperforms in an unconstitutional mission with respect to a targeted racial group in the aggregate.” *Chinese American Citizens Alliance of Greater New York v. Adams*, 116 F.4th 161, 173 (2d Cir. 2024). The Third Circuit joined that approach, explaining that aggregate discriminatory impact may satisfy the injury inquiry but “is not the only permissible form of proof.” *Sargent*, 165 F.4th at 749–50.

Sargent then addressed the First and Fourth Circuits by name: “we respectfully disagree” with their approaches and “reject their framework.” *Id.* at 748. It refused to create an Equal Protection exception merely because a court deemed a racial group “sufficiently successful.” *Ibid.* It preserved a limiting principle: the injury must be real and identifiable, and purpose without actual injury is insufficient under Third Circuit precedent. *Id.* at 749–50.

The First and Fourth Circuits take the opposite approach. *Coalition for TJ* and *Boston Parent Coalition* treat the absence of aggregate comparative disadvantage as dispositive even when other evidence may support an inference of racial purpose. 68 F.4th at 879–82; 89 F.4th 46, 57–58 (1st Cir. 2023). Respondents cannot dissolve the split by recasting it as a dispute over whether a temporal decline, standing alone, proves impact. Amici agree it need not. The conflict is whether aggregate group-level disadvantage is the only permissible form of injury proof when a plaintiff alleges concrete individual harm and discriminatory purpose. *Sargent* expressly rejected the First and Fourth Circuits’ framework. 165

F.4th at 748–50. Materially similar claims may proceed in New York or Pennsylvania but be dismissed in Massachusetts, Maryland, or Virginia before a court examines the evidence of purpose. Only this Court can restore national uniformity.

II. THE GROUP-BASED GATEWAY CONFLICTS WITH THE INDIVIDUAL NATURE OF EQUAL-PROTECTION RIGHTS.

Racial groups are not the holders of the constitutional right. Individuals are. The Fourth Circuit’s gateway reverses that principle by making the aggregate success of a racial group determine whether a court may consider evidence that an individual was intentionally disadvantaged because of race.

Established disparate-treatment frameworks confirm the mismatch. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), provides a method for evaluating circumstantial evidence that a person was denied an opportunity because of race. Courts consider the person’s qualifications, the adverse treatment, the defendant’s explanation, and evidence of pretext. The framework does not require the plaintiff to prove underrepresentation of the plaintiff’s racial group before a court may consider individualized evidence of intentional discrimination. See *Rashdan v. Geissberger*, 764 F.3d 1179, 1182–83 (9th Cir. 2014).

McDonnell Douglas does not govern AFEF’s *Arlington Heights* claim. The comparison is limited, but revealing. Both bodies of law address purposeful discrimination against persons. A university accused of rejecting an applicant because of race could not ordinarily defeat the claim merely by showing that other applicants of the same race remained numerous

in the class. The success of other Asian-American students does not erase one applicant's right to equal treatment.

CACAGNY makes the point concrete. The challenged reforms improved Asian-American admissions in the aggregate, yet the Second Circuit held that identifiable Asian-American students could establish discriminatory effect from being excluded from eligibility for reserved seats. 116 F.4th at 173–78. Statistical neutrality—or even aggregate improvement—does not categorically negate an individual denial of equal treatment.

This litigation illustrates the distinction. Addressing AFEF's original challenge to the prior Field Test, the district court held that a member's child alleged a cognizable injury from being required to compete under criteria that plausibly denied him equal footing because of race; the child did not have to prove that he would have received a seat absent the challenged barrier. *Association for Education Fairness v. Montgomery County Board of Education*, 560 F. Supp. 3d 929, 945–46 (D. Md. 2021). That ruling concerned standing and the former Field Test; it does not establish the motive behind the later Pandemic Plan. But it confirms the conceptual point: an individual competitive injury and aggregate racial underrepresentation are not the same thing.

The pleading posture makes the gateway more anomalous. In *Swierkiewicz v. Sorema N.A.*, this Court held that the *McDonnell Douglas* prima facie case is “an evidentiary standard, not a pleading requirement.” 534 U.S. 506, 510–12 (2002). It warned against transposing a flexible method into a rigid pleading rule. It makes even less sense to impose at the pleading stage a demographic gateway that

neither *Arlington Heights* nor the analogous evidentiary framework requires.

This Court’s unanimous decision in *Ames* reinforces the point. 605 U.S. at 309–11. *Ames* rejected a circuit-created “background circumstances” rule that imposed an extra, group-based burden on selected disparate-treatment plaintiffs and demanded specified forms of proof, including statistical evidence. *Id.* at 309–11. The Court stressed the law’s focus on individuals and repeated that the prima facie inquiry was never meant to be “rigid, mechanized, or ritualistic.” *Ibid.*

Ames, *Swierkiewicz*, and *McDonnell Douglas* do not replace *Arlington Heights*. They confirm a narrower proposition: courts should not invent a group-based evidentiary add-on and convert it into a pleading gate that blocks probative evidence of intentional discrimination.

The practical consequence is serious. Purpose is often proved through records controlled by defendants. Before discovery, a plaintiff may be able to allege racial objectives, suspicious sequence, procedural departures, proxy selection, and statements of purpose, but lack complete applicant data, internal simulations, and decisionmaking communications. A favorable aggregate percentage may end the case and foreclose discovery into the materials *Arlington Heights* treats as central.

III. THE AGGREGATE GATEWAY HAS NO STABLE BASELINE AND CANNOT DISPLACE OTHER EVIDENCE OF A POLICY’S RACIAL EFFECT.

A before-and-after reduction and aggregate comparative disadvantage answer different questions. The first asks what changed after the challenged

policy; the second asks how the targeted group fares against a selected comparator. A substantial decline in Asian-American admissions may be probative of injury, causation, and purpose even when Asian Americans remain above an applicant-pool, population, or success-rate benchmark. Temporal evidence is not conclusive alone, but neither cannot be discarded merely because another aggregate measure appears neutral.

The aggregate comparative-disadvantage gateway cannot operate until a court chooses a denominator and comparator. Should it use the targeted group's share of the general population, the school district, the eligible population, the raw applicant pool, or a purportedly qualified pool? Should it examine the group's share of offers, its selection rate, the change from earlier years, or a counterfactual estimate of what would have happened without the challenged criteria? Those measures answer different questions. They can produce opposite conclusions from the same record.

Coalition for TJ shows the problem. The challenged policy reduced Asian-American students' share of offers from between 65% and 75% in the five prior cycles to 54.36%. Yet the Fourth Circuit chose a different comparator: Asian-American students were 48.59% of applicants and received 54.36% of offers. 68 F.4th at 879–81. A before-and-after comparison showed a substantial adverse change. An applicant-share comparison showed no cognizable aggregate impact. The methodological choice determined whether the rest of the evidence could matter.

Respondents may answer that applicant share is a useful measure of relative disadvantage and that a temporal decline, standing alone, can be confounded. Both points may be true in a particular record. They

remain free to argue that a decline reflects ordinary fluctuation, was not caused by the challenged features, or that a particular feature affected too few seats to produce the asserted injury. Those are record-specific questions of causation and evidentiary weight. Amici do not ask the Court to constitutionalize the prior admissions status quo or to make before-and-after data dispositive. Such questions do not justify transforming one aggregate measure into an indispensable element that prevents consideration of every other form of injury and every other *Arlington Heights* factor.

Sargent exposes a still deeper problem: denominator endogeneity. Philadelphia changed the criteria that determined who entered the “qualified applicant” pool. It then argued that the policy was neutral because each racial group’s share of admitted students approximately tracked its share of that newly constructed pool. The Third Circuit rejected that presentation as lacking context because the challenged policy had changed the qualifications themselves. 165 F.4th at 741–44. The policy altered the denominator and then invoked that denominator as its defense. That is not merely a statistical problem; it is a scope-of-review problem. When the challenged criteria determine who enters the qualified pool, evenhanded selection within that pool cannot establish constitutional neutrality. A court must also examine why the eligibility and filtering criteria themselves were chosen.

No baseline is always dispositive. Population proportionality includes people who may never have been eligible, qualified, or interested and risks importing racial balancing into the constitutional inquiry. Demographic estimates also may not correspond to the relevant admissions cycle, and an

applicant’s equal-protection right cannot turn on unrelated shifts in the surrounding population. The raw applicant pool may be shaped by recruitment, deterrence, eligibility rules, and the challenged policy itself. A qualified pool can be circular when officials allegedly selected or manipulated the qualifying criteria for racial reasons. Prior-year outcomes may show what changed, but conditions also change. A counterfactual may best measure causation, but may require applicant-level data and internal modeling unavailable before discovery.

That does not reveal a defect in *Arlington Heights*. It shows why impact is evidence whose weight depends on context. Before-and-after data may show the effect of a policy change. Applicant-pool and selection-rate data may reveal other patterns. A qualified-pool measure may help when qualifications are independently defined. A counterfactual may clarify causation. *Arlington Heights* allows courts to assess those measures together with the rest of the evidence. The Fourth Circuit instead requires the plaintiff to win an antecedent statistical contest before purpose can be considered.

The rule is also difficult to apply to multiracial applicants. Aggregate analysis assumes categories that are stable, exclusive, and consistently defined. They are not. An institution may count a multiracial applicant in every selected category, in one category, fractionally, or under institution-specific coding rules. Under the decision below, those choices may determine whether a court can consider intent at all. Yet *Students for Fair Admissions* recognized that conventional admissions categories can be overbroad, arbitrary, undefined, or underinclusive. 600 U.S. 181, 216–17 (2023). A constitutional threshold cannot turn on an institution’s coding convention.

IV. THE AGGREGATE BENCHMARK TURNS GROUP SUCCESS INTO A SAFE HARBOR FOR PURPOSEFUL DISCRIMINATION.

The aggregate benchmark makes racial balancing self-validating. Officials may identify a racial distribution they dislike, select proxies expected to move enrollment toward a preferred distribution, and then invoke the resulting group balance as proof that no discrimination occurred. The practical result is stark. Suppose officials decide that a selective program enrolls too many Asian-American students. They choose a facially neutral mechanism because they expect it to reduce those students' opportunities. The policy imposes an identifiable racial burden. But Asian-American students remain above the court's selected benchmark. Under the Fourth Circuit's rule, the case ends before the court examines purpose.

The more successful a targeted group has been, the more intentional disadvantage the government may impose before the group falls below the line. That cannot be reconciled with an individual right. Equal protection protects persons, not racial aggregates. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). An applicant does not lose the right to equal treatment because other people assigned to the same racial category obtained seats. Intentional discrimination does not become permissible because it affects some members of the targeted group. As *Feeney* explained, “[i]nvidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.” 442 U.S. at 277.

Justice Alito described the consequence in *Coalition for TJ*: the rule “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.” 146 S. Ct. at 545 (Alito, J., dissenting from denial of certiorari).

The reasoning of *Students for Fair Admissions* is incompatible with that logic. The Court said that “[e]liminating racial discrimination means eliminating all of it,” 600 U.S. at 206, and called racial balancing “patently unconstitutional,” *id.* at 223.

Those principles do not condemn every facially neutral reform that changes racial outcomes. School systems remain free to remove subjective criteria, expand geographic access, improve transportation, provide test preparation, broaden outreach, and adopt genuine socioeconomic measures for legitimate educational reasons. Nor does mere awareness that a reform may change racial outcomes establish discriminatory purpose. A general hope that removing legitimate barriers will broaden participation is not the same as choosing a mechanism because it is expected to impose a racial burden on an identified group or to attain a preferred racial allocation by reducing that group’s opportunities. The distinction is the one between acting “in spite of” and acting “because of” the racial consequence. *Feeney*, 442 U.S. at 279. That *SFFA* involved express consideration of race does not make its individual-rights principle irrelevant. *SFFA* does not itself resolve proxy intent; *Arlington Heights* supplies the mode of proof for a facially neutral policy. Facial neutrality changes how purpose is proved, not the prohibition against purposeful racial discrimination.

Nor does race-blind administration resolve the antecedent question of policy design. A lottery administrator may never see an applicant’s race, and random final selection may remove discretion at the last stage. But if officials allegedly selected the eligibility rules, qualifying criteria, geographic

allocations, or lottery structure because of the racial burdens they expected those rules to impose, anonymity at the final draw does not answer the *Arlington Heights* inquiry. The inquiry concerns why the challenged governmental choice was made, not merely whether race appears on the final selector's screen.

The same is true when a policy benefits some members of the affected racial group. Evidence that low-income or nonfeeder-school Asian-American applicants benefited may bear on purpose and causation, but it does not negate an injury to other Asian-American applicants. Equal protection does not treat a racial group's net benefit as making an intentional burden harmless. Nor does support for lawful access measures waive a challenge to a policy allegedly chosen for racial purpose. The inquiry focuses on the challenged policy's purpose and operation, not whether the challenger supports socioeconomic or geographic diversity.

The Harvard record in *SFFA* forecloses treating substantial aggregate representation as a safe harbor. Harvard admitted Asian-American students. Yet this Court stated that Harvard's consideration of race had led to an 11.1% decrease in the number of Asian Americans admitted and quoted the district court's observation that the policy "overall results in fewer Asian American and white students being admitted." *Students for Fair Admissions*, 600 U.S. at 218–19. The relevant question was not whether Asian Americans remained numerous in the class, but whether individual applicants were burdened because of race. Aggregate success did not erase that injury, and it cannot categorically foreclose consideration of injury here.

Nor may government avoid that inquiry by relabeling a preferred racial distribution as “diversity,” “equity,” “representation,” or “access.” “[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,” and the prohibition against racial discrimination is “levelled at the thing, not the name.” *Students for Fair Admissions*, 600 U.S. at 230–31 (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). *Parents Involved* likewise rejected the proposition that verbal formulations can transform racial balancing into a constitutionally distinct objective. 551 U.S. 701, 732 (2007) (plurality opinion). If officials use a facially neutral mechanism as a racial proxy, facial neutrality does not end the inquiry. The asserted purpose and decisionmaking record must be tested under the governing standard.

The danger is clear when a group is called “overrepresented.” That label treats individual achievement as a demographic excess to be reduced. It turns the success of some members of a race into a defense for disadvantaging others. The Equal Protection Clause sets no ceiling on a racial group’s success. *Yick Wo v. Hopkins* remains instructive: formally neutral administration cannot hide unequal treatment on racial grounds. 118 U.S. 356, 373–74 (1886).

**V. THE CIRCUIT SPLIT IS MATURE, IS
ALREADY AFFECTING HIGHER-EDUCATION
LITIGATION, AND MAY SOON CONFRONT
THE NINTH AND SIXTH CIRCUITS.**

The issue is not confined to magnet middle schools. Educational institutions commonly use facially neutral criteria correlated with race, including geography, school assignment, income, first-

generation status, standardized-testing policies, and holistic rubrics. Those criteria may serve lawful purposes. But when a plaintiff alleges that officials selected them for a racially discriminatory purpose, the same threshold question arises: must the plaintiff first prove aggregate comparative disadvantage by the racial group before a court may consider intent?

That question matters after *Students for Fair Admissions*. The Court held that universities may not use race as a negative, stereotype applicants, or pursue racial balance through admissions. 600 U.S. at 218–24. Institutions remain free to use genuine race-neutral alternatives. But *SFFA* would lose force if officials could design nominally neutral alternatives as racial instruments and defeat an intentional-discrimination claim merely because the targeted group remains numerically successful.

Justice Alito identified the higher-education connection in *Coalition for TJ*. He warned that *TJ*'s model and the Fourth Circuit's rule supplied two roadmaps: one showed institutions how to alter racial outcomes through facially neutral criteria; the other showed courts how to shield the asserted purpose from review through aggregate arithmetic. 146 S. Ct. at 546 & n.9. He cited public statements by the dean of UC Berkeley School of Law and the University of Michigan's general counsel about TJ-like approaches after *Students for Fair Admissions*. See Brief for Cato Institute as Amicus Curiae at 4–10, *Coalition for TJ v. Fairfax County School Board*, No. 23-170 (U.S. Sept. 20, 2023).

Those statements do not establish why UC or Michigan adopted or maintained any policy. Amici do not ask this Court to decide the merits of their cases. See *Zhong v. Regents of the University of California*, No. 2:25-cv-00495 (E.D. Cal.); *Zhong v. University of*

Michigan Board of Regents, No. 5:25-cv-10579 (E.D. Mich.). The cases matter here for a narrower reason. They show that disputes over facially neutral admissions criteria allegedly selected for racial purposes are recurring and that courts will need a uniform answer to the threshold question presented.

The issue has now produced a concrete pleading-stage ruling in the Ninth Circuit. In Amici’s pending Title VI and Equal Protection action against the University of Washington, defendants invoked *Coalition for TJ* and argued that Asian Americans were “extremely well represented” because “50.2% of applicants admitted to the Allen School in 2023 were Asian-American.” Defendants’ Motion to Dismiss Second Amended Complaint at 2, 16–17, *Zhong v. University of Washington*, No. 2:25-cv-00348-JLR, ECF No. 43 (W.D. Wash. Mar. 30, 2026). Without specifically discussing *Coalition for TJ* or that statistic, the district court denied dismissal on the merits of Stanley Zhong’s principal federal discrimination claims against the remaining proper defendants. It held that, even if UW’s admissions criteria were facially race-neutral, the Allen School’s racial targets supported an inference that race was nevertheless being considered, and that whether discrimination occurs “below the surface” is a factual question not appropriate to resolve on a motion to dismiss. Order at 18–19, *Zhong v. University of Washington*, No. 2:25-cv-00348-JLR, ECF No. 50 (W.D. Wash. Aug. 7, 2026). The court further concluded that the pleaded documents plausibly supported the allegation that race was considered “to achieve racial balancing.” *Id.* at 19.

The same issue can arise under Title VI at private universities receiving federal funds. *Students for Fair Admissions* evaluated Harvard’s Title VI claim under

Equal Protection standards. 600 U.S. at 198 & n.2. Amici’s Cornell action provides another setting in which a court may be asked whether aggregate Asian-American representation forecloses consideration of evidence that facially neutral criteria served a discriminatory purpose. See *Zhong v. Cornell University*, No. 3:25-cv-00365 (N.D.N.Y.).

These cases show present recurrence without asking this Court to resolve any pending merits dispute. The existing appellate split remains the First and Fourth Circuits on one side and the Second and Third on the other. The Washington order is not Ninth Circuit precedent, and the pending Michigan case does not yet speak for the Sixth Circuit. But the same threshold issue is now being litigated in both circuits and may soon require additional courts of appeals to choose between the competing approaches.

The competing rules may determine not merely the outcome, but whether a plaintiff ever obtains the evidence necessary to prove discriminatory purpose. Much of the evidence identified by *Arlington Heights*—internal analyses, communications, model runs, procedural departures, and decisionmaking records—is ordinarily controlled by defendants. An aggregate gateway that permits dismissal before discovery can therefore prevent a plaintiff from obtaining the very evidence necessary to prove the discriminatory purpose alleged.

The resulting geographic disparity is especially consequential in education: public institutions and federal funding recipients face incompatible standards, and a student’s ability to obtain discovery into evidence of purpose may depend on geography. Review would supply a narrow and workable national rule before the existing conflict spreads: before-and-after impact and other statistics may be relevant, and

sometimes powerful, evidence, but aggregate comparative disadvantage is not a prerequisite to considering the remaining evidence of discriminatory purpose.

VI. THIS CASE IS A CLEAN VEHICLE.

The district court dismissed AFEF's amended complaint on two grounds. It held that the Pandemic Plan did not produce disparate impact under its aggregate analysis and, alternatively, that the amended complaint did not plausibly allege discriminatory purpose. *Association for Education Fairness v. Montgomery County Board of Education*, 617 F. Supp. 3d 358, 368–73 (D. Md. 2022). The court of appeals recited both holdings. But its stated rationale addressed only the first. Treating *Coalition for TJ* as binding, the panel held that AFEF's claim lacked an “essential element” and affirmed on that basis. Pet. App. 3a–4a. It did not decide whether the district court correctly evaluated AFEF's allegations of purpose under *Arlington Heights*. That distinction is important because *Coalition for TJ* arose on a full summary-judgment record, while this case was dismissed at the pleading stage without a separate appellate analysis of purpose.

Respondents may invoke the district court's unreviewed alternative ground and argue that correcting the aggregate-impact rule could not change the judgment. *Ames* supplies the answer. There, Ohio urged affirmance on alternative grounds that the court of appeals had not addressed. This Court rejected the challenged gatekeeping rule and left the remaining arguments “to the courts below” on remand. 605 U.S. at 313. The same course is appropriate here. The Court can determine whether aggregate group-level disparate impact is an

indispensable prerequisite to consideration of discriminatory intent, vacate the judgment, and permit the Fourth Circuit to address any preserved alternative ground under the proper framework.

Such a disposition would neither presume discriminatory purpose nor shift AFEF's burden. Respondents would remain free to invoke any applicable presumption of governmental good faith and to argue that the Pandemic Plan resulted from COVID-19, that different officials adopted it, that randomized final selection eliminated discretionary choices, that no racial proxy or reliable demographic modeling was used, that the Consortia followed ordinary procedures, and that the plan served legitimate socioeconomic and geographic goals. AFEF would remain responsible for plausibly alleging a concrete injury and that racial purpose was a motivating factor. Those record-specific contentions may bear on the merits; they do not make the threshold legal question disappear. The question here is whether continued aggregate success by Asian-American students prevents a court from considering the historical background, sequence of events, policy design, decisionmakers' statements, procedural circumstances, and alleged individual burdens together.

The district court's two opinions underscore that distinction rather than create a vehicle defect. Its 2021 opinion concerned the prior Field Test and found those allegations sufficient to warrant factual development. 560 F. Supp. 3d at 952–56. Its 2022 opinion concerned the later Pandemic Plan and concluded that COVID-19, changed decisionmakers, the lottery, and other circumstances defeated the pleaded inference of purpose. 617 F. Supp. 3d at 368–73. The former ruling does not establish the purpose

of the latter plan, and historical background is relevant rather than dispositive. But the contrast demonstrates that discriminatory purpose is a conventional, record-sensitive *Arlington Heights* question. It does not justify an antecedent rule forbidding consideration of purpose whenever the targeted racial group fails to show aggregate comparative disadvantage.

The separate Rule 60(b)(2) ruling creates no obstacle. The court of appeals held that AFEF had inadequately developed its challenge to the denial of postjudgment relief and therefore waived appellate review. Pet. App. 4a–5a. The question presented arises from the antecedent Rule 12(b)(6) dismissal and can be resolved without reviewing the later evidence or disturbing the waiver ruling.

Nor does the opinion’s unpublished status obscure the issue. The panel expressly treated the published decision in *Coalition for TJ* as binding and dispositive. It applied that precedent to enter a final judgment against AFEF. The question therefore concerns the operation of a published circuit rule, not the precedential status of the short opinion applying it.

The conflict is mature and acknowledged. The First and Fourth Circuits impose an aggregate threshold before other intent evidence may be considered. The Second and Third Circuits reject that prerequisite, and the Third Circuit expressly rejected the First and Fourth Circuits’ framework. The conflict can no longer be dismissed as a mere disagreement over the sufficiency of before-and-after statistics. *CACAGNY* and *Sargent* reject aggregate group-level disadvantage as an indispensable prerequisite to an intentional-discrimination claim. More percolation will not clarify the alternatives. It will produce more inconsistent outcomes and encourage defendants to

invoke aggregate representation as a threshold defense before courts examine purpose.

The pending university cases confirm recurrence. This case allows the Court to resolve the threshold question without itself deciding the ultimate purpose of the Pandemic Plan. *See* Sup. Ct. R. 10(a), (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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