No. 23-1137

In the

Supreme Court of the United States

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Petitioner,

v.

THE SCHOOL COMMITTEE FOR THE CITY OF BOSTON; ALEXANDRA OLIVER-DÁVILA; MICHAEL O'NEILL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DERAUJO; BRENDA CASSELLIUS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE BEACON CENTER OF TENNESSEE, GOLDWATER INSTITUTE, PUERTO RICO INSTITUTE FOR ECONOMIC LIBERTY, AND JONATHAN ROBERTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an equal protection challenge to facially race-neutral admission criteria is barred simply because members of the racial groups targeted for decline still receive a balanced share of admissions offers commensurate with their share of the applicant pool.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **Beacon Center of Tennessee** is a nonprofit public interest organization that strives to protect individual rights and eliminate government barriers to opportunity. To this end, Beacon represents Tennesseans and other Americans free-of-charge in public interest litigation. This case is relevant to Beacon because Beacon seeks to eliminate government-imposed barriers — such as racial discrimination — to educational opportunity for all.

The **Goldwater Institute** is a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates on behalf of clients and participates as amicus curiae in cases involving constitutional liberty. The Institute has worked to end government racial discrimination, having helped draft the Arizona Civil Rights Initiative in 2010, and litigating against discrimination in many cases. *See, e.g., Carter v. Tahsuda,* 743 Fed. Appx. 823 (9th Cir. 2018).

The **Puerto Rico Institute for Economic Liberty** (ILE for its Spanish acronym) is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberties, the rule of law, private property rights, and limited government. ILE's mission includes identifying and removing public

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[1] The parties were notified that amici intended to file this brief at least 10 days before its filing. *See* Sup. Ct. R. 37.2. No party's counsel authored any part of this brief, and Amici alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

sector barriers to provide opportunities and enable all Puerto Rico residents to prosper under a free market-based system that allows them to achieve their goals, eliminate dependency, and live the kind of lives they value.

Jonathan Roberts is a lifelong New Yorker and a strong proponent of equality before the law. In 2022, Mr. Roberts filed a civil rights lawsuit challenging government-issued directives that instructed medical providers to use race in prioritizing then-scarce COVID-19 treatments. As Justice Alito noted, the government's actions in Mr. Roberts's case "illustrate[d] the danger of departing from the foundational principle that in the United States all people are entitled to 'equal justice under law.'" *Thompson v. Henderson*, 143 S. Ct. 2412, 2414 (2023) (Alito, J., respecting denial of cert.).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

For twenty years, admission to three of Boston's selective public schools was based on GPA and performance on a standardized test. App. 5a. In 2020, the Boston School Committee convened a working group and charged it with revising the admissions process. *Id.* at 6a–7a. That group's "equity impact statement" declared that it will "work towards an admissions process" to tailor "enrollment at each of the [three] schools so that it better reflects the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston." *Id.*

To that end, the group "reviewed multiple simulations of the racial compositions that would result from different potential admissions criteria." *Id.* at 7a.

Following deliberations infected with racial animus, the School Committee replaced its longstanding admissions policy with a plan that reserved seats for applicants from each of Boston's 29 zip codes. *See id.* at 8a–9a. The gerrymandered admissions process had its intended effect: the proportion of white and Asian students fell from 61% to 49%. *Id.* at 16a. The First Circuit upheld the new admissions plan. It accepted that "the Plan was chosen precisely to alter racial demographics," *id.* at 29a, but nonetheless held that the Coalition failed to establish a disparate impact merely because Asian American and white applicants still earned more seats than their share of the applicant pool. *See* App. 17a–19a.

This Court should grant the Petition. ***First***, the Fourteenth Amendment recognizes that every American is "a unique individual and must be treated as such by the law." *Thompson,* 143 S. Ct. at 2414 (Alito, J., respecting denial of cert.). Recent years have witnessed an alarming rise in government programs that "divide [us] up by race or ancestry," *id.*, and discriminate on the basis of race. Review is sorely needed to clarify that governments may not sidestep the prohibition on racial discrimination by resorting to facially neutral proxies for race.

Second, as this Court has explained time and again, the Fourteenth Amendment "protect[s] *persons, not groups*." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551

U.S. 701, 743 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Yet discrimination by proxy threatens individualism every bit as much as express racial classifications.

Third, the First Circuit's disparate impact analysis clashes with this Court's equal protection jurisprudence. That court veered in the wrong direction when it tied the viability of an equal protection claim to whether the plaintiff was a part of an overrepresented racial group, as opposed to whether he or she suffered discrimination. *See* App. 26a. That analysis contravenes the Fourteenth Amendment's demand that the government treat all Americans as individuals.

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important Given the Alarming Rise in Government Programs that Discriminate on the Basis of Race

"All men are created equal," endowed with "unalienable Rights." Decl. of Independence, 1 Stat. 1 (1776). The Fourteenth Amendment enshrines this fundamental guarantee of "equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

The concept of "a creditor or debtor race" is "alien to the Constitution's focus upon the individual." *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring). "In the eyes of government, we are just one race here. It is American." *Id.*

Yet it has become increasingly fashionable in recent years to "divvy[] us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (*LULAC*) (Roberts, C.J., concurring). Government entities—federal, state, and local—have increasingly flouted the Constitution's guarantee of equality before the law. In so doing, they have discarded the principle of equal rights among individuals, in favor of equal outcomes among groups.

One example involves racial preferences in the distribution of lifesaving COVID-19 treatments. In December 2021, Americans faced the largest wave of reported COVID-19 cases during the pandemic, and a severe supply shortage of effective COVID-19 antivirals. The State of New York and New York City issued directives to healthcare providers instructing them to prioritize treatment for certain patients. Aside from race-neutral factors such as kidney disease and heart conditions, however, these governments directed providers to prioritize treatment to non-white or Hispanic patients. *Roberts v. McDonald*, 143 S. Ct. 2425, 2425 (2023) (Alito, J., respecting denial of cert.). The government attempted to use "longstanding systemic health and social inequities" to justify these mechanical racial preferences. *Id.* Fortunately, however, the supply shortage giving rise to the case soon ended, but New York's actions reflect a disturbing instinct to prioritize medical treatment on the basis of race.

Some health care officials, in fact, now openly advocate discriminating against whites and other groups in the provision of medicine. In a 2021 article in the *Boston Review*, physicians Bram Wispelwey and Michelle Morse of Brigham and Women's Hospital in

Boston boasted of their choice to give "a preferential admission option for Black and Latinx heart failure patients to our specialty cardiology service," and indeed to rely on race "rather than rely on provider discretion or patient self-advocacy to determine whether they should go to cardiology or general medicine." Such discrimination, they claimed, was required to correct for "our system of colorblind law." *An Antiracist Agenda for Medicine*, Boston R., Mar. 17, 2021.[2]

The federal government has even instituted mechanical racial preferences. The American Rescue Plan Act of 2021 called for billions of dollars in debt relief to farmers and ranchers. Yet the government provided debt relief only to socially disadvantaged farmers and defined "social disadvantage" exclusively in terms of race and ethnicity. *Wynn v. Vilsack*, 545 F.Supp.3d 1271, 1275 (M.D. Fla. 2021). Regardless of a farmer's individual circumstance, the program provided debt relief for all black, Hispanic, and Asian farmers with eligible loans, while categorically excluding white (non-Hispanic) farmers.[3]

Other examples involve racial preferences in COVID-19 relief grants. In Colorado, an event planner

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[2] https://www.bostonreview.net/articles/michelle-morsebram-wispelwey-what-we-owe-patients-case-medical-reparations/

[3] Three different federal courts issued preliminary injunctions preventing the government from forgiving loans on the basis of race, and the federal government subsequently repealed the discriminatory program. *Wynn*, 545 F.Supp.3d at 1294–95; *Miller v. Vilsack*, 21-cv-0595, 2021 U.S. Dist. LEXIS 264778, at *35–36 (N.D. Tex. Jul. 1, 2021); *Holman v. Vilsack*, 21-cv-1085, 2021 U.S. Dist. LEXIS 127334 at *35 (W.D. Tenn. Jul. 8, 2021); *see also* Pub. L. No. 117-169, §§ 22007-08 (2022) (repealing race-based forgiveness program).

who had lost all revenue generated from his event planning business because of COVID-19 cancellations challenged a statewide relief plan that allocated relief "mechanical[ly]" based on racial qualifiers. Order Granting in Part and Reserving Ruling in Part on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction at 5, *Collins v. Meyers* (*Collins* TRO), No. 21-cv-2713-WJM-NY (D. Colo. Oct. 12, 2021).

In Illinois, a chiropractor sued Cook County for discriminating against him through its COVID-19 small business grant program. The application required applicants to identify whether the business is at least 51% minority-owned, operated, and controlled, and noted that the grant program "prioritizes historically excluded populations for selection, including People of Color, Women, Veterans, and Persons with a Disability." Complaint at ¶¶ 23–24, *Cusano v. Cook County*, No. 1:22-cv-7196, (N.D. Ill. Dec. 21, 2022).

Small business owner Brian Dalton challenged a Massachusetts program that excluded his business from consideration for a grant because of his race. The state's Inclusive Recovery Grant Program aimed to assist small businesses with grants of up to $75,000. Yet this "inclusive" program excluded applicants from consideration unless they were members of a racial minority, or women, or LGBTQ+. Complaint at ¶ 2, *Dalton v. Hao*, No. 1:23-cv-11216 (D. Mass. May 31, 2023).

These civil rights lawsuits led to happy endings. Faced with legal challenges, the government entities either scrapped their race-based programs or gave grants to all who had applied. Yet these cases also

show the regrettable persistence of government efforts to "divvy[] us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring).

This Court's precedents provide a clear path for victims of overt racial discrimination to seek a remedy in court. Last term's landmark decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023), made plain that there is no higher-education exception to the Constitution's mandate of equality before the law. Yet, as demonstrated by this case and the Fourth Circuit's decision in *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023), *cert. denied,* No. 23-180 (Feb. 20, 2024), students suffering the sting of racial discrimination by proxy face a murky doctrine in raising their equal protection claims.

This issue will only grow in importance. Many schools now forbidden from *overtly* using racial classifications to generate some preconceived racial demographic outcome will turn to purportedly neutral proxies for race to achieve the same ends. After this Court's decision in *Students for Fair Admissions*, the University of Colorado reiterated its "unwavering" commitment to doing just that. *See* Erica Breunlin, *Colorado Universities Will Double Down on Diversity After Supreme Court Effectively Barred Affirmative Action*, The Colo. Sun (Jun. 30, 2023).[4] Many other selective colleges did likewise. *See* Aatish Bhatia & Emily

[4] https://coloradosun.com/2023/06/30/colorado-colleges-universities-affirmative-action/.

Badger, *Can You Create a Diverse College Class Without Affirmative Action*, NY TIMES (Mar. 9, 2024).[5]

Erwin Chemerinsky, Dean of the University of California, Berkeley School of Law, even told an audience last year that the school engages in racial discrimination in faculty hiring to achieve "diversity," despite the fact that this is illegal, adding "if ever I'm deposed, I'm going to deny I said this to you." *Berkeley Law Dean Caught Telling Class He'd Lie in Deposition Now Says He Was Joking*, College Fix, July 14, 2024.[6]

In March, the *New York Times* published an interactive article that modeled ways for universities to engage in racial balancing without using overt racial preferences. Bhatia & Badger, *supra*, and the federal government offered similar guidance in August. It advised schools to use "information about the applicant's neighborhood and high school" as a permissible way to achieve a desired racial outcome after *Students for Fair Admissions*. Dep't of Educ. Office of Civil Rights & Dep't of Justice's Educ. Opp. Section, *Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard Coll. and Univ. of North Carolina* (Aug. 14, 2023).[7]

In all, Petitioner is correct in noting that this issue is not going away. Pet. for Cert at 4.

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[5] https://www.nytimes.com/interactive/2024/03/09/upshot/affirmative-action-alternatives.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb.

[6] https://www.thecollegefix.com/berkeley-law-dean-caught-telling-class-hed-lie-in-deposition-now-says-he-was-joking/.

[7] ocr-questionsandanswers-tvi-20230814.pdf (ed.gov)

II. Racial Discrimination by Proxy Undermines the Fourteenth Amendment's Core Value of Individual Treatment Just as Much as Express Racial Preferences

The Constitution prohibits both overt and covert forms of discrimination. That's because, regardless of form, government-sponsored discrimination flouts the constitutional mandate that government must treat each American as an individual. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). "Race-based assignments embody stereotypes that treat individuals as the product of their race." *Id.* at 912 (internal quotation marks omitted).

When the State assigns voters on the basis of race, for instance, it engages in "the offensive and demeaning assumption that voters of a particular race, because of their race, think alike." *Id.* at 911–12. In admissions decisions, too, a student must be assessed by "[his or her] unique ability to contribute to the university . . . based on his or her experience as an individual—not on the basis of race." *Students for Fair Admissions*, 143 S. Ct. at 2176.

Regardless of form, race-based admissions decisions offend the basic constitutional principle of individualism. Admissions plans that employ proxies to achieve the government's desired racial balance suffer from three fatal flaws.

First, such plans rely on race in a "nonindividualized, mechanical" way. *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003) (O'Connor, J., concurring). Students are admitted not because of their individual characteristics, but because they reside in an area that

makes them a likely member of the government's desired racial group. This form of racial discrimination not only contravenes the Fourteenth Amendment but also the reasoning advanced by *proponents* of racial preferences in admissions. As one advocate defending a university's use of racial preferences asserted to this Court, a "holistic" admissions process would be needed to further "diversity within diversity." *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 416 (2016) (*Fisher II*) (Alito, J., dissenting) (citing University's brief at 34). But geographic quotas—like the one here—undermine that goal because they all but ensure that the increase in members of a racial group will all come from the same geographic area.

Second, admissions programs that discriminate by the clever use of proxies of race are still just racial classifications. Some consider them facially race-neutral because they don't consider the race of any student, but the programs nonetheless fixate on the racial composition of the student body. How else would they determine whether a group is "overrepresented" or not?

"The very object" of proxy-based discrimination is to "single[] out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics,'" and to do so "for a racial purpose." *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (citation omitted). It relies on government-created racial labels—and those labels are broad and arbitrary. *See* App. 7a–8a (noting the working group's fixation on sorting students into one of four categories: "White," "Asian," "Black," and "Latinx."). The broad racial category "Asian," for example, has been used by universities to group together

Chinese, Korean, Japanese, Indian, Bangladeshi, and Pakistani individuals: individuals with vastly different appearances, languages, and cultures. *See Students for Fair Admissions*, 143 S. Ct. at 2210–12 (Gorsuch, J., concurring). "It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experience to share. So why [are they lumped] together[?]" *Fisher II*, 579 U.S. at 414 (Alito, J., dissenting).

Third, admissions programs that discriminate through proxies increase racial hostilities just as much as plans that use express racial classifications. *Cf. City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (racial classifications must be "strictly reserved for remedial settings" in part because they "lead to a politics of racial hostility").[8] *See also* Asra Nomani, *How Mama Bears Won a Court Victory—and Helped Elect a Governor—in Virginia* (Education Next, Aug. 23, 2022) (detailing Coalition for TJ member's fight for equality at Thomas Jefferson High School)[9]; Alex Zimmerman and Monica Disare, *De Blasio's Specialized School Proposal Spurs Outrage in Asian Communities* (Chalkbeat, Jun. 5, 2018).[10]

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[8] To be sure, racial discrimination is wrong regardless of the reaction it evokes. It is the act of discrimination, not the reaction to it, that violates the constitutional mandate of equality under the law.

[9] https://www.educationnext.org/how-mama-bears-won-court-victory-helped-elect-governor-virginia-immigrant-parents-asia-fight-discrimination/

[10] https://www.chalkbeat.org/newyork/2018/6/5/21105142/de-blasio-s-specialized-school-proposal-spurs-outrage-in-asian-communities/

This is no surprise. Admissions programs like the one here "effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision-making such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730 (internal quotation marks omitted).

In the end, 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*, 143 S. Ct. at 2176 (internal quotation marks omitted). This Court should take this case to resolve once and for all that racial balancing, whatever its form, is "patently unconstitutional." *Parents Involved*, 551 U.S. at 730.

III. The First Circuit's Decision Cannot Be Squared with This Court's Precedents

The decision below was wrong in two key respects. *First*, the court below incorrectly concluded that the admission plan couldn't be a "subterfuge for . . . a race-based selection process" merely because "admission under the Plan correlates positively with being White and Asian, the only groups numerically over-represented under the Plan." App. 25a–26a. The Fourteenth Amendment forbids government from discriminating on the basis of race. Yet the First Circuit's holding "effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, Slip Op. at 8 (Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

The First Circuit's logic is incompatible with this Court's decision in *Students for Fair Admissions*. Harvard's admissions plan violated Title VI because it disadvantaged Asian students—even though Asian students were "overrepresented" under either Harvard's plan or a racial-neutral one. 143 S. Ct. at 2171 (Asian Americans made up between 17% to 20% of the incoming class at Harvard even under a system that discriminated against them); *id.* at 2156 & n.2 (discrimination that violates the Equal Protection Clause also violates Title VI when committed by an institution that accepts federal funds).

The First Circuit's rationale would have also excused Harvard's disreputable discrimination against Jewish students roughly a century ago. *See* Jerome Karabel, *The Chosen: The Hidden History of Admissions at Harvard, Yale, and Princeton* 96 (2005) (Harvard admissions subcommittee used information about a student's name, place of birth, and parents to assign the student a J1, J2, or J3 to designate the likelihood that the applicant was Jewish). After all, Jewish students were "overrepresented" at elite colleges like Harvard.

In all, the First Circuit's test—which prevents white and Asian students from prevailing on an equal protection claim because their group is overrepresented—is incompatible with the Constitution's demand that government treat each person as an individual. Protection under the Fourteenth Amendment doesn't depend on (perceived) political power, but on the moral and constitutional imperative of equality before the law.

Second, the First Circuit failed to appreciate that the Committee's two-tier system served as strong evidence of discrimination. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (substantive departures may be relevant, especially if factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached).

The initial phase of the new admission plan reflected the Committee's decision to use GPA as *the* indicator of merit. App. 45. The Committee ranked applicants by GPA and filled 20% of seats at Boston's selective exam schools with the highest-ranked students. *Id.* But subsequent rounds of admission reserved seats for applicants by geographic area, and pitted applicants only against peers from the same zip code. Because student performance varied among the school districts, the zip code quota marked a sharp departure from the criterion (GPA) the Committee viewed as dispositive in the first phase. Over 60% of students admitted from one predominantly black and Hispanic zip code were admitted with a GPA of below 10.0 on a 12-point scale. Pet. for Cert. 10. In at least six majority white and Asian zip codes, however, the number of students with a sub-10 GPA was zero. *See id.* In other words, the Committee departed substantively from its norm by skipping students with high GPAs in high-performing zip codes. It did so because it believed that they were likely white or Asian—which violates the Equal Protection Clause.

In the end, the First Circuit joined the Fourth Circuit in endorsing an admissions plan that deprives students of educational opportunities on the basis of

race. This Court should grant review to ensure that the First Circuit's reasoning doesn't spread to deny other students of their fundamental right to equality under the law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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