
In the Supreme Court of the United States

ASSOCIATION FOR EDUCATION FAIRNESS,

Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION;
DR. MONIQUE FELDER, INTERIM SUPERINTENDENT,

Respondents.

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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

The petition presents a square circuit split on a recurring issue of national importance. Until resolved, this Court will continue to face this irreconcilable conflict over whether equal-protection challengers to facially race-neutral admissions criteria must clear an aggregate disparate-impact bar to proceed. Today, challengers within the First and Fourth Circuits cannot prevail unless they can show that the targeted racial group received fewer seats than the group's share of the applicant pool. This categorical bar "render[s] legally irrelevant" even direct evidence of racial animus. *Bos. Parent Coal. for Academic Excellence Corp. v. Sch. Comm. for Bos.*, 145 S. Ct. 15, 17-18 (2024) (Alito, J., dissenting from denial of certiorari).

In Respondents' haste to downplay the circuit split, they obscure the decision below and try to recast this case as unremarkable, fact-bound, and unworthy of this Court's review. But the judgment below relied on a categorical rule requiring dismissal of any equal protection challenge to facially race-neutral admissions criteria where the challenger cannot clear the aggregate disparate-impact bar. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 881 (4th Cir. 2023). The panel below issued a short, per curiam order on that ground alone. App. at 3a-4a. Absent that rule, the Fourth Circuit would have had to review the Association for Education Fairness' remaining allegations under the traditional framework of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977). Far from seeking fact-bound error correction, the petition

involves a threshold rule of law that barred inquiry into discriminatory intent below.

Because the disputed aggregate disparate-impact bar determined the outcome of AFEF's appeal, Respondents' lengthy argument about the sufficiency of AFEF's allegations is premature and irrelevant. The Fourth Circuit has not yet passed on the general sufficiency of the complaint. This Court need not do so either. Instead, the Court should grant the petition to address the threshold issue that foreclosed appellate review of AFEF's remaining allegations of discriminatory intent.

ARGUMENT

I. The Fourth Circuit's Disparate Impact Holding Was Dispositive

Respondents primarily argue that the question presented was not outcome determinative because AFEF did not adequately allege discriminatory purpose. Resp. at 17-22. Yet, because of the categorical bar AFEF asks this Court to review, the Fourth Circuit never addressed the remaining factors for proving discriminatory intent under *Arlington Heights*. It relied solely on circuit precedent requiring dismissal if the challenger to facially race-neutral admission criteria does not plead that the share of seats the targeted group earned fell below the group's share of the applicant pool. *Coal. for TJ*, 68 F.4th at 881. Were the Court to grant review and reverse on the question presented, the Fourth Circuit could then address the remainder of the *Arlington Heights* factors on remand.

Respondents' entire premise is flawed. They want to rely on the district court's conclusion that AFEF

failed to plead discriminatory intent, but to do that, they must explain why the Fourth Circuit never addressed the other *Arlington Heights* factors. So they quibble that AFEF never challenged this holding on appeal. Resp. at 16. Respondents might have a point if that were true, but it isn't. Point I of AFEF's opening brief in the Fourth Circuit explicitly argued that the district court's intent holding was wrong. ECF No. 56 in No. 23-1068 (4th Cir.) at 24-29 ("Fourth Circuit Brief"). Based on the district court's previous ruling that AFEF plausibly alleged the initial "field test" criteria were adopted for a discriminatory purpose, 560 F. Supp. 3d 929, 953 (D. Md. 2021), AFEF argued that "[t]he allegations of the amended complaint make it plausible that the weighted lottery MCPS now uses to select students for its magnet middle school programs was implemented at least in part to maintain the racial effect of the field test." Fourth Circuit Brief at 29.

The Fourth Circuit did not address this argument. There was no need. Binding circuit precedent holds that failure to plead disparate impact under the *Coalition for TJ* standard is fatal. *Coal. for TJ*, 68 F.4th at 882 (noting after finding the Coalition for TJ failed to show disparate impact that "we recognize that we could end our analysis of the Coalition's Equal Protection Claim at this juncture"). While the *Coalition for TJ* court continued on to discuss the remaining *Arlington Heights* factors, the Fourth Circuit chose not to do so in this case.

Absent *Coalition for TJ*'s disparate-impact bar, the Fourth Circuit would have had to address the remainder of AFEF's allegations. That makes this case an especially good vehicle to answer the disputed question. The posture allows the Court to issue a

decision limited to the question presented, remanding to the Fourth Circuit to address the remainder of the parties' previously unaddressed arguments. This helps the Court answer important threshold questions with nationwide import without delving into the factual intricacies of each case. *See, e.g., Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 312-13 (2025) (unanimously reversing on a threshold Title VII question despite the respondent's argument that the claim would ultimately fail for reasons the court of appeals did not address); *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 280 (2024) (unanimously reversing the California Court of Appeal on a threshold issue that had barred the claim, while expressly declining to consider "any of the parties' other nuanced arguments" that the lower court did not address because it applied a threshold bar).

Because they cannot characterize the Fourth Circuit's short *per curiam* opinion as anything more than a summary affirmance based on the very circuit precedent that merits this Court's review, Respondents lean back on the district court's analysis of the remaining factors. But the merits of the district court's analysis are beside the point. The arguments have yet to receive a full airing below because of the offending circuit precedent. Remand would allow AFEF the same opportunity to appeal the district court's dismissal order that a similarly situated plaintiff would get in the Second or Third Circuits.

In any event, the district court "required far too much at the pleading stage." Fourth Circuit Brief at 29. Specifically, the district court's conclusion that the admissions lottery (or the "Pandemic Plan") was so divorced from the field test that field-test era allegations were irrelevant to intent was premature.

Circuit precedent insists that surviving a motion to dismiss is a “low bar.” *Jehovah v. Clarke*, 798 F.3d 169, 180 (4th Cir. 2015). And as AFEF argued below, multiple district courts within the circuit have held that “a complaint need not plead sufficient facts to satisfy all four *Arlington Heights* factors to raise a plausible claim of intentional discrimination.” Fourth Circuit Brief at 27 (citing *Carcaño v. Cooper*, 350 F. Supp. 3d 388, 420 (M.D.N.C. 2018), & *La Unión del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 394 (D. Md. 2018)). Even leaving aside the other factors—especially considering that AFEF has yet to have the benefit of discovery—the district court’s holding that AFEF’s original complaint plausibly alleged discriminatory intent at least means the “historical background” of Respondents’ decision supports a plausible inference of discriminatory intent. See *Arlington Heights*, 429 U.S. at 267.

Ultimately, Respondents’ discussion of the complaint’s discriminatory intent allegations merely distracts from the question presented. This case is a good vehicle in large part because the Court need not engage with the district court’s conclusion that AFEF did not plausibly allege discriminatory intent. Instead, it can grant certiorari, resolve the circuit split, and remand to allow the Fourth Circuit to review the district court’s conclusion in the first instance.

II. Respondents Misunderstand the Circuit Split

Respondents next argue that there is no circuit split at all because “[e]ach of the four court of appeals decisions . . . considers disparate impact necessary to trigger strict scrutiny of a facially neutral admissions

policy.” Resp. at 28. It’s true that the First, Second, Third, and Fourth Circuits all hold that proof of disparate impact is required to win an *Arlington Heights* case (although some circuits do not and this Court has never so held, see *Bos. Parent Coal.*, 145 S. Ct. at 17 & n.2 (Alito, J., dissenting from denial of certiorari)). More importantly, though, that is not the circuit split this petition presents. Instead, AFEF seeks review because these four circuits disagree over whether challengers to facially race-neutral admissions criteria “must satisfy an aggregate disparate-impact benchmark before courts may consider evidence of discriminatory intent.” Petition at 11.

The divide on this question is clear. In *Coalition for TJ*, the district court found that the challengers had shown disparate impact both through “a simple before-and-after comparison,” and by demonstrating that the racial proxy in that case disproportionately forced Asian-American students to meet higher standards for admission. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022). The Fourth Circuit rejected that analysis in favor of an aggregate impact benchmark. 68 F.4th at 881. The First Circuit then cited *Coalition for TJ* to support its own threshold aggregate impact requirement. *Bos. Parent Coal. for Academic Excellence Corp. v. Sch. Comm. for Bos.*, 89 F.4th 46, 57-58 (1st Cir. 2023). Both courts made clear that a challenger cannot show disparate impact (and thus cannot prevail) without evidence that the targeted group’s share of seats fell below the group’s share of the applicant pool.

The Second and Third Circuits acknowledged the requirement that a challenger show impact, but they

rejected aggregate benchmarks. The Second Circuit specifically reversed the district court’s imposition of an aggregate-impact benchmark, holding instead that strict scrutiny applies “even if there is no evidence that the discriminatory policy has resulted in negative impact on individuals of that race at an aggregate level.” *Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 171 (2d Cir. 2024). The Third Circuit followed, explaining that “the Second Circuit has taken a sounder approach than the First and Fourth Circuits” in holding that a showing of aggregate impact is “not a prerequisite” to a successful equal-protection claim. *Sargent v. Sch. Dist. of Philadelphia*, 165 F.4th 727, 749 (3d Cir. 2026).

AFEF’s allegations of disparate impact, including a before-and-after comparison and evidence that Asian-American students disproportionately have to satisfy a higher standard to qualify for the lottery, meant nothing in the Fourth Circuit under *Coalition for TJ*. Cf. *Sargent*, 165 F.4th at 750 (“[W]hile evidence of an aggregate discriminatory impact may satisfy the ‘discriminatory impact’ inquiry, it is not the only permissible form of proof. Appellants must show that ‘similarly situated individuals of a different race were treated differently.’” (quoting *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 550 (3d Cir. 2011))). Respondents suggest that *Coalition for TJ* did not announce a categorical rule, but the panel’s rejection of the district court’s disparate impact analysis refutes that characterization. In any event, the Fourth Circuit read it as categorical in this case, App. at 3a-4a, and the First and Third Circuits agree, see *Bos. Parent Coal.*, 89 F.4th at 58 (citing *Coalition for TJ* to support its categorical aggregate benchmark); *Sargent*, 165 F.4th at 747 (describing the holding of

Coalition for TJ as “[e]ven in the face of evidence of discriminatory intent and a measurable effect on enrollment, so long as the allegedly disfavored racial group remained more successful than other racial groups, the Fourth Circuit held that it need only apply rational basis review”); *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 544 (2024) (mem.) (Alito, J., dissenting from denial of certiorari) (“[T]he panel majority held that there was no disparate impact because [Asian Americans] were still overrepresented in the TJ student body.”).

These same allegations are entitled to a full hearing in the Second and Third Circuits. Along with allegations of discriminatory intent, challengers in these circuits have enough to trigger strict scrutiny (and thus defeat a motion to dismiss). Respondents’ attempt to obscure the clear circuit split should not deter this Court’s review.

III. Past Denials Have Allowed the Circuit Split to Percolate and Deepen

Respondents insist that this is an “unremarkable” case. Resp. at 22. They see no reason the Court would grant certiorari here when it turned away similar petitions in *Coalition for TJ* and *Boston Parent Coalition*. Respondents even try to frame this case as relatively minor compared to the “far more serious allegations” in cases like *Boston Parent Coalition* and *Coalition for TJ*. Resp. at 23-24. None of this means the Court should avoid deciding the question presented now that the circuit split has crystalized and challengers in the First and Fourth Circuits must satisfy a substantial threshold requirement that does not exist in the Second and Third Circuits.

First, Respondents' comparison between the facts here and those in *Coalition for TJ* and *Boston Parent Coalition* is misleading. Those cases were decided on the merits. *Coalition for TJ* had a seven-volume joint appendix in the Fourth Circuit. See ECF No. 36-1 in No. 22-1280 (4th Cir.). The First Circuit appendix in *Boston Parent Coalition* was nearly 3,000 pages and consisted of voluminous data, minutes of meetings, and communications between School Committee members. Doc. No. 00117887662 in Case No. 21-1303 (1st Cir.). This case is still at the pleading stage. Because of that, we know very little about how the so-called "Pandemic Plan"—a weighted lottery that is still in effect six years later—was developed. Yet we do know that it replaced the field test criteria, and the district court found the allegations related to that plan made "plausible that the County acted with a discriminatory motive" in implementing the field test. 560 F. Supp. 3d at 953. Again, these are questions for remand, but Respondents' attempt to minimize this case based on the facts is unpersuasive.

More importantly, conditions have changed since the Court denied certiorari in those cases. When the Court denied *Coalition for TJ*, no circuits had yet rejected the Fourth Circuit's aggregate disparate-impact threshold. *Boston Parent Coalition* followed. The Second Circuit's decision in *Chinese American Citizens Alliance* that triggered the circuit split did not issue until about a month after regular briefing on the *Boston Parent Coalition* petition finished. See Supplemental Brief of Petitioner Boston Parent Coalition for Academic Excellence Corp. in No. 23-

1137.¹ Since then, the Third Circuit “respectfully disagree[d] with the First and Fourth Circuits’ approaches to the discriminatory impact inquiry and reject[ed] their framework.” *Sargent*, 165 F.4th at 749. The question has now sufficiently percolated in the lower courts, ripening it for this Court’s review.

At this stage, the facts of each individual case are less important than the cleaved standards used to judge these challenges in the lower courts. Each challenge to facially race-neutral K-12 admissions criteria must consider how to measure disparate impact and then how much to factor it into the overall discriminatory intent inquiry under *Arlington Heights*. The facts of each case aside, the answers to these questions are typically outcome determinative. With such a sharp divide among the circuits, only this Court can clear up the confusion and ensure that the Equal Protection Clause provides the same protection nationwide.

IV. Respondents’ Defense of the Fourth Circuit’s Rule Underscores the Need for Review

Finally, Respondents defend the Fourth Circuit’s rule on its merits. Resp. at 33-35. This just demonstrates why the Court should grant the petition. The conflict over the proper measurement of disparate impact in *Arlington Heights* claims implicates core equal-protection principles. After *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*), many

¹ The supplemental brief is available here: https://www.supremecourt.gov/DocketPDF/23/23-1137/326828/20240925134557065_Boston%20Supplemental%20Brief.pdf.

institutions have turned to racial proxies to approximate the results they can no longer obtain with outright racial preferences. See Brief for Students for Fair Admissions as Amicus Curiae at 9-18. The success of this endeavor depends largely on what sort of evidence courts require to prove discriminatory intent under *Arlington Heights*.

Were courts to adopt the Fourth Circuit’s rule, universities and K-12 schools could easily replicate pre-*SFFA* results. An aggregate disparate-impact benchmark requiring a showing that the targeted group received fewer seats than its share of the applicant pool would establish a racial-balance safe harbor. See Brief for American Civil Rights Project et al. as Amici Curiae at 12-14. Institutions could then avoid inquiries into discriminatory intent and preserve proportionality by race, defying this Court’s warning that racial balancing is “patently unconstitutional.” *SFFA*, 600 U.S. at 223 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)).

Whether intentional racial discrimination receives strict scrutiny should not depend on the circuit in which it occurs. Only this Court can resolve the conflict once and for all.

CONCLUSION

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

Respectfully submitted,

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