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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* THE EQUAL PROTECTION PROJECT IN SUPPORT OF PETITIONER

WILLIAM A. JACOBSON
Counsel of Record
LEGAL INSURRECTION FOUNDATION
18 Maple Avenue 280
Barrington, RI 02806
(401) 246-4192
contact@legalinsurrection.com

Counsel for Amicus Curiae

Of Counsel:
JAMES R. NAULT

329273

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[1]

The Equal Protection Project (EPP) of the Legal Insurrection Foundation (LIF),[2] a Rhode Island tax-exempt 501(c)(3), is devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism.

Since its creation in February 2023, EPP has filed more than twenty civil rights complaints, in various fora, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP transparently updates the public on all of its activities at EPP's own website.[3]

Pertinent to our interest in this case, a constant theme that EPP has observed is that entities engaging in racially discriminatory conduct frequently attempt to obfuscate the purpose of such conduct. For example, EPP has documented that many institutions of higher education, even after this Court's *Students for Fair Admissions* opinion,[4] will likely continue to discriminate surreptitiously

1. This brief conforms to the Court's Rule 37, in that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* the Equal Protection Project of the Legal Insurrection Foundation funded its preparation or submission. All parties have been notified of EPP's intention to file this brief within the timeline set forth in Rule 37.2.

2. https://legalinsurrectionfoundation.org/.

3. https://equalprotect.org/.

4. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

in several ways, including by considering an applicant's race under the guise of eliciting information regarding an applicant's *experience* with race, by dispensing with standardized testing, and by using word games – such as "first generation," "historically underrepresented group," or "marginalized populations" – as crude proxies for race and skin color.[5]

Nor is the desire to continue engaging in racially discriminatory conduct post-*Students for Fair Admissions* limited to academia. As EPP recently spotlighted, the use of algorithms, unseen by the public, to racially manipulate pools of job candidates provided to potential employers and recruiters is an emerging trend.[6]

EPP's experience in this area is directly applicable to the instant matter because in this case, the court below improperly endorsed the use of supposedly "race-neutral" means as a pretext and methodology to boost enrollment

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5. *See Six Ways Higher Ed Will Attempt To Evade The Supreme Court's Affirmative Action Ruling*, https://legalinsurrection.com/2023/07/six-ways-higher-ed-will-attempt-to-evade-the-supreme-courts-affirmative-action-ruling/; *see also* William A. Jacobson & Kemberlee A. Kaye, *Supreme Court struck down affirmative action, but that won't stop Harvard*, Fox News, July 6, 2023, https://www.foxnews.com/opinion/supreme-court-struck-down-affirmative-action-wont-stop-harvard.

6. *https://legalinsurrection.com/wp-content/uploads/2023/07/Follow-Up-Letter-To-LinkedIn-Re-DIR-Feature-7-5-23.pdf*; *see also LinkedIn Should End 'Diversity in Recruiting' Feature: "Discrimination by algorithm is still discrimination*," https://legalinsurrection.com/2023/07/linkedin-should-end-diversity-in-recruiting-feature-discrimination-by-algorithm-is-still-discrimination/.

for preferred groups while causing the enrollment of non-preferred groups to plummet. And, most egregiously, the First Circuit endorsed these obviously non-race-neutral objectives even though the committee enacting those means spewed hateful, racist rhetoric *while enacting the plan*, further demonstrating its intent to racially discriminate. While EPP supports Petitioner's arguments in favor of the Court granting certiorari, EPP submits this brief to address an area squarely in EPP's experience – the use of superficially race-neutral means as a smokescreen for insidious and intentional racial discrimination.

SUMMARY OF ARGUMENT

Petitioner makes a compelling case that the opinions of the First Circuit below[7] and the Fourth Circuit in *Coalition for TJ*[8] diverge from this Court's precedent and other circuit courts in their treatment of the use of "race-neutral" means to boost minority enrollment in admissions.[9] Petitioner also rightly argues that the opinions of the court below and *Coalition for TJ* provide a roadmap for future lower courts to evade this Court's rulings on intent and impact when assessing racial discrimination. Petitioner argues successfully, in EPP's view, that the First Circuit's opinion here, combined with

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7. *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. for the City of Boston*, 89 F.4th 46 (1st Cir. 2023).

8. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, --- S. Ct. ---, 2024 WL 674659 (U.S. Feb. 20, 2024).

9. Petition for Certiorari at 17-22, *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. for the City of Boston*, No. 23-1137 (2024) [hereinafter, "Brief for Petitioner"].

the Fourth Circuit's *Coalition for TJ* opinion, represent a powerful one-two punch dismantling this court's equal protection jurisprudence and creating a serious circuit split among the courts of appeals.

In addition, we are cognizant that this Court declined review of *Coalition for TJ*.[10] While the two cases have substantial legal similarities, the need for this Court to accept review of this case is more pronounced for multiple reasons, including because of racist statements made by Boston School Committee members and because the use of zip codes is not racially neutral, except on the surface. Zip codes are a traditional method in many contexts of microtargeting of race and ethnicity, so the use here was even more pernicious than the more general use of middle schools in *Coalition for TJ*.

First, as Petitioner correctly relates, three Boston School Committee members in the case at bar resigned in disgrace following outrageously racist comments aimed at the very people severely victimized by the Committee's "Zip Code Plan", i.e., the admissions plan for Boston's elite "Exam Schools"[11] that apportioned high school seats based primarily on the applicants' zip code of residence.[12]

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10. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659 (Alito, J., dissenting from denial of certiorari).

11. Boston's elite "Exam Schools" are Boston Latin Academy, Boston Latin School, and the John D. O'Bryant School. *Boston Parent Coalition*, 89 F.4th at 51 ("For the twenty years preceding the 2021–2022 school year, admission to the Exam Schools was based on applicants' GPAs and their performance on a standardized test.").

12. Brief for Petitioner at 8.

And, even worse, those School Committee members' racist comments occurred *at the meeting when the Zip Code Plan was enacted*.[13] That did not happen in *Coalition for TJ*,[14] and is of the utmost importance because pursuant to this Court's *Arlington Heights* jurisprudence,[15] racist intent, which was on full and ugly display in the case at bar, is the touchstone for assessing the propriety of a plan impacting racial groups.

Second, unlike in *Coalition for TJ*, the allegedly race-neutral means used to boost preferred race enrollment at Boston's three Exam Schools was anything but race neutral in reality. In *Coalition for TJ*, the admissions plan involved allotting seats for attending the Thomas Jefferson High School for Science & Technology ("TJ") based on which middle school the student applicant attended.[16] Here, admittance to Boston's elite Exam Schools involved allocation by zip code, which has long been associated with racial discrimination going back to redlining from the 1930s to the 1960s, where mortgages for Black citizens were denied based on their neighborhood of residence, even if the applicant met the underwriting

13. *Id.* at 8-9.

14. *See infra* pp. 7-8, 10 (noting general statements concerning the propriety of demographic balancing by the Fairfax County School Board as the sole verbal evidence of intent to discriminate).

15. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . . Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

16. *Coalition for TJ*, 68 F.4th at 875.

requirements for the mortgage.[17] The Zip Code Plan here amounted to intendedly racist redlining; i.e., the Boston School Committee's use of prospective students' zip codes of residence to attain the racial outcome desired; namely, the reduction in attendance by White and Asian-American students.

In short, this Court should grant certiorari to make clear that *intentional* racial discrimination through supposedly, but *in name only*, race-neutral means is unlawful under *Students for Fair Admissions* and the United States Constitution. The Court chose not to review *Coalition for TJ*; it should review this case.

ARGUMENT

I. This case is more compelling for review than *Coalition for TJ* because here the court below discounted racist statements by Boston School Committee members made contemporaneously with adoption of the plan.

Initially, this case was proceeding on a trajectory similar to *Coalition for TJ* in that in both cases, School Committee members made statements reflecting a generalized intent to have the high schools in question more closely reflect the demographic makeup of the communities near those schools.

For example, in the case at bar, at the Boston School Committee's initial meeting on October 8, 2021, the

17. *See infra* pp. 13-16 and notes 23-24, 27 (explaining background and consequences to Black community of redlining).

Committee expressed general statements concerning the propriety of demographic balancing in Boston's Exam Schools:

> During this meeting, members of the Working Group discussed historical racial inequities in the Exam Schools, and previous efforts to increase equity across the Exam Schools. The Working Group also discussed . . . a desired outcome of 'rectifying historic racial inequities afflicting exam school admissions for generations,' and, as one School Committee member stated, the 'need to figure out again how we could increase these admissions rates, especially for Latinx and Black students.' Another School Committee member stated that she 'want[ed] to see [the Exam Schools] reflect the District[,]' and that '[t]here's no excuse . . . for why they shouldn't reflect the District, which has a larger Latino population and Black African-American population.'

Boston Parent Coalition, 89 F.4th at 52-53.

In *Coalition for TJ*, School Committee members expressed similar attitudes:

> Principal Bonitatibus went on to observe that the TJ community did 'not reflect the racial composition in FCPS [Fairfax County Public Schools]' . . . [and] members of the Board likewise voiced their frustrations with the TJ student body's lack of diversity. The Board's Chair, Karen Corbett Sanders, stated that the

> Board and FCPS 'needed to be explicit in how we are going to address the underrepresentation' of Black and Hispanic students at TJ, and Board member Karen Keys-Gamarra insisted at a June meeting that, 'in looking at what has happened to George Floyd, we know that our shortcomings are far too great . . . so we must recognize the . . . unacceptable numbers of African Americans that have been accepted to TJ.'

Coalition for TJ, 68 F.4th at 873.

After this point, however, the two cases diverge wildly, in that here, unlike in *Coalition for TJ*, Boston School Committee members made statements so ugly and so imbued with racially discriminatory hatred that all three members expressing such sentiments resigned.[18]

First, at the Boston School Committee's October 21, 2021 meeting, when the Exam Schools' Zip Code Plan was adopted, the Committee chairman was overheard, on a hot mic, making fun of and denigrating the names of Asian school parents who appeared before the Committee to testify as to the impropriety of the plan:

> During this meeting, School Committee chairperson Michael Loconto made comments mocking the names of some Asian parents. Two members of the School Committee, Alexandra Oliver-Dávila and Lorna Rivera, texted each other regarding the comments, with one saying

18. Brief for Petitioner at 8.

> 'I think he was making fun of the Chinese names! Hot mic!!!' and another responding that she 'almost laughed out loud.' The chairperson apologized and resigned the following day.

Boston Parent Coalition, 89 F.4th at 53.

Second, School Committee members Oliver-Dávila and Rivera, mentioned above, also made comments at the Zip Code Plan adoption meeting on October 21, 2021 that can only be described as blatantly racist:

> Reacting to the Committee chairman's mocking of Asian parent names, Oliver-Dávila texted Rivera '[b]est s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry.' Rivera responded, 'Me too!! Wait til the White racists start yelling [a]t us!' Oliver-Dávila then responded '[w]hatever . . . they are delusional.' Additionally, Oliver-Dávila texted 'I hate WR,' which the parties seem to agree is short for West Roxbury, a predominantly White neighborhood. Rivera then responded '[s]ick of westie whites,' to which Oliver-Dávila replied '[m]e too I really feel [l]ike saying that!!!!'

Boston Parent Coalition, 89 F.4th at 54. This led the district court to conclude that "the text messages [were] 'racist,'" and that "they showed that '[t]hree of the seven School Committee members harbored some form of racial animus.'" *Id.* (quoting *Boston Parent Coalition for Academic Excellence Corp. v. Sch. Comm. for the City of Boston*, No. 21-cv-10330-WGY, 2021 WL 4489840, at *15 (D. Mass. Oct. 1, 2021)).

This open racial animus at the time of decision sets this case apart from *Coalition for TJ*. There, no School Committee members expressed any racial hatred or directed racial invective toward any group. And while the TJ School Committee's generalized statements supporting "diversity" and racial balancing are bad enough on their own,[19] they paled in comparison to what happened here. Here, both the district court and the court of appeals below found that the School Committee in question was infected with racial animus *during the very meeting that they adopted the Zip Code Plan.* This clear showing of intent to racially discriminate is the key factor in the *Arlington Heights* calculus: "Even a policy that is race neutral on its face may be unconstitutional if it is adopted for a 'racially discriminatory intent or purpose.'" *Coalition for TJ*, 2024 WL 674659, at *4 (Alito, J., dissenting from denial of certiorari) (quoting *Arlington Heights*, 429 U.S. at 265-66).

This is important because in effect what the First Circuit held is that even in a case where clear racial hatred is expressed by those adopting a plan that racially discriminates against the targeted racial group(s) *at the meeting where the plan is adopted*, the fact of that racial hatred, which is clear evidence of the Committee's intent to discriminate, is irrelevant as long as the racially discriminatory reduction in admissions was not severe enough to cause the targeted group to be underrepresented admissions-wise. That cannot be right.

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19. *Students for Fair Admissions*, 600 U.S. at 223 ("'[O]utright racial balancing' is 'patently unconstitutional.'") (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)).

Take Justice Alito's insightful basketball team example as a test case. *Id.* at *5. In it, Justice Alito postulates that in a school district that has 85 percent White students and 15 percent Black students, 10 of the 12 (or 83 percent) members of the high school basketball team are Black. Then, as a result of White parent complaints, the school kicks five of the Black players off the team for contrived, facially neutral reasons. This lowers the percentage of Black students on the team to 42 percent, which, by the Fourth Circuit's analysis in *Coalition for TJ*, would have been acceptable because 42 percent still exceeds the percentage of Black students at the school. *Id.* at *5.

Translating that to the instant case, assume that not only is the percentage of Black high school basketball players reduced from 83 to 42 percent, but that the high school principal is found to have been recorded during discussions with the coach mocking the names of some of the Black basketball players, and the coach is found to have used racial slurs in texts to the principal while discussing the plan to remove the Black students from the team. The First Circuit here would still endorse the *Coalition for TJ* approach, with the addition that it would still affirm the propriety of the team's racial balancing in the face of these awful, racist circumstances.

The court below erred because under *Arlington Heights*, intent to discriminate, now on full display, is key and warrants a finding of unconstitutional racial discrimination.

In short, this Court must grant certiorari to address this new issue, i.e., the lower court's holding that racial

animus is irrelevant, which is now the law of the land in two Circuits.

II. This case also is more compelling for review because the use of zip codes has a history of racial and ethnic microtargeting, and in this case amounted to redlining of school admissions.

This case is legally similar to *Coalition for TJ* in that in both cases the means used to racially balance the respective schools' student populations were not explicitly racist; i.e., they did not employ an explicit racial quota or other blatantly race-based means. In *Coalition for TJ*, the School Committee apportioned seats at TJ based on the middle school each applicant attended. Here, the School Committee apportioned seats at Boston's Exam Schools based on the zip code where each applicant resided.

Here the use of zip codes was more pernicious than the use of middle schools.[20] In *Coalition for TJ*, while the middle school an applicant attended might have had some relation to where the applicant lived, that relation was necessarily attenuated by special programs that drew attendees from various parts of the community not in the middle school's vicinity. *See, e.g.*, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809, at *9 (E.D. Va. Feb. 25, 2022) (explaining that some middle schools had "Advanced Academic Program (AAP) Level IV centers that dr[e]w in students from other middle school zones to attend them").

20. Although the plan admitted the "top 20% of the rank ordered GPAs" on a district-wide basis, all other seats were allocated based on the applicants' zip code of residence. *Boston Parent Coalition*, 89 F.4th at 53.

Here, the Boston School Committee used the zip code of residence for applicants to Boston's Exam Schools, with seats allocated to students "living in the zip code with the lowest median family income (for families with school age children), and continuing with applicants in each zip code in ascending order of the zip code's median family income."[21] That this caused a drop in attendance by White and Asian-American students and an increase in Black and Hispanic student enrollment is undisputed and was acknowledged by the court below.[22] The use of zip codes or other geographical markers to define the location of residence has long been associated with historically racially discriminatory practices, such as redlining.[23]

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21. *Boston Parent Coalition*, 89 F.4th at 53.

22. *Boston Parent Coalition*, 89 F.4th at 57 ("the percentages of invited students classified as White dropped from 40% to 31%, while the percentage classified as Asian dropped from 21% to 18% . . . the Plan's effects were expected, at least in part, by those who knew the schools best: the defendants themselves."). The court below also acknowledged, as did the district court, that the plan increased Black and Hispanic student enrollment. *See id.* at 54 ("[T]he district court noted that 'it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics,' that is, 'but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen.'") (quoting *Boston Parent Coalition*, 2021 WL 4489840, at *15).

23. *See* Greg Kaufman, *Why Achieving the American Dream Depends on Your Zip Code*, Talk Poverty Dec. 17, 2015, https://talkpoverty.org/2015/12/17/american-dream-zip-codes-affordable-housing/index.html (quoting President Obama as stating: "In this country, of all countries, a person's zip code shouldn't decide their destiny."); *see also South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446, 491-93 (D.N.J. 2001) (finding Plaintiffs had established *prima facie*

The Federal Reserve has a succinct explanation of redlining:

> Redlining is the practice of denying people access to credit because of where they live, even if they are personally qualified for loans. . . . The FHA was the architect of federally sponsored redlining from 1934 until the 1960s. . . . The FHA began redlining at the very beginning of its operations in 1934, as FHA staff concluded that no loan could be economically sound if the property was located in a neighborhood that was or could become populated by Black people, as property values might decline over the life of the 15- to 20-year loans they were attempting to standardize. . . . For the next few decades, the FHA generally favored loans on new construction in suburban areas rather than urban areas with . . . Black residents.[24]

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case of disparate racial impact by analyzing the adverse effect of pollution-causing facilities in New Jersey on racial minorities, based on the minorities' zip code of residence); Madeleine St. Amour, *ZIP Codes and Equity Gaps*, Inside Higher Education, July 8, 2020 ("People from neighborhoods that are majority Black or Hispanic are less likely to attend college, and when they do, they borrow more and default on student loans more, according to a report from the Federal Reserve Bank of New York. . . . Over all, borrowers in majority Black or Hispanic ZIP Codes are more likely to default on this debt by age 30."), https://www.insidehighered.com/news/2020/07/09/report-finds-racial-equity-gaps-college-attendance-debt-and-defaults-based-zip-codes.

24. *Federal Reserve History: Redlining*, https://www.federalreservehistory.org/essays/redlining.

Importantly, Black citizens were denied access to credit by redlining "even if they [we]re personally qualified for loans." *Id.* And, while zip codes did not exist at the beginning of redlining, as they were introduced in 1963,[25] the use of location of residence as a means to group citizens and discriminate against "inharmonious racial groups,"[26] in redlining parlance, dates back long before that.

And the damaging effects of redlining on Black populations were all based on the location of residence:

> The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private citizens, so that banks and savings-and-loan institutions institutionalized the practice of denying mortgages 's*olely because of the geographical location of the property*.'[27]

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25. *Library of Congress: Zip Code Introduced*, https://guides.loc.gov/this-month-in-business-history/july/zip-code-introduced.

26. *See supra* note 24.

27. Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining under the Fair Housing Act*, 32 J. Marshall L. Rev. 617, 627 (1999) (quoting Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 217 (1985) (emphasis added)); *see also* Richard Rothstein, The Color of Law xvi (2017) ("[W]e have developed euphemisms to help us forget how we, as a nation, have segregated African American citizens.

That is exactly what the Boston School Committee did here. The Boston School Committee used the zip codes of the Exam Schools' applicants to meticulously enact a plan that the Committee knew would cause an increase in Black student attendance at the Exam Schools, rather than a reduction, and a reduction in White and Asian-American student attendance, just as surely as the FHA knew that classifying Black neighborhoods as "inharmonious" and then "redlining" them, would necessarily lead to Blacks being denied access to mortgage credit.

What the Boston School Committee did here is redlining, and its use renders this case more important for review than the use of middle schools in *Coalition for TJ*.

Boston School Committee member statements at the Oct 21, 2021, Zip Code Plan enactment meeting make clear that zip codes were a proxy for racial targeting. Committee member Oliver-Dávila texted that she "hated" a predominantly White neighborhood in Boston, and in another Oliver-Dávila and Committee member Rivera agreed that they were "sick of" the White residents of that neighborhood.

The use of zip codes was the means to punish these residents in that neighborhood by enacting a plan guaranteed by historical pedigree to reduce the residents' children's enrollment at Boston's elite Exam Schools. And we must not forget the Committee chairman, who resigned in disgrace after callously mocking the names of

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We have become embarrassed about saying *ghetto*, a word that accurately describes a neighborhood where government has not only concentrated a minority but established barriers to its exit.") (emphasis in original).

Asian-American parents of school children who desired to attend the Exam Schools. He shepherded the Committee to a positive vote on a plan that would decimate enrollment for the very racial group whose names he had denigrated, *using the redlining plan guaranteed to do so.*

This is more damning evidence of intent to discriminate, which was not present in *Coalition for TJ*, and this evidence, and the First Circuit's opinion here, far more so than in *Coalition for TJ*, "cries out for correction."[28]

In short, the Court should grant certiorari for the additional, critical reason that the supposedly "race-neutral" use of zip codes was not in fact race neutral, and amounted to redlining.

28. *Coalition for TJ*, 2024 WL 674659, at *1 (Alito, J., dissenting from denial of certiorari).

CONCLUSION

We urge this Honorable Court to grant certiorari to address the legal errors committed by the court below, to resolve the circuit split worsened by the opinion of the court below, and to address redlining through the use of zip codes as proxies for racial and ethnic microtargeting.

Respectfully submitted,

WILLIAM A. JACOBSON
Counsel of Record
LEGAL INSURRECTION FOUNDATION
18 Maple Avenue 280
Barrington, RI 02806
(401) 246-4192
contact@legalinsurrection.com

Of Counsel:
JAMES R. NAULT

Counsel for Amicus Curiae