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 *AMICI CURIAE* NATIONAL ASSOCIATION OF SCHOLARS and CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Scholars ("NAS") is an independent membership association of academics, including professors, graduate students, administrators and trustees, that works to foster intellectual freedom and to sustain the traditions of intellectual integrity and individual merit in America's colleges and universities. In pursuit of this mission NAS supports the maintenance of merit-based selection at academically rigorous secondary schools such as those at issue in this case.

The Chinese American Citizens Alliance of Greater New York ("CACAGNY") is a chapter of the Chinese American Citizens Alliance, the oldest Asian-American civil rights organization in America. Its mission is to empower Chinese Americans as citizens of the United States based on principles of fairness and equal opportunity and guided by ideals of patriotism, civility, dedication to family and culture, and high ethical and moral standards. CACAGNY opposes policies that discriminate against or limit the educational opportunities of Asian-American or other students.

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[1] Pursuant to Rule 37(6), *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of the brief.

Amici gave timely notice pursuant to Rule 37(2) to counsel of record for all parties of its intention to file this *amicus* brief.

SUMMARY OF ARGUMENT

The crux of the First Circuit's holding in this case is that a policy change that significantly reduces the representation or access of a racial group -- such as by materially decreasing the enrollment share of Asian-Americans and whites at selective public schools as occurred here -- somehow does not have a "relevant disparate impact" on the members of the negatively affected groups so long as they are still "over-represented" compared to their share of the population. However, not only does this holding inherently embrace racial balancing and proportionality, which this Court has repeatedly stated is "facially" or "patently unconstitutional," it also defies the consistent understanding of this Court and the other Circuit Courts of Appeals that the measure of "disparate impact" entails a comparison between the status quo ante and the situation after the implementation of new procedures – not a comparison to an idealized or proportional racial balance.

This is seen in all areas of civil rights law, including cases under the Civil Rights and Voting Rights Acts and the Equal Protection Clause, in all of which courts reject a "bottom line" approach based on "whether members of the applicant's race are already proportionately represented." Thus the court below has created a conflict with the decisions of this Court and of other courts of appeals on an important question of law.

The concerns of the court below that a ruling for Petitioner "would turn the previous status quo into an immutable quota" guaranteeing Asian and white students their share of seats in perpetuity, and would preclude Respondents and other educational institutions from employing such facially race-neutral methods as preferences based on family wealth and income, are unavailing. A shift from the purely race-based preferences that were previously in place at almost every college and university in America, and many secondary schools, to preferences based on genuine, objective measures of economic disadvantage such as family income and wealth, would have no constitutional infirmity.

Institution of such criteria at the tiny handful of selective public high schools, such as those in the present case, that have previously had pure academic-merit-based admissions criteria would merit additional scrutiny to assure that the added economic criteria were indeed genuine and objective and not merely a subterfuge for race. Such scrutiny, which need not be of the most exacting variety, is justified in light of the historic role of these schools as engines of opportunity for immigrants and minorities, but would not, and should not, create an "immutable" entitlement for Asian and white students.

ARGUMENT

I. A Policy Change that Significantly Reduces the Representation of a Racial Group by Definition Has a Racially "Disparate Impact" on the Group Even if it Remains "Over-Represented" Compared to its Share of the Population.

The crux of the First Circuit's holding in this case is that a policy change that significantly reduces the representation or access of a racial group -- such as by materially decreasing the enrollment share of Asian-Americans and whites at selective public schools as occurred here -- somehow does not have a "relevant disparate impact" on the members of the negatively affected groups so long as they are still "over-represented" compared to their share of the population. App. 16a, 20a-21a; *see id.* 18a ("certain races' stark over-representation").

"The bottom line," the court held, was that even after the change from an exam-centric to a zip code-based selection process the racial balancing at the schools was still not proportional to the school-age population, *id.* 20a, with white and Asian students continuing to enjoy "greater success in securing admission … than students from any other racial or ethnic group," *id.* 21a (quoting *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 879 (4th Cir. 2023), *cert.*

denied, 601 U.S. ___, 218 L. Ed. 2d 71 (2024)).[2] Thus, as full racial balancing had not been achieved, the sharp drop in white and Asian enrollment under the revised plan didn't matter – indeed, didn't even count as a disparate impact.

But as Justice Alito recognized in dissenting from the denial of certiorari to review the similar holding of the Fourth Circuit in *Coalition for TJ*, s*upra*, this "startling," "aberrant" and counterintuitive proposition cannot accurately state the law. 218 L. Ed. 2d at 73, 76. And it does not. Even putting aside its inherent endorsement of racial balancing, which this Court has repeatedly stated is "facially" or "patently unconstitutional,"[3] it defies logic, the plain English meaning of the words "disparate impact," and the consistent understanding of this Court and the other Circuit Courts of Appeals as to the basic meaning of those words. As the ensuing discussion shows, this understanding is that it entails a comparison between the status quo ante and the situation after the

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[2] The court stated in this passage that the Asian enrollment percentage at the schools under the new plan was 40%. App. 20a. However, as stated elsewhere in the court's opinion and in the district court record the correct figure is 18%. *Id.* 16a, 21a n. 5, 47a.

[3] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013)); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). *See generally* Pet. Cert. 13-17.

implementation of new procedures – not a comparison to an idealized or proportional racial balance.[4]

In *Ricci v. DeStefano*, 557 U.S. 557 (2009), this Court held that the City of New Haven had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by refusing to certify the results of an objective competitive examination for promotion to supervisory firefighting positions because white candidates had scored more highly on the test than had black or Hispanic applicants. While *Ricci* was a disparate treatment rather than a disparate impact case (as there was no claim that the city's failure to promote the successful white test takers had been based on anything other than their race), it involved the same trade-off as here between discrimination against an "overrepresented" group and the use of facially neutral merit selection policies that may maintain that "overrepresentation." *See* App. 18a, 20a.[5]

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[4] While the import of a finding of disparate impact varies across different areas of civil rights law and even, in some contexts such as the equal protection one involved here, between Circuits, *see Coal. for TJ*, 218 L. Ed. 2d at 75 n.8, the requisites for such a finding are consistent. Thus it is relevant to examine cases from all areas of civil rights law.

[5] In *Ricci* the City argued unsuccessfully that it would have been subject to a disparate impact claim by minority firefighters had it **not** thrown out the test results. Here, the Court of Appeals lamented "the use of facially neutral policies that 'freeze the status quo of prior discriminatory practices.'" App. 18a (quoting

- *continued* -

Notably, the Court reached its holding over a dissent by Justice Ginsburg that was strikingly similar to the reasoning of the First Circuit here. Even after the test results were discarded, she argued, whites were still significantly overrepresented in the senior ranks of the Fire Department compared to their share of the city's population, 557 U.S. at 609-11, and "[i]t is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed." *Id.* at 611. The Court rejected this reasoning, focusing not on this "entrenched inequality" relative to population share but on the injury to individual white firefighters who were passed over for promotion when the city changed its policy by abandoning the test results.

The Court had even more forcefully rejected the First Circuit's "bottom line" approach to disparate impact litigation a quarter of a century earlier in *Connecticut v. Teal*, 457 U.S. 440 (1982), where it held that black employees who had scored disproportionately lower than whites on a promotion exam could maintain a Title VII disparate impact claim even though the employer had maneuvered the selection process after the test in such a way that a greater percentage of blacks than whites were nonetheless

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Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)) (internal quotation marks and ellipsis omitted) – even though, unlike in *Griggs*, there was no finding here of any prior discriminatory practices by the Respondents. *See* Point II *infra*.

promoted, and thus "th[e] 'bottom-line' result [was] more favorable to blacks than to whites." *Id.* at 444.

The Court rejected this "'bottom-line' theory of defense," *id.* at 442, stating that "[i]n considering claims of disparate impact" it "has consistently focused on … requirements that create a discriminatory bar to *opportunities*" rather than "on the overall number of minority or female applicants actually hired or promoted," *id.* at 450 (emphasis in original). The flaw in the "bottom line" defense, the Court stated, is that it would allow civil rights defendants "to justify discrimination against [plaintiffs] on the basis of their favorable treatment of other members of [plaintiffs'] racial group" but "'[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, **without regard to whether members of the applicant's race are already proportionately represented**.'" *Id.* at 454-55 (emphasis added) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978)).

The Court noted that this rule applied not just to "facially discriminatory policies" but to "a facially neutral policy," like the promotion exam in the case before it or the zip code-based selection process in the present case:

> [I]rrespective of the form taken by the discriminatory practice, [the] treatment of other members of the plaintiffs' group can be "of little comfort to the victims of

> . . . discrimination." Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. **That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every individual ... is protected against both discriminatory treatment and "practices that are fair in form, but discriminatory in operation**."

457 U.S. at 455-56 (emphasis added) (quoting *Teamsters v. United States*, 431 U.S. 324, 342 (1977), and *Griggs*, *supra*, 401 U.S. at 431).

That disparate impact analysis necessarily entails a comparison of a plaintiff group's status before and after a policy change – *i.e.*, whether it is worse off than it would have been under the status quo ante, regardless of how well it may be doing under other metrics – is perhaps best seen in voting rights jurisprudence. Indeed, section 5 of the Voting Rights Act of 1965, 52 U.S.C. § 10304, which requires preclearance for any "change in voting procedures" in covered jurisdictions, *Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013),[6] is in many respects the quintessential disparate impact statute. As the Court stated

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[6] Section 5 remains in force should Congress revise the coverage formula of section 4(b), 52 U.S.C. § 10303(b), struck down in *Shelby County*. *See* 570 U.S. at 557

in *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997) (internal citations omitted), the Section 5 test of whether a change "would lead to a retrogression in the [electoral] position of racial minorities … by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." This "necessarily implies that the jurisdiction's existing plan is the benchmark against which the effect of voting changes is measured." *Id.* (internal quotation marks omitted).

Similarly here, analysis of whether a change in public school admissions policies has had a racially disparate impact "by definition, requires a comparison of [the] jurisdiction's new … plan with its existing plan" and the "existing plan is the benchmark against which the effect of [the] changes is measured."

Courts have applied the same logic not just to Section 5 but also to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and to voting rights claims under the Equal Protection Clause. For example, the same Fourth Circuit that ruled in *Coalition for TJ*, *supra*, that Asian students had no cognizable disparate impact claim against an admissions policy change that reduced their enrollment share at a selective public school from 73% to 54% because they remained "over-represented," 68 F.4th at 902, 895 (Rushing, J., dissenting), had earlier ruled that voting procedure changes **had** had a disparate impact on African-American voters in violation of both Section 2 and the Equal Protection Clause – even though black voter turnout, and apparently the black share of the

electorate as well, had actually increased following implementation of the changes. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016); *see N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 350 (M.D.N.C. 2016), *rev'd*, 831 F.3d 204 (4th Cir. 2016) (African-American turnout increased relative to other groups).

Like the Supreme Court in *Connecticut v. Teal*, *supra*, the *McCrory* Circuit Court found this bottom-line increase in black representation to be irrelevant. Rather it focused solely on the presumed disparate impact of the changes themselves – limitations on same-day registration, early voting and out-of-precinct voting, each of which "African Americans disproportionately used," and the requirement of a photo ID which they "disproportionately lacked." 831 F.3d at 231. Since black voters were presumably worse off than they **would have been** under the status quo ante before the changes, a disparate impact claim was established regardless of their voting strength vis a vis the rest of the population.

In the present case, the change in selection procedures has not just presumably but demonstrably left Asian-American and white students in a worse position than they were under the prior system, lowering their collective enrollment share from 61% to 49%. A16a. By ignoring this, by failing to use the previous plan as the obvious benchmark for comparison as required by this Court in *Reno v. Bossier Parish School Board*, *supra*, and instead adopting the "bottom line" approach rejected by the

Court in *Connecticut v. Teal*, the court below has created a conflict with the decisions of this Court and of other courts of appeals on an important question of law – and one which is likely to recur with increasing frequency in the wake of the Court's decision in *Students for Fair Admissions v. Harvard*, *supra* (*see* Pet. Cert. 23-27). It's decision should be reviewed here.

II. Striking Down the Racially Discriminatory Policy Change Here Would Not Create "an Immutable Quota" for Asian and White Students, or Bar Use of Facially Race-Neutral Methods, Such as Genuine Economic Preferences, that Serve Legitimate Non-Racial Goals.

One rationale offered by the circuit court for its holding here was that "[t]o rule otherwise would turn 'the previous status quo into an immutable quota,'" guaranteeing Asian and white students their share of seats in perpetuity, App. 19a (quoting *Coal. for TJ*, 68 F.4th at 881). This, the court said, would "'freeze the status quo of prior discriminatory practices.'" App. 18a (quoting *Griggs*, *supra*, 401 U.S. at 430) (internal quotation marks and ellipsis omitted) – though, as noted above, unlike in *Griggs* there was no finding here of any prior discriminatory practices against black and Latino applicants. *See supra* n. 5.

A related argument suggested by the court is that such a ruling might preclude Respondents and other educational institutions from employing such facially

race-neutral methods as preferences based on family wealth and income as a means of pursuing both racial and economic class diversity. *See* App. 22a-26a. As the court noted, several justices of this Court spoke approvingly of such economic preferences in striking down race-based preferences in college admissions in *Students for Fair Admissions*, and indeed the petitioner in that case had proposed them as an alternative. App. 23a.

Implicit to both of these arguments is that neither Asian-Americans nor the members of any other group have a constitutional entitlement to any particular school admissions system. This is undoubtedly correct. Indeed, school districts are under no constitutional obligation to establish academic-merit-based criteria for admission to selective schools in the first place, or to have any selective schools at all for that matter. Many don't.

However, this Court and other courts have long recognized that there is a crucial legal difference, which also comports with a basic sense of fairness, between not taking an action in the first place, even if failure to do so disproportionately impacts a racial or ethnic group, and undoing such an action once taken. *See McCrory*, *supra*, 831 F.3d at 232 ("removing voting tools that have been disproportionately used by African Americans meaningfully differs from not initially implementing such tools," and citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966), for the proposition that "[O]nce the franchise is granted to the electorate, lines may not be drawn which are

inconsistent with the Equal Protection Clause").

Thus, in finding that the government's rescission of the DACA program violated the Administrative Procedure Act, the Court held that, while there was obviously no obligation to establish the program, doing so had created "serious reliance interests" that "[i]t would be arbitrary and capricious to ignore." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. __, 140 S. Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016), and *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009)). "[B]ecause DHS was not writing on a blank slate, it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." 140 S. Ct. at 1915 (internal quotation omitted). *See also Romer v. Evans*, 517 U.S. 620 (1996) (though there was no claim that municipalities were required to pass gay rights ordinances, a state referendum barring them and repealing those previously enacted violated the equal protection rights of gays and lesbians).

This does not mean, though, that the court below was correct that a ruling for plaintiffs here would create an "immutable" entitlement for Asian and white students to their current proportion of admissions slots. Nor would it bar academic institutions from implementing preferences based on economic disadvantage – which "disproportionately affect protected groups … 'in spite of' [rather than] 'because of'" race, *Coal. for TJ*, 68 F.4th at 905 (Rushing, J.,

dissenting) (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) – in lieu of the racial preferences struck down in *Students for Fair Admissions v. Harvard*. There would almost certainly be no negative disparate impact at all on Asian-Americans and whites in moving to such an admissions regime from the pre-*Harvard* regime of overt racial discrimination against them.

Further, as the court below suggested, such a consideration of financial disadvantage would not be constitutionally suspect as it would have "independent validity" as a means of pursuing the legitimate goal of redressing economic inequality, rather than merely serving "as subterfuge for indirectly conducting a race-based selection process." App. 25a.[7] Contrast this with the jerry-rigged zip code system here which Respondents continually tinkered with in devising it in order to achieve the exact racial balance they desired. *See* Pet. Cert. 6-7; App. 7a (decision below noting that "[a]s part of its process, the Working Group reviewed multiple simulations of the racial

[7] The court acknowledged that "[o]f course, 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." *Id.* However, *amici* note that even some socio-economic criteria could fall prey to this concern. Thus we suggest that to survive scrutiny such criteria should be based on genuine, objective economic measures, such as family wealth and income, rather than on looser criteria such as family structure that might discriminate among equally poor students based on race.

compositions that would result from different potential admissions criteria").

For these reasons, there would be no constitutional infirmity in replacing the overt racial preferences that were in place at almost every college and university in America, and many secondary schools, prior to this Court's decision in *Students for Fair Admissions*, with preferences based on genuine, objective measures of economic disadvantage such as family income and wealth. Nor would there be any issue with implementing such economic class criteria at new schools or at schools instituting selective admissions programs for the first time.

However, for the small handful of selective public high schools, such as those in the present case and in *Coalition for TJ*, that have previously had pure academic-merit-based admissions criteria such as competitive examinations – schools that Justice Alito accurately described as having historically served as "ticket[s] to the American dream" and "engines of social mobility … for minorities and the children of immigrants," *Coalition for TJ*, 218 L. Ed. 2d at 72 – such a change would merit additional scrutiny to assure that the added economic criteria were indeed genuine and objective and not merely a "subterfuge for a race-based selection process." Such scrutiny need not be of the most exacting "fatal in fact" variety, however, and thus would not, and should not, create an "immutable" entitlement for Asian and white students to their current enrollment shares.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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