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, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF FOR THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does the Fourteenth Amendment always require that a state-run competitive-admissions school meet strict scrutiny when it tries to attain a race-conscious goal by manipulating its admission criteria?

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Here, the opinion of the lower court suggests that schools can circumvent this Court's Equal Protection jurisprudence by using so-called race-neutral criteria to achieve a goal that would be prohibited if it were achieved by direct, straightforward means.

STATEMENT

CIR adopts the recitation of facts in the Petition for Writ of Certiorari.

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[1] Counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below concluded that the state can manipulate criteria to achieve a racial goal consistent with the Equal Protection Clause of the Fourteenth Amendment if the proportion of applicants of the group the state wants to diminish is less the proportion of successful applicants from that group.

This holding has enormous consequences. Amicus begins with a variation on Justice Alito's hypothetical in his dissent from the denial of the petition for writ of certiorari in *Coalition for TJ v. Fairfax County School Bd.*, 218 L. Ed. 2d 71, 75 (2024).

Suppose a state college basketball coach holds tryouts and tests the prospective players for skills. Three-fourths of those trying out are black, and one-fourth are white. The coach tests the potential players with a certain formula weighing certain skills (foul shooting, rebounding prowess, passing, etc.) based on the coach's experience as to the importance of those skills, yielding a composite score. After the scores are tabulated, the highest 18 scores make the team. One year, all but one of the 18 players chosen for the team are black. The coach is concerned that a primarily minority team will upset the fan base. He considers simply adding the two unsuccessful white players with the highest scores and eliminating the two black players in the top 18 with the lowest scores. But, he is told by the school's counsel, this would be flagrant race discrimination and illegal under the Equal Protection Clause.

But the counsel notices that, if the coach manipulates his predetermined criteria by giving more weight to foul shooting and less weight to rebounding, then two additional white players, and two fewer black players, would make the team. Moreover, because 5/6 (fifteen of eighteen) of the team would be black players, and black players made up only 3/4 of those trying out, the manipulated criteria have no disparate impact on blacks and, according to the rationale of the court below, there is no Equal Protection Clause violation.

Or consider a variation on the facts in *Ricci v. DeStefano*, 557 U.S. 557 (2009). Instead of refusing to certify the exam results, suppose that New Haven had adopted the reweighting of the exam components (written and oral) that the critics of the civil service exam suggested was a "less discriminatory testing alternative." *Id.* at 589. This Court rejected the argument that the existence of such an alternative would be a defense (a "strong basis in evidence") to the plaintiffs' claim of disparate treatment (intentional discrimination) under Title VII. *Id.* at 590. But, under the rationale of the court below, there likely would be *no intentional discrimination at all* because the percentage of successful candidates who were white would not have fallen below the percentage of white applicants. *But cf. id.* at 579-80 (holding that refusal to certify the exam "would violate the disparate-treatment prohibition of Title VII absent some valid defense" because "[w]hatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race."); *id.* at 593

("The problem . . . is that . . . the raw racial results became the predominant rationale for the City's refusal to certify the results.").

A third hypothetical: a state school applying the same admissions criteria to all applicants would end up with a class that is 60% women and 40% men, even though the applicants are evenly split between the sexes. It wants a class that has roughly the same number of men and women. It could simply add a plus to all the male applicants, but that would risk a violation of Title IX or the Equal Protection Clause. *E.g.*, *Johnson v. Board of Regents*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000) (holding that adding a fraction of a point to the score of all male applicants to a university violated Title IX), *aff'd*, 263 F.3d 1234 (11th Cir. 2001). Instead, it starts to consider height as an admissions criterion, and, because men are generally taller than women, and giving the weight to height that will achieve its goal, it ends with a class that is 49½% male. Under the rationale of the court below, there is no violation of any anti-discrimination provision.

There is something wrong with these outcomes. Not only do they permit state schools to engage in race-conscious (or sex-conscious) conduct, but they elevate form over substance.

CIR submits that at least part of the problem is one caused by this Court's own jurisprudence. This Court repeatedly has said that state entities must consider "race neutral alternatives" before using race-conscious selection methods. But this Court has never actually defined what a "race neutral alternative" is, and, accordingly, it seems to have

promoted "race neutral" alternatives that have specific racial goals. At the same time, it never required state actors to pursue obvious "race neutral" alternatives. Thus, for years, colleges and universities were able to maintain race-conscious admissions systems side-by-side with legacy programs giving admission advantages to (largely white) alumni.

ARGUMENT

I. THE "RACE NEUTRAL ALTERNATIVE" PROBLEM[2]

A state entity that consciously uses race or national origin as a selection device to choose who will receive the benefits of a program that entity operates must show that the use of race meets "strict scrutiny." *Fisher v. Univ. of Texas*, 570 US. 297, 310 (2013). It is the burden of that state entity to show that the use of race is "narrowly-tailored" to meet a compelling governmental interest. *Id.* ("racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'") (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

This Court first articulated the idea of a race-neutral alternative in 1989 in *City of Richmond v.*

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[2] A significant amount of the material in this section is taken from Michael E. Rosman, *The Quixotic Search for Race-Neutral Alternatives*, 47 U. Mich. J. Law Reform 885 (2014).

J.A. Croson Co., 488 U.S. 469 (1989). That case involved a set-aside program, called The Richmond Plan, for city construction contracts, a program that this Court found violated the Fourteenth Amendment's guarantee of equal protection. The discussion of the role that race-neutral alternatives play in the narrow-tailoring analysis was relatively brief:

> As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations.
>
> First, there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. . . . Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If [minority-owned businesses] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.

J.A. Croson Co., 488 U.S. at 507.

This appears to suggest that one can indeed use race-neutral means to achieve a race-conscious goal. That is, the discussion appears to assume that, if identified past discrimination created a shortfall of minority contractors in Richmond, that one can "remedy" that problem by just giving out money to small contractors generally – "a race-neutral program of city financing" – which will, coincidentally enough, be sufficient for minority firms to bid on contracts that they otherwise might lack the resources for.

It should be noted that this Court did *not* say that bonding or capital requirements were generally unnecessary and that Richmond should not have imposed them in the first place. Thus, this Court's "race-neutral" solution was not simply the elimination of inappropriate barriers to small business success. Rather, it would have been an effort to work around apparently legitimate barriers.

There are several obvious rejoinders. First, a race-neutral program of financing for all small contractors might be quite expensive – perhaps a lot more expensive than simply setting aside contracts for minority contractors. A proposal to implement this Court's suggestion could well have led a citizen to ask the following question: if there is a compelling governmental interest in increasing *minority* firm participation, why should we provide financing to firms that are *not owned by minorities*?

Second, and relatedly, a race-neutral program of financing might not increase the proportion of minority-owned firms receiving city contracts. After all, while the financing of minority-owned small

firms is surely likely to increase the proportion of those firms procuring city contracts, the financing of non-minority-owned small firms is likely to have the opposite effect. And even assuming that the former effect will outweigh the latter, it will be no doubt difficult to predict the degree by which it will. That is, if the goal is to increase the proportion of minority-owned firms procuring city contracts, a race-neutral financing scheme is likely to be an *inefficient* way of doing that.

Finally, one can question whether a "race-neutral" system of financing small businesses *whose purpose is to increase the number of minority-owned firms obtaining city contracts* is "race-neutral" in any meaningful sense of the term. That purpose, after all, is presumably what this Court meant when it claimed that such a program would lead to greater minority participation. Indeed, normally such policies would themselves be considered race-conscious and subject to strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 913 (1995) ("statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications but also when, though race neutral on their face, they are motivated by a racial purpose or object.").

The same should hold true in the admissions context: a policy whose purpose is to achieve a particular racial goal should not be considered "race neutral." If a medical school began to consider singing ability as a criteria for admissions only because it was convinced that more applicants from a particular race would be offered admission as a

consequence, is that really a "race-neutral" admissions criteria?

The problem with the notion of a "race-neutral alternative," then, is that the "alternative" depends significantly on what the goal is. A race-neutral alternative to achieving a race-neutral goal is fairly easy to think of. If the goal is to reduce highway deaths, and it turns out that one ethnicity is disproportionately speeding and, consequently, causing fatal highway accidents, one could propose lowering the speed limit only for that ethnicity. But since that ethnicity is not *exclusively* causing highway accidents, there seems an obvious race-neutral alternative: lower the speed limit for everyone. Or, to put it in terms of "necessity," it is not necessary to single out one ethnicity and discriminate against it to achieve the goal of reducing highway fatalities. Accordingly, the race-conscious law would be unconstitutional.

This Court has said that "remedying the effects of past intentional discrimination" is a compelling governmental interest. *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007). One such effect might be that a government agency has paid a lot for construction contracts (because, for example, it discriminatorily excluded low-cost contractors owned by minorities). But one can achieve lower costs simply by permitting all qualified contractors to bid – that is, the agency can just stop discriminating.

A second "effect of past discrimination" might be that a particular person has been deprived of certain benefits; but remedying a particular person's

injury does not really require race-conscious efforts by the government. One can simply measure the injury and provide (or require those who caused the injury to provide) compensation. *Cf. J.A. Croson Co.*, 488 U.S. at 526 (Scalia, J., concurring) ("a State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him . . . . ").

But another "effect of past discrimination," particularly of systemic discrimination, is that there may be fewer members of particular races in higher education, professions, or specific industries. If the goal is to remedy *that* effect, it presumably means striving to have more members of those races in those areas. But, if the *goal itself* is a racial goal, then trying to achieve it in a "race-neutral" way seems quite odd.

In the education context, this Court's emphasis on race-neutral alternatives has led both lower court and litigants to focus on seemingly-disingenuous means of achieving greater inclusion of racial minorities. The most well-known of these is the Texas "Top Ten Percent Plan," which provided that students ranked in the top ten percent of their high school classes (by GPA) would automatically be admitted to the public universities in Texas, including the University of Texas. Because many of Texas's high schools had student populations with one predominant racial group, this actually led to a significant number of minorities being admitted to the University of Texas each year.

It was widely believed that the Texas legislature adopted that plan because of that anticipated

increase in minorities.[3] Indeed, Texas's brief to the Supreme Court in *Fisher v. Univ. of Texas* took this position. It asserted that "increas[ing] minority admissions" was "[a]n acknowledged purpose of the law," which came "at significant cost to educational objectives."[4]

So, was the "Top Ten Percent" plan (and plans like it) race-neutral? This Court danced around that issue for years, but ultimately concluded that it was not. In *Grutter*, this Court rejected plaintiff's argument that such plans rendered the race-conscious admissions system at the University of Michigan Law School unconstitutional "even assuming such plans are race-neutral." *Grutter*, 539 U.S. at 340. In *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), this Court considered an admissions system (for undergraduates at the University of Texas) that continued to use the Top Ten Percent plan, but also explicitly considered race as a potential diversity factor for

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[3] *Cf.* Acts 2009, 81st Leg., ch. 1342, § 7 (Tex.) ("The purpose of the reforms provided for in this Act is to continue and facilitate progress in general academic institutions in this state with regard to the racial, ethnic, demographic, geographic, and rural/urban diversity of the student bodies of those institutions . . . ").

[4] Brief for Respondents at 8, *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013) (No. 11-345). *See also* Brian Fitzpatrick, *Strict Scrutiny Of Facially Race-Neutral State Action And The Texas Ten Percent Plan*, 53 Baylor L. Rev. 289, 292, 321-29 (2001); William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race In College and University Admissions*, 287-88 (Princeton 2000).

those not admitted under that plan. This Court did not address whether the Top 10% plan was or was not race-neutral (and what the consequences would be if it were not).

Justice Ginsburg, however, the sole dissenter in *Fisher*, had no problem claiming that "only an ostrich could regard the supposedly neutral alternatives as race unconscious." *Id.* at 335 (Ginsburg, J., dissenting). She insisted that "i[t] is race consciousness, not blindness to race, that drives such plans." *Id.* This Court did not respond to Justice Ginsburg's claim.

Several years later, the *Fisher* case came back to this Court, which then adopted Justice Ginsburg's view of the Top Ten Percent plan. *E.g.*, *Fisher v. Univ. of Texas*, 579 U.S. 365, 386 (2016) ("As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment."). Indeed, it quoted Justice Ginsburg's dissent from the earlier decision in support. *Id.*

II. TAKING RACE-NEUTRALITY SERIOUSLY

While eventually rejecting racially-motivated "neutral" criteria, this Court never addressed another potential race-neutral alternative: eliminating policies with a disparate racial impact that had no obvious value. This, of course, is what Title VII currently requires in the employment context. *E.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Thus, when defenders of race-conscious

admissions plans pointed out that other policies of colleges and universities had disparate impact, the plaintiffs in those cases embraced the elimination of selection devices with bias and no educational justification. *E.g.*, Petitioner's Reply Brief at 12-13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Petitioner's Reply Brief at 11, *Gratz v. Bollinger*, 539 U.S. 244 (No. 02-516). Indeed, the elimination of such policies should be the paradigmatic example of "race neutral" policies that ought to be tried before the adoption of race-conscious ones.

Yet, this Court never identified even one policy that ought to be eliminated under the narrow-tailoring rubric in an effort to find "race neutral alternative" to race preferences. What is remarkable about this is that, since this Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023), universities have been eliminating such policies with gusto.

Chief among these is "legacy" or "alumni preference" policies. People – including many of those who were in charge of such policies – are now quick to condemn them as unfair and counterproductive. *See*, *e.g.*, Susan Svrluga, *Va. Bans college legacy policies*, Wash. Post, B1 (March 11 2024) (online version available at https://www.washingtonpost.com/education/2024/03/09/virginia-college-legacy-preferences/) ("'There really wasn't any pushback.' said state Sen. Schuyler T. VanValkenburg (D-Henrico), who sponsored the Senate bill. 'I think colleges know that these practices are indefensible.'"); *id.* at B2 ("President Biden singled it out as one of the practices 'that expand

privilege instead of opportunity.'"); Hari Sreenivasan and Christina Romano, *Colleges rethink legacy admissions in the wake of decision against affirmative action,* PBS News Hour (Oct. 24, 2023) (available at hppts://www.pbs.org/newshour/show/colleges-rethink-legacy-admissions-in-the-wake-of-decision-against-affirmative-action) (quoting President of Wesleyan University Michael Roth: "this is something I have been thinking about for, I'd say, five or six years. … And then, this summer, when I read the Supreme Court opinions that were so self-righteous about not using affiliation with broader groups to judge an individual's case, and we can't use affiliation with a racial group, I thought to myself, how could we continue this practice? How could we give an advantage just because of who your parents were?"); Bill Schackner, *Children, relatives of alumni no longer have admissions edge at Carnegie Mellon, Pitt*, Pittsburgh Tribune-Review (July 16, 2023) (available at https://triblive.com/news/ children-relatives-of-alumni-no-longer-have-admissions-edge-at-carnegie-mellon-pitt) (Carnegie-Mellon "does this to ensure equity throughout the admission process for all students.").

And yet, throughout all of the years when race-conscious admissions policies were being used by the vast majority of selective colleges and universities in this nation, no university, no administrator, no state governor, and no court (including this one) ever suggested that such terrible policies had to be eliminated as a "race-neutral alternative" to preferences.

One cannot help but wonder if the "race

neutral alternative" requirement ever had any teeth.

III. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT ALL RACE-CONSCIOUS POLICIES, EVEN IF RACE NEUTRAL IN FORM, ARE SUBJECT TO STRICT SCRUTINY AND TO RECONCILE CONSTITUTIONAL ANALYSIS WITH TITLE VII

This Court's references to "race-neutral alternatives" likely misled lower courts into thinking that even racially-motivated policies that were race-neutral in form somehow were entitled to more deference if they had no disparate impact on the disadvantaged groups than those that were explicitly race-conscious.

But as noted previously, *Miller v. Johnson*. among many other cases, laid down a very simple rule: statutes or policies that are race neutral on their face, but motivated by a racial purpose or object, are subject to strict scrutiny. The court below (and the similar opinion of the Fourth Circuit in *Coalition for TJ v. Fairfax County School Bd.*, 68 F.4th 864 (4th Cir. 2023)) either directly ignore this rule or create a gaping exception to it. (The exception being that the rule is inapplicable when a selection device does not reduce a given group's success rate below the percentage of applicants that group has.) There is no basis in this Court's precedents for any such exception.

Curiously, there appears to be no precedent in Title VII case law that would support this result

either, even though Title VII specifically permits claims based on a disparate impact theory. That is, CIR is unaware of any authority that precludes a plaintiff from bringing a disparate treatment claim solely because it has been unable to prove a disparate impact claim. Indeed, the very existence of the prohibition against adjusting or altering scores on the basis of race (42 U.S.C. § 2000e-2(l)) suggests that such altering is a form of intentional discrimination regardless of what the percentages of applicants and successful applicants among any group might be. *Ricci*, 557 U.S. at 590 ("banding" scores would violate § 2000e-2(l)).

The decision below also has another odd feature: the constitutionality of a given program is dependent upon the availability of statistics that are usually solely in the possession of the defendant. If the plaintiff below could have shown that Jews or Italian-Americans had a lower percentage among all successful applicants than than they did among all applicants, then the program, even under the court below's legal analysis, would have had to meet strict scrutiny. Yet it would be very difficult for most plaintiffs to be able to obtain such statistics, and defendants would have very little incentive to collect them.

Finally, the decision of the court below encourages the elevation of form over substance. State entities cannot reserve spots for a given race, no matter how well the discriminated-against race succeeds under the normal, race-neutral selection criteria. No matter what one's position may be on the constitutionality of race-conscious affirmative action

– and reasonable people are surely permitted to disagree on that question – the Constitution should not be interpreted to encourage subterfuge. *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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