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

Brief of *Amici Curiae* Advancing American Freedom; American Hindu Coalition; AFA Action; American Values; AMAC Action; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Defense of Freedom Institute; Eagle Forum; Frontline Policy Council; Charlie Gerow; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House and Chairman, Missouri Center-Right Coalition; Leadership Institute; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; et al. 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.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that every American has a right to be treated equally by the government, without regard to irrelevant characteristics like race. AAF fights for these values for its over 1,400 members in Massachusetts and over 2,700 members in the First Circuit.

The American Hindu Coalition (AHC) is a national nonprofit organization that promotes the civil rights of American Hindus, among which is the right to education opportunities without facing discrimination based on race, color, religion, sex, and national origin. Largely comprised of first- and second-generation immigrants, Hindu Americans are known for their spectacular success in academia, in business, and in government. A beneficiary of merit-based excellence, AHC members and constituents are passionate advocates of preserving the same rights and privileges for future generations.

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[1] All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

AHC has a growing chapter in Boston, Massachusetts, with members and constituents who have children currently enrolled in grades 7-12 in the Boston Public Schools and in the prestigious Exam Schools. AHC is a coalition partner of the Students for Fair Admission and of the Coalition for TJ (Thomas Jefferson High School of Science & Technology). AHC members also serve on the Boards of these respective organizations, comprising a significant part each of their membership.

This case is important to *amici* AFA Action; American Values; AMAC Action; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Defense of Freedom Institute; Eagle Forum; Frontline Policy Council; Charlie Gerow; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Former Speaker, Missouri House and Chairman, Missouri Center-Right Coalition; Leadership Institute; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; Nevada Policy; New Jersey Family Foundation; Project 21 Black Leadership Network; 60 Plus Association; Southeastern Legal Foundation; Tradition, Family, Property, Inc.; Women for Democracy in America, Inc.; and Young America's Foundation because they believe that the bedrock principle of the Equal Protection Clause of the Fourteenth Amendment is that equal treatment before the law cannot be modified by race or ethnicity.

SUMMARY OF THE ARGUMENT

This Court's decision in *Students for Fair Admissions v. Harvard* recognized the "transcendent aims of the Equal Protection Clause": the protection of individuals from invidious government treatment because of their race or other superficial characteristics irrelevant to a given government action. 600 U.S. 181, 201, 202 (2023) (alteration in original) (quoting Cong. Globe, 39th Cong., 1st Sess., 431 (1866) ("To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—'the absolute equality of all citizens of the United States politically and civically before their own laws.'"). This case concerns the Boston School Committee's modification of the admissions policy for three selective schools in the city. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 89 F.4th 46 (1st Cir. Dec. 19, 2023). That change in policy was explicitly designed to accomplish racial rebalancing in those schools. App. 6a-8a. Applying an erroneous and unconstitutional group-oriented interpretation of the Equal Protection Clause, the First Circuit ruled for the Committee and against the parents and students challenging this racially discriminatory policy.

The Court should grant certiorari in this case for several reasons. This case represents an important opportunity to further clarify the Equal Protection Clause and anchor it in the Western tradition of the dignity of the individual. The Equal Protection Clause protects "person[s]" regardless of their race, U.S. Const. amend XIV § 1, not groups; an understanding of the clause that is consistent with the fundamental

purpose of government. Further, *Students for Fair Admissions* and the basic principle it upheld risk becoming nothing more than parchment barriers if decisions like the one below are allowed to stand. Rather than ensuring that all students face truly race-neutral admissions standards, the First Circuit held that the Equal Protection Clause was not violated because students of the targeted groups remained overrepresented in the schools compared to their representation in the applicant pool. App. 18a-19a. This reductive understanding of the Fourteenth Amendment opens the door for a massive resistance campaign among school administrators at every level all around the country to undermine the Court's decision in *Students for Fair Admissions*. In order to ensure that all Americans are treated equally by those who govern, this Court should grant certiorari and reverse.

INTRODUCTION

America is the greatest country in the world. Most immigrants know that. They come because they see what those born in America so often forget: in America, it does not matter who you are, or who your parents were, or what you look like. If you work hard and treat people as you would wish to be treated, you can build a life for yourself, even from nothing, and in so doing, build the foundation for generations of success for your children and your children's children. In America, there are no arbitrary barriers. There is freedom not only to succeed, but to succeed in the pursuit to which you are called. At no time in American history has that promise been perfectly afforded to all people. Yet, American history is the

story of all kinds of people demanding not special treatment because of who they are, but to be treated equally regardless of who they are.[3]

Last year, America celebrated the 60th anniversary of Dr. Martin Luther King's dream that his children might "one day live in a nation where they [would] not be judged by the color of their skin but by the content of their character."[4] That dream echoes the Equal Protection Clause of the Fourteenth Amendment, which establishes that "no State" shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. In his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Justice Harlan, better than his colleagues, understood the Court's role in safeguarding the dignity of equality before the law.

This debate over how people ought to be judged continues to roil America, but the Equal Protection Clause is clear. Before the law, race must not matter. America's long history of racial injustice was the

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[3] As former slave and abolitionist Frederick Douglass explained, "Everybody has asked the question. . . 'What shall we do with the Negro?' I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!" Jason L. Riley, *Please Stop Helping Us: How Liberals Make It Harder for Blacks to Succeed* 4-5 (2014).

[4] Dr. Martin Luther King, Jr., I Have a Dream Speech Transcript,https://www.archives.gov/files/social-media/transcripts/transcript-march-pt3-of-3-2602934.pdf (last visited May 1, 2024).

result of an insistence that it did. In this case, the First Circuit incorrectly applied the Fourteenth Amendment's equal protection guarantee when it construed it to protect not "any person," U.S. Const. amend XIV § 1, but groups. This Court should grant certiorari and reverse.

ARGUMENT

For two decades, Boston Latin School, Boston Latin Academy, and John D. O'Bryant School (Boston's "Exam Schools") based their admissions on a combination of applicant grade point average (GPA) and standardized test scores. App. 5a. However, the Boston School Committee (the "Committee"), which governs Boston Public Schools, decided that the admissions criteria should change beginning with the 2021-2022 school year. App. 6a. In the process of developing these new criteria, the Working Group assigned to the task made clear that racial balancing[5]

[5] Any reasonable person will want to see students of every race find academic success. Such success is a benefit both to the individuals and to the nation. Indeed, the widespread desire for success is demonstrated by the widespread interest in school choice, which would allow parents to choose the schooling options that are best for their children rather than being forced to send them to (often disastrously run) public schools. For example, among Democratic voters, "African American Democrats support targeted school vouchers, universal vouchers, and charter schools at 70%, 60%, and 55%, respectively. Among Hispanic Democrats, support for the three policies is at 67%, 60%, and 47%. On the other hand, just 40% of non-Hispanic White Democrats support targeted vouchers, 46% support universal vouchers, and 33% support charter schools." Similarly, "Republican support for universal vouchers has gained 20 percentage points over the last four years, to 61% from 41%." Education Next, *EdNext Poll:*

was the central objective of the new standards.[6] App. 6a-8a.

Further, not only was the policy designed to bring about racial balancing, but members of the working group appeared to have contempt for the Asian Americans their policy was designed to exclude. The School Committee chairman Michael Loconto resigned after he mocked the names of Asian American parents and two other members resigned after the release of

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Democrats Divided Over School Choice, Harvard Graduate School of Education (August 19, 2019) https://www.gse.harvard.edu/ideas/news/19/08/ednext-poll-democrats-divided-over-school-choice.

[6] Evidence of this discriminatory intent is abundant. The Working Group "completed a so-called 'equity impact statement'" that stated as one of the purposes of the new admissions standards ensuring that the exam schools "better reflect[] the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston.'" App. 6a-7a. The "Working Group reviewed multiple simulations of the racial compositions that would result from different potential admissions criteria." App. 7a. The Working Group, "discussed historical racial inequities in the Exam Schools," and "discussed a substantial disparity in the increase in fifth grade GPAs for White and Asian students as compared to Black and Latinx [sic] students." App. 7a. It considered the "desired outcome of 'rectifying historic racial inequities afflicting exam school admissions for generations,'" and the supposed "need" to "increase these admissions rates" for black and Hispanic students. App. 7a (internal quotation marks omitted in final quote). One member of the Committee explained the perceived need for the racial composition of the schools to reflect that of the district. App. 7a-8a. At another meeting, "committee members voiced concerns that the revised plan, while an improvement, 'actually [did not] go far enough' because it would likely still result in a greater percentage of White and Asian students in exam schools than in the general school-age population." App. 8a (alteration in original).

text messages regarding the mockery. App. 8a, 42a-43a. Such derision by the powerful of those their policy intentionally treats as lesser adds insult to injury.

Under the plan ultimately adopted, white and Asian American students saw a drop in the percentage of their admissions.[7] Specifically, from the year before the adoption of the plan to the first year after its adoption, admissions of white students dropped from 40% to 31% and of Asian American students from 21% to 18%. App. 16a. The First Circuit claims that "[t]he Coalition's reliance on these raw percentages without the benefit of some more robust expert analysis serves poorly as the proof that the observed changes were caused by the Plan rather than chance." App. 16a (citing *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 46 (1st Cir. 2021)). That skepticism would be justified if the demographic change occurred in a vacuum, but it borders on willful blindness in the face of the overwhelming evidence of the Committee's intent to

[7] Were it not so common in America today it would be shocking that resources are being spent punishing students who have already found success rather than seeking to improve, on the front end, the education of those who have been less successful. It is much easier to tear down those who have than it is to build up those in need. But, when equity is the goal, the path to "success" is tearing down those who haver rather than building up those in need. As Dr. Corey DeAngelis notes, early in the COVID-19 pandemic, Governor Tom Wolf of Pennsylvania ordered all schools closed, including "cyber charter schools serving more than thirty-seven thousand children in the state virtually," a move that DeAngelis says, "was clearly intended to protect public schools from competition, even at the cost of kids' learning." Corey A. DeAngelis, *The Parent Revolution* 6 (1st ed. 2024).

engage in racial balancing. The First Circuit's error here "cries out for correction." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170 at 1 (Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

As was argued before the Court in *Brown v. Bd. of Educ.*, "no State has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." *Students for Fair Admissions*, 600 U.S. at 204 (quoting Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952)) (internal quotation marks omitted).[8] Indeed, government efforts at racial balancing are never constitutionally acceptable. Yet that is exactly what the Committee did here.

Americans would be appalled to learn that a school had changed its admissions policies to increase the number of red-haired students, or students of below average height. That anger would be justified. Why, the obvious question would be, would a school change

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[8] Such racial policies send an insidious message to children. "[S]ome emphasis on racism can even be counterproductive." Thomas Sowell, *Social Justice Fallacies*, 27 (1st ed. 2023). Dr. Sowell relates that one young black man considered joining the U.S. Air Force but decided against it because he believed "that the Air Force 'would never let a black man fly a plane.'" *Id*. That young man's life was altered by a lie, and an obvious one given that it came "*decades after there was a whole squadron of black American fighter pilots during World War II*," and after "two black pilots went on to become *generals* in the U.S. Air Force." *Id*. (emphasis in original). Policies like the one adopted by the Committee in this case only serve to make such racist lies a reality and send a message that is "cancerous to young minds seeking to push through barriers." *Students for Fair Admissions*, 600 U.S. at 280 (Thomas, J., concurring).

its admissions policy based on something as insignificant and superficial as hair color or height? Should people not have equal opportunity regardless of these physical characteristics? Yet those who insist that current racial discrimination is the solution to past racial discrimination demand equally superficial and degrading policies that further rather than lessen the racial divide in America by pitting people against one another based on the color of their skin.[9] The question is whether continuing to engage in racial discrimination today really remediates the evils of the past or, in fact, perpetuates them on a new and innocent generation of children.

I. The Court Should Grant Certiorari in this Case to Further Clarify that the Equal Protection Clause Protects the Interest of Individuals, not Groups, in Equal Protection of the Laws.

"[A]dmissions are zero sum." *Students for Fair Admissions*, 600 U.S. at 218. In zero-sum situations,

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[9] Further, this focus on race is the driving force behind the current resurgence of antisemitism in America, and especially on its university campuses. Groups that are labeled as victimizers, often based on their relative success in various arenas, must be "resisted." Thus, when Hamas terrorists brutalize and slaughter Jewish civilians, comfortable Western college students can cheer members of Hamas as martyrs for the cause of resistance. This pernicious focus on race has truly abominable consequences. *See generally* Germania Rodriguez Poleo, *UNC Chapel Hill Abolishes DEI Department and Transfers All Funds to Campus Cops After Frat Brothers Were Left to Defend the Flag from Anti-Israel Mob*, Daily Mail (2:36 PM May 13, 2024) https://www.dailymail.co.uk/news/article-13413503/UNC-Chapel-Hill-abolishes-DEI-department-frat.html?EdNo=181.

discrimination in favor of the individuals of one racial group is necessarily discrimination to the detriment of the individual members of some disfavored racial group. *See id*. The Equal Protection Clause protects individuals without regard to their group identities; it does not protect or require government action to manipulate group outcomes.

A. The Equal Protection Clause of the Fourteenth Amendment protects individuals, not groups, against discrimination.

The Equal Protection Clause of the Fourteenth Amendment establishes that "no State" shall "deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added). Thus, the Equal Protection Clause protects the right of individuals, "persons," to equal treatment before the law. As the Court has said, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion). Its application to groups as opposed to individuals leads to results fundamentally at odds with the language of the Equal Protection Clause and fundamental justice, as occurred below.

The fundamental conflict between the group-centric and individual-centric views of the Equal Protection Clause is the difference between equality before the law and mandated equality of outcome. The competing opinions in *Students for Fair Admissions* illustrated that conflict. There, Justice Sotomayor

espoused the group-protection view, writing, "In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law." *Students for Fair Admissions*, 600 U.S. at 361 (Sotomayor, J., dissenting).[10] Of course, "making room" for one group on the basis of race rather than qualification necessarily displaces more qualified individuals of other groups. Under this conception of the Equal Protection Clause, the individual must either suffer or benefit because of the relative success of his group.

On the other hand, as this Court recognized, "the transcendent aims of the Equal Protection Clause" are "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States[.]" *Students for Fair Admissions*, 600 U.S. at 202 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880) (internal quotation marks omitted). In other words, under the Equal Protection Clause, the law must apply the same standard to every individual,

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[10] Along with being inconsistent with the original meaning of the Equal Protection Clause, Justice Sotomayor's interpretation of the clause would seem to lead to the perverse outcome of constitutionally mandated discrimination. If "racial equality cannot be achieved without making room for underrepresented groups," and "[a] racially integrated vision of society, in which institutions reflect all sectors of the American public . . . *is precisely what the Equal Protection Clause commands*," would racial balancing not be required? *See Students for Fair Admissions*, 600 U.S. at 361 (Sotomayor, J., dissenting) (emphasis added).

regardless of race. As this Court said, "Eliminating racial discrimination means eliminating all of it." *Id.* at 206.

B. The individual-protection understanding of the Equal Protection Clause rests upon the fundamental philosophy of American government.

The Equal Protection Clause's protection of individuals rather than groups is consistent with the fundamental purpose of American government: the protection of the rights of the people. The Declaration of Independence imbues meaning into the later documents of our Republic, including the Constitution. "Governments are instituted among Men," to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). The use of the word "secure" in the Declaration demonstrates "that governments are instituted to secure the preexisting natural rights that are retained by the people."[11]

Government, in turn, "deriv[es its] just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). The consent of the governed does not mean majority rule. Rather, "the 'consent of the governed'" defines when a particular government is justified in undertaking the "mission of 'securing,'" the people's natural rights.[12] That consent,

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[11] Randy Barnett, *Our Republican Constitution* 41 (1st ed. 2016).
[12] Barnett *supra* note 11 at 42.

in turn, is "presumed."[13] As Justice Samuel Chase explained in *Calder v. Bull*:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

3 U.S. 386, 388 (1798) (Chase, J.) (emphasis in original). That the people would consent to a government that treats them differently depending on their race is "against all reason and justice." *See id*.

The Equal Protection Clause enshrines in law that same principle. That principle is violated where, as here, a government actor treats individuals as mere representatives of their racial groups. Because all citizens are presumed to have consented to delegate certain powers to the government to secure their own rights, they are all entitled to be treated as individuals by that government.

The group protection view of the Equal Protection Clause is also inconsistent with the fundamental principles of justice. The idea that justice must be impartial has a millennia-long heritage in Western thought, tracing at least as far back as the early books of the Bible, where judges were instructed, "You shall not be partial in judgment. You shall hear the small

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[13] *Id*. at 73-77.

and the great alike."[14] The Founders understood this as well. As Alexander Hamilton explained, "There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government."[15] Or, as Chief Justice John Jay wrote, "what is it to justice, how many, or how few; how high, or how low; how rich, or how poor; the contending parties may chance to be? Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794).

At issue in this case are two competing conceptions of how race should be understood in the United States. Chief Justice Roberts articulated the first: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Ibram Kendi has expressed the opposing view: "The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."[16] In fact, according to Kendi, "The most threatening racist movement is . . . the regular American's drive for a 'race-neutral [state]."[17] In Kendi's world, once there has been any individual instance of discrimination, the first domino has fallen and an unending chain of

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[14] Deuteronomy 1:17 (ESV).

[15] 1 *Records of the Federal Convention of 1787*, 473 (M. Farrand ed. 1911).

[16] Ibram X. Kendi, *Ibram X. Kendi Defines What it Means to be an Antiracist*, Penguin Books (June 9, 2020) https://www.penguin.co.uk/articles/2020/06/ibram-x-kendi-definition-of-antiracist.

[17] *Id.*

active measures of discriminatory retribution into the future is the only equitable remedy.[18] Only the first of these views is consistent with "equal justice under law," to quote the pediment of the Supreme Court building.

A court that chooses "to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination," *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting), rather than applying the Constitution equally to every party before it creates a government of men, and not of laws.[19]

II. The First Circuit Applied the Group Protection View of the Equal Protection Clause and the Disparate Impact Analysis and thus its Decision Should be Overturned.

A facially race-neutral policy nonetheless discriminates based on race if it was adopted to accomplish a discriminatory purpose. *See Arlington Heights v. Metro. Hous. 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."). When determining whether facially race-neutral policies challenged under the

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[18] In summarizing Kendi's *How to be an Antiracist* for his talk at Germanna Community College, college publicists state that the book "argues that neutrality is not an option to the racism struggle—people must take active measures if they wish to end discrimination." Germanna Community College, Facebook (Mar. 16, 2022) https://m.facebook.com/gccva/photos/a.118459220637/10159531669120638/?type=3.

[19] *See generally* Mass. Const. pt. 1 art. XXX.

Equal Protection Clause are the product of discriminatory intent, whether "the impact of the official action" "bears more heavily on one race than another" "may provide an important starting point." *Id*. at 266 (internal quotation marks omitted) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Court should grant certiorari in this case to clarify that the proper subject of the disparate impact analysis under the Equal Protection Clause is the impact of the policy on individuals because of their race; not the impact of the policy on groups.

The First Circuit applied a group protection interpretation of the *Arlington Heights* disproportionate impact factor; an interpretation that is inconsistent with the basic protections of individuals enshrined in the Equal Protection Clause. In its assessment of that factor, the circuit court rejected the Coalition's claim of disproportionate impact because even after the adoption of the new policy, white and Asian Americans still outperformed every other racial group in admissions and thus were admitted at a higher rate than their representation in the applicant pool. App. 18a-19a.

The First Circuit claims that the Coalition's challenge to the policy in this case "has it backwards." App. 18a. According to the court, the Equal Protection Clause "encourages precisely what the Coalition claims the Plan has done here." App. 18a. Namely, "as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more." *Id.* at 18a-19a.

This reductionistic view of the disparate impact analysis, and thus of the Equal Protection Clause,

opens the door to massive racial discrimination by proxy. Under this reading, any policy, apparently no matter how racially charged the reason for its adoption, would apparently be acceptable so long as the resulting racial balance is closer to the representation of groups in the population than it was before the adoption of that policy.

As Justice Alito's hypothetical demonstrates, under the First Circuit's understanding of disparate impact, a facially neutral policy designed to reduce the number of black players on a high school basketball team would *reduce* disparate impact if it reduced the racial composition gap between the school and the team, even if more qualified black players were removed from the team to accomplish that goal. *See Coal. for TJ*, No. 23-170 at 8-9 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari). That her racial group still outperformed all others would undoubtedly be cold comfort to the kid reading the rejection letter she received not because she was not qualified but because she had the wrong skin color.

Given its restrictive reading of the disparate impact analysis, when would the First Circuit be willing to recognize discriminatory intent? It explains: "at some point, facially neutral criteria might be so highly correlated with an individual's race and have so little independent validity that their use might fairly be questioned as subterfuge for indirectly conducting a race-based selection process." App. 25a. The second of these two factors simply contradicts this Court's decision in *Arlington Heights*. There, the Court made clear that, "When there is a proof that a discriminatory purpose has been a motivating factor

in the decision, [] judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-66.

As for the first factor, the whole reason the Committee chose to use ZIP codes was because that method would give it the racial reconfiguring it was seeking, as demonstrated by its repeated consideration of the racial consequences of potential policies. Generally, one looks to correlation as a first step in trying to understand a causal relationship between two factors. However, where the government entity makes clear that it is looking for a factor that will result in a change of racial makeup, the court need not seek to discern whether that factor correlates with race. The government's selection of that factor demonstrates the causal relationship.

Rather than asking what effect a policy has on groups, courts should compare racial composition before and after the adoption of the policy to what change in racial composition might have otherwise been expected given the totality of the circumstances. The proper test is whether "[u]nder [an] old policy," applicants of a particular race "had a certain chance of admission," and "[u]nder [a] new policy, that chance has been significantly reduced, while the chance of admission for members of other racial and ethnic groups ha[s] increased." *Coal. for TJ*, No. 23-170 at 7-8 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

Because two circuits[20] have refused to enforce the Equal Protection Clause in cases of obvious racial

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[20] *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (2023); *Bos. Parent Coal.* 89 F.4th 46.

discrimination in school admissions, this Court should grant certiorari in this case before more students are refused admissions to life-changing magnet schools on the basis of their skin color.

III. The Court Should Grant Certiorari Because Lower Courts Are Likely to Face Similar Cases in the Near Future as a Result of the Coming Massive Resistance to *Students for Fair Admissions v. Harvard*.

Some people are determined to discriminate. "[N]either voters nor state officials can end university racial preferences by a single stroke. Like the ancient Hydra of Greek myth, two heads are likely to grow in place of the original."[21] But, as this Court explained, "Eliminating racial discrimination means eliminating all of it," and "the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *Students for Fair Admissions*, 600 U.S. at 206 (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)).

Students for Fair Admissions was an essential step towards equality before the law for all Americans, regardless of race. Yet those who insist on racialized school admissions appear to be marshalling their forces for a massive resistance campaign designed to circumvent the protections afforded by the Equal Protection Clause. In the wake of the Court's decision, the president of the American Association of Universities and the heads of many higher education institutions released statements expressing their disappointment in the decision, but assuring their

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[21] Richard H. Sander, Stuart Taylor, *Mismatch*, 169 (1st ed. 2012).

respective audiences that, while they would follow the law, they also remained committed to diversity, by which they meant primarily diversity of skin color, not ways of thinking.[22]

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[22] *See*, *e.g.*, Barbara R. Snyder, *AAU President Reiterates the Value of Diverse Campus Communities*, Association of American Universities (June 29, 2023), https://www.aau.edu/newsroom/press-releases/aau-president-reiterates-value-diverse-campus-communities; John J. DeGioia, *Today's Supreme Court Ruling and our Commitment to Diversity, Equity, and Inclusion*, Georgetown University (June 29, 2023), https://president.georgetown.edu/todays-supreme-court-ruling-and-our-commitment-to-diversity-equity-and-inclusion/; Christina H. Paxson, *Brown President Responds to Supreme Court's Decision on Affirmative Action*, Brown University (June 29, 2023), https://www.brown.edu/news/2023-06-29/scotus-affirmative-action; Lawrence S. Bacow et al., *Supreme Court Decision*, Harvard University (June 29, 2023), https://www.harvard.edu/admissionscase/2023/06/29/supreme-court-decision/; Salovey, *Supreme Court Decisions Regarding Admissions in Higher Education*, Yale University (June 29, 2023), https://president.yale.edu/president/statements/supreme-court-decisions-regarding-admissions-higher-education; Ronald Daniels, *Johns Hopkins' Unwavering Commitment to Diversity*, Johns Hopkins University (June 29, 2023), https://president.jhu.edu/messages/2023/06/29/johns-hopkins-unwavering-commitment-to-diversity/; *Columbia Issues Statement on Affirmative Action Cases*, Columbia University (July 5, 2023), https://news.columbia.edu/news/columbia-issues-statement-affirmative-action-cases; Michael V. Drake, *UC Statement on SCOTUS Decision Regarding the Use of Race in College Admissions*, University of California (June 29, 2023), https://www.universityofcalifornia.edu/press-room/uc-statement-scotus-decision-regarding-use-race-college-admissions; *GW Leadership Reacts to Supreme Court Ruling on Race-Conscious Admissions in Higher Education*, George Washington University (June 29, 2023),

Several of the presidents' statements express displeasure with *Students for Fair Admissions* and suggest an intent to circumvent it. For example, President John DeGioia of Georgetown University wrote, "While we are deeply disappointed in today's decision and will continue to comply with the law, we remain committed to our efforts to recruit, enroll, and support students from all backgrounds."[23] There is no reason to be disappointed in a decision striking down racial discrimination unless racial discrimination is the favored policy. These presidents insisted they would follow the law while at the same time making clear their intent to find ways of maintaining the *status quo ante*. The only way to accomplish that goal while maintaining apparent compliance with the law is to engage in racial discrimination by proxy.

In fact, that is exactly what some are doing. As explained in detail in one report, the New York State Bar Association ("NYBSA") "recommends that law schools in the state continue to consider applicants racial identities and experiences in the admissions process by tying those features to 'a non-racial goal or value being pursued by the university.'"[24] Further, "NYBSA also advises law schools to develop admissions policies that, while race-neutral on their

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https://gwtoday.gwu.edu/gw-leadership-reacts-supreme-court-ruling-race-conscious-admissions-higher-education.

[23] *Id*.

[24] Renu Mukherjee, *Affirmative "Re-Action": How Major American and New York Bar Associations Are Responding to* Students for Fair Admissions at 4, Manhattan Institute (May 2024) available at https://media4.manhattan-institute.org/wp-content/uploads/how-major-american-and-new-york-bar-associations-are-responding-to-students-for-fair-admissions.pdf.

face, intend to increase the number of [underrepresented minorities] in effect."[25]

Just as colleges and universities today appear to be organizing a widespread effort to maintain their power to discriminate in contravention of *Students for Fair Admissions* and the Equal Protection Clause, so earlier authorities engaged in massive resistance to this Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In "1956, Senator [Harry] Byrd coined the term 'Massive Resistance,' and ninety percent of the congressional delegation from the South signed a 'Southern Manifesto,' castigating *Brown* as a 'clear abuse of judicial power' and vowing to reverse it."[26]

Courts of the time were not oblivious to the clear discriminatory intent of many of the supposedly race-neutral laws they reviewed. The district court in one case found, "Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body." *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 442 (E.D. Va. 1957).

The Court should grant certiorari in this case and strike down racial preferences by proxy to preempt their propagation throughout the educational ecosystem. The Court rightly rejected racial discrimination by proxy in *Students for Fair Admissions*. *See* 600 U.S. at 230-31 (quoting

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[25] *Id.*

[26] Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 W. & Mary Law Rev. 1261, 1269 (1996).

Cummings, 4 Wall. At 325) ("'The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'"). It should reiterate its commitment to that doctrine for all those who would continue their racial discrimination behind a mask of race neutrality.

CONCLUSION

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

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