Nos. 23-1137

In the

Supreme Court of the United States

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Petitioner,

v.

THE SCHOOL COMMITTEE FOR THE CITY OF BOSTON, ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. 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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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country.

Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs.

Mountain States Legal Foundation ("MSLF") is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to speak freely, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g.*,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023) (amici curiae in support of petitioners); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (amicus curiae in support of petitioner).

SUMMARY OF ARGUMENT

The U.S. Department of Education (Department) maintains an Office for Civil Rights (OCR). OCR has jurisdiction to enforce civil rights statutes and their attendant regulations on behalf of the Department. These statutes include Title VI, Title IX, and Section 504 of the Rehabilitation Act, as examples.

OCR also issues policy guidance to schools and the public, which purports to address civil rights compliance topics. On several occasions, OCR has published policy guidance on the topic of race, and the extent to which race can be considered and used by school officials.

But that policy guidance—particularly in the are of the use of race to achieve racial "diversity"—has vacillated drastically over the years. On some topics, guidance has been issued, withdrawn, reissued, and is now back under consideration for withdrawal. Notably, some presidential administrations have actively encouraged schools to engage in race-based measures to seek diversity, while others have emphasized the very important limitations on the legal use of race in education under Title VI.

The Court's decision in *Students for Fair Admission, Inc.* v. *President and Fellows of Harvard College* (*SFFA*) benefitted schools and the public by

clarifying that race was not appropriately tied to a school's interest in diversity. 600 U.S. 181 (2023). It was careful to set clear and predictable lines for schools when considering the use of race. *Id.* at 206 ("Eliminating racial discrimination means eliminating all of it."); *id.* at 230 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."); *id.* ("But despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.").

However, OCR has attempted to put its own gloss on the Court's decisions, and public institutions have thus flouted the *SFFA* precedent. Initially, for instance, political appointees working in OCR made widely reported statements urging schools and the public to avoid relying on third-party interpretations of *SFFA*. Specifically, shortly after *SFFA*'s announcement, OCR's Assistant Secretary for Civil Rights, Ms. Catherine Lhamon, told the National Summit on Equal Opportunity in Higher Education that schools, and the public generally, will know what the law is after *SFFA only* "when you hear from us."

Allegedly, college leaders understood Ms. Lhamon's other comments at that meeting as a directive "that maintaining diversity in higher education is not only possible, but imperative in the wake of the Supreme Court's decision." Jillian Berman, *Inside the room where Biden administration officials and college leaders game planned college*

*admissions after affirmative actio*n, Morningstar News (July 26, 2023).[2]

Subsequently, OCR and the Department of Justice's Civil Rights Division published two packages of sub-regulatory guidance that undermine *SFFA*. While the *SFFA* decision was a major step forward in carefully defining the use of race in the context of education, current OCR officials are trying to sidestep *SFFA*. The current resistance to the Court's groundbreaking jurisprudence is not unprecedented. After *Brown* v. *Board of Education*, 347 U.S. 483 (1954), judges and much of the country resisted the Court's rejection of the *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), "separate but equal" doctrine. Similarly, because "diversity" measures are in vogue, OCR, DOJ, schools, and even some courts are trying to evade *SFFA*'s directives.

The Court should reiterate its directives that race discrimination, no matter the motivation, is invidious and unlawful.

ARGUMENT

I. OCR guidance on proxy discrimination measures vacillated significantly before *SFFA*.

1. Extraordinary and rapid shifts in federal policy undermine consistency and predictability for thousands of schools and millions of students. Similarly, public confidence erodes when civil rights

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[2] www.morningstar.com/news/marketwatch/20230726514 /inside-the-room-where-biden-administration-officials-andcollege-leaders-game-planned-college-admissions-afteraffirmative-action.

laws are inconsistently interpreted. Schools particularly must confront this confusing landscape against the backdrop of the incredibly severe consequence of losing all federal education funds in an OCR enforcement action. 34 C.F.R. § 100.8(c).

This potential penalty is particularly concerning in light of the conflict between OCR guidance, and the Constitution and civil rights law. The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This constitutional directive was embedded in Title VI of the Civil Rights Act of 1964, which states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

2. Despite these directives, the Obama Administration actively encouraged schools to adopt race-conscious policies by counting Justice Kennedy's concurring opinion in *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), with the four dissenters in that case. *See id.* at 788 (Kennedy, J., concurring) ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial

composition.").[3]

OCR guidance documents, in particular, drew heavily from Justice Kennedy's concurring opinion in *Parents Involved*, cherry-picking elements from that concurrence and joining them with the views of the dissenters to offer purported affirmative points of law. *See* U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (2011 ESE Guidance) at 5 (Dec. 2, 2011)[4] ("Although *Parents Involved* ultimately was decided on other grounds, a majority of Justices expressed the view that schools must have flexibility in designing policies that endeavor to achieve diversity or avoid racial isolation, and, at least where those policies do not classify individual students by race, can do so without triggering strict scrutiny.").

To drive home OCR's point regarding using broad race-based measures to achieve diversity, the 2011 Guidance prognosticated about what this Court might do if faced with a case where a school adopted a host of race-conscious policies that stopped just short of making decisions specifically based on the race of individual students:

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[3] This Court has specifically cautioned against this sort of "vote tallying" of concurrences and dissents. *See, e.g., Marks* v. *United States*, 430 U.S. 188, 193 (1977) (advising that when the Court is fragmented, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.").

[4] www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf.

> Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be "unlikely" to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.

Id. at 5.

The departments cited Justice Kennedy's concurrence in *Parents Involved* stating schools can consider racial impacts on diversity if motivated by enhancing racial diversity.

> [L]eeway to devise race-conscious measures to achieve diversity or avoid racial isolation extends only to circumstances where entities pursue the goal of bringing together students of diverse backgrounds and races.

U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (2011 Postsecondary Guidance) at 5 n.11 (Dec. 2, 2011)[5] (internal quotation marks omitted).

Thus, during the Obama Administration, OCR advanced the proposition that some "good" race-based decisions were permitted, and not subject to strict scrutiny. This position, however, is in deep tension with other longstanding precedents. *See Adarand Constructors* v. *Pena*, 515 U.S. 200, 226 (1995)

[5] www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf.

("[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, it may not always be clear that a so called preference is in fact benign. More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (internal quotation marks and citations omitted*); see also Fisher* v. *University of Texas at Austin* (*Fisher I*), 570 U.S. 297, 328 (2013) (Thomas, J., concurring) ("The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.").

In addition to this guidance, the Department and DOJ later issued even more joint guidance, after the Court's decision in *Fisher I*. U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Questions and Answers About Fisher v. University of Texas at Austin* (2013 *Fisher I* Guidance) (Sept. 27, 2013)[6].

The 2013 *Fisher I* Guidance reiterated in full the departments' earlier guidance from 2011, *id.* at 3, but also went further and characterized the Court's decision regarding strict scrutiny in *Fisher I* as an extremely narrow holding, which applied exclusively to admissions policies.

More broadly, in the 2013 *Fisher I* Guidance, the departments affirmatively suggested ways that schools could generate "racial diversity" by simply sidestepping the Court's precedents on admissions. *Id.*

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[6] www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.pdf.

at 2. Specifically, the Departments stated:

> The Court's opinion does not address a college or university's ability to promote diversity through other efforts that do not consider an individual's race in admissions, such as engaging in targeted outreach and recruitment or partnering with high schools through pipelines programs to promote student body diversity.

Id. at 2.

Although the guidance was reaffirmed as operative by OCR as late as 2016, U.S. Dep't of Educ.'s Off. for Civil Rts., *Questions and Answers About Fisher v. University of Texas at Austin II* at 2 (Sept. 30, 2016)[7] ("The guidance issued by the Departments in 2011, 2013, and 2014 regarding the voluntary use of race to achieve student body diversity remain in effect, and were supported and reinforced by *Fisher II*."), it was in serious tension with *Fisher* v. *Univ. of Texas* (*Fisher II*), 579 U.S. 265, 385 (2016). In *Fisher II*, this Court suggested that "race neutral" plans adopted specifically for race-conscious reasons are on just as shaky ground as outright racial preferences. Specifically, the Court explained:

> [Ten Percent] plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I*, 570 U.S., 133 S. Ct., at 2433 (Ginsburg, J., dissenting). "It is race consciousness,

[7] www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

> not blindness to race, that drives such plans." [*Id.*] Consequently, *petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.*

Id. at 386 (emphasis added).

3. In 2018, the new administration thoroughly reviewed the guidance documents published between 2011 and 2016 on the topic of race-conscious policies. As the foregoing analysis shows, the Obama-era directives overstepped the Court's directives. Accordingly, the DOJ and the Department withdrew them all. On July 3, 2018, the departments wrote in a Dear Colleague Letter: "The Departments have reviewed the documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI." U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Updates to Department of Education and Department of Justice Guidance on Title VI* at 2 (July 3, 2018).[8]

4. Yet, after President Biden's election, President Obama's previous Assistant Secretary for Civil Rights, Ms. Catherine Lhamon, re-adopted her stale—and questionable—prior position. During her 2021 confirmation process, she re-asserted the same themes of these prior guidance documents that—based on vote-tallying from *Parents Involved*—schools can consider race to affect the racial demographics of their

[8] www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf.

student bodies:

> [Question] 25. Has the U.S. Supreme Court ever ruled that K-12 schools have a compelling state interest in a student body diversity?
>
> [Answer] In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), a majority of the justices on the Supreme Court recognized the compelling interests that K-12 schools have in obtaining the benefits that flow from achieving a diverse student body and avoiding racial isolation. *Justice Kennedy, in concurrence, explained that he was in agreement with Justice Breyer's dissenting opinion*, which was joined by Justices Stevens, Souter, and Ginsburg, in recognizing these compelling interests.

U.S. Senate Health Committee Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of Education (July 14, 2021), at 14–15 (emphasis added).[9]

On June 29, 2023, this Court issued its decision in *SFFA*. The Court explained that the "compelling interest" lauded by Secretary Lhamon during the Obama administration and again at her 2021

[9] https://mslegal.org/wp-content/uploads/2021/08/Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf.

confirmation hearing was not "compelling" at all. "[T]he interests [Harvard] view[s] as compelling cannot be subjected to meaningful judicial review," which included "better educating its students through diversity . . . ." *SFFA*, 600 U.S. at 214. Indeed, "[t]he interests that [Harvard] seek[s], though plainly worthy, are inescapably imponderable." *Id*.

Nevertheless, Lhamon's assertions once again made their way into OCR's official communications, which stated that schools can and should consider the interest of "diversity." First, on August 14, 2023, OCR and DOJ jointly published a Dear Colleague Letter, U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Dear Colleague Letter Re: Resources on Students for Fair Admission, Inc. v. President and Fellows of Harvard College and Students for Fair Admission, Inc. v. University of North Caolina et al. (SFFA cases)* (Aug. 14 DCL) (Aug. 14, 2023)[10], and a Questions and Answers Resource document, U.S. Dep't of Educ.'s Off. for Civil Rts. & U.S. Dep't of Justice's Civil Rts. Div., *Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admission, Inc., v. Harvard College and University of North Carolina* (August 14 Q&A) (Aug. 14, 2023)[11].

These documents attempted to side-step SFFA's directives. For instance, in its August 14, 2023 Q&A, the departments asked the question: "Can institutions

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[10] www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf.

[11] www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf.

of higher education continue to take other steps to achieve a student body that is diverse across a range of factors, including race and ethnicity?" August 14 Q&A at 3. The departments' doublespeak response was: "Yes, institutions of higher education may continue to articulate missions and goals *tied to student body diversity*," but then qualified their answer by requiring institutions to only "use all legally permissible methods to achieve that diversity." *Id.* (emphasis added). Additionally, OCR and DOJ stated schools can use race-conscious measures affecting student demographics if applicants are not directly preferred on race alone:

> In particular, nothing in the SFFA decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.

Id.

Then, on August 24, 2023, OCR unilaterally issued further sub-regulatory guidance, purporting once again to offer the definitive take on how schools can use and consider race, despite the SFFA decision. OCR reiterated the principle that schools may focus on racial diversity, *i.e.* the racial demographics of their students—so long as their programs and activities are technically open to everyone.

> [A] program does not violate Title VI

> merely because it focuses its recruitment efforts on students of a particular race or national origin if the program is open to all students without regard to race or ethnicity.

U.S. Dep't of Educ.'s Off. for Civil Rts., *Dear Colleague Letter Re: Race and School Programming* (August 24 DCL) at 11 (Aug. 24, 2023) (citing *Fisher II* for the proposition that schools may target specific racial groups for admission as a "race-neutral" alternative). But if *SFFA* disqualified racial diversity as a compelling interest, the institutions have no business pursuing it.

Put simply, the August 14, 2023 DCL, the August 14, 2023 Q&A, and the August 24, 2023 DCL revive OCR's 2011 theory, which is also echoed in the First Circuit's decision: Schools may consider race in broad terms to gerrymander the racial demographics of their student body. This outdated theory wrongly limits *SFFA* to the issue of direct racial preferences in the admissions process. The Court should take this case to disabuse the federal bureaucracy—and, by extension, the First Circuit—of such a narrow reading.

II. OCR's guidance gets it wrong, in the same way that Boston Public Schools does.

The Court has unmistakably held that actions based on racial classifications are discriminatory, even if intended to correct disparities. *See Ricci* v. *DeStefano*, 557 U.S. 557, 579 (2009) ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. . . . The question

is not whether that conduct was discriminatory but whether the City had a lawful justification for its race based action.").

Nevertheless, since *SFFA*, the Biden Administration has embraced, once again, the idea that schools may use proxy race discrimination without triggering heightened scrutiny.

The First Circuit echoed this viewpoint by upholding a plan that was intentionally chosen—with racial animus—"because of [its] effect on racial demographics." *See* Pet. App. at 11a; *see also id.* at 17a (noting that the "Plan's effects were expected" by the School Committee and "were not the result of mere chance"). Nonetheless, the First Circuit determined that a failure to show a disparate impact—even where intentional discrimination harms a plaintiff—is fatal to an equal protection claim.

Unless the Court grants a writ of certiorari here, it is not just the First Circuit that will live under this erroneous rule—it is the entire country, at least until such time as future OCR officials revisit—and correct—the policy guidance.

Indeed, OCR has already discovered sufficient ambiguity in *SFFA* to describe many instances where the use of race is perfectly permissible. This will eventually result in additional regulatory "whiplash" on this topic when another presidential administration exercises control over Executive Branch agencies.

But the immediate consequences are just as concerning: For the indefinite future, many schools will adopt new race-conscious policies relying on

OCR's publicly-issued guidance. Contra *SFFA*, 600 U.S. at 204 ("[N]o 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.") (internal quotation marks and citations omitted).

OCR announced that it would double down on its prior position—which involved sweeping claims about racial diversity based on ill-defined racial classifications—that schools ought to be racially and ethnically diverse:

> The benefits of diversity in educational institutions extend beyond the classroom as individuals who attend diverse schools are better prepared for our increasingly racially and ethnically diverse society and the global economy.

August 14 DCL at 1. *Contra SFFA*, 600 U.S. at 216 ("It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.").

And despite the Court's clear statements against broad racial stereotypes in *SFFA*, the August 14 DCL expressly instructed schools that they may target diversity efforts at particular racial groups: "[F]ulfilling this commitment will require sustained action to lift the barriers that keep underserved students, including students of color, from equally accessing the benefits of higher education." August 14 DCL at 2; *see id.* at 1–3 (using the phrase "students of

color" four separate times).

Separately, the August 14 Q&A contains a sweeping statement that schools are completely free to pursue efforts to affect the racial demographics of their classes, so long as they do not engage in direct decisions based on an applicant's race:

> In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.

August 14 Q&A at 3.

More broadly, the August 14 Q&A offers detailed examples instructing schools to skirt the bar on direct racial preferences, by instead focusing on proxy discrimination measures that are purportedly "race-neutral":

- "To promote and maintain a diverse student applicant pool, institutions may continue to pursue targeted outreach, recruitment, and pipeline or pathway programs." *Id.* at 3.
- "The Court's decision in SFFA does not require institutions to ignore race when identifying prospective students for outreach and recruitment . . ." *Id.* at 4.
- "For example, in seeking a diverse student applicant pool, institutions may direct outreach

> and recruitment efforts toward schools and school districts that serve predominantly students of color and students of limited financial means." *Id.*

- "An institution may consider race and other demographic factors when conducting outreach and recruitment efforts . . . [and] the institution may give pathway program participants preference in its college admissions process." *Id.*

The August 14 Q&A also suggests that schools might alter their longstanding admissions processes specifically to gerrymander racial demographics:

> Similarly, institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. An institution may choose to study whether application fees, standardized testing requirements, prerequisite courses such as calculus, or early decision timelines advance institutional interests.

Id. at 6.

The August 14 Q&A is meant to give schools cover for considering race in broad terms as a proxy factor. The First Circuit's decision echoes this very principle by upholding a plan admittedly designed to alter the racial makeup of the Exam Schools. *See* Pet. App. at 11a (noting the district court's finding that the plan's criteria "were chosen precisely because of their effect on racial demographics"); *see also Coal. for TJ* v. *Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 893 (4th Cir.

2023) (Rushing, J., dissenting) ("A school board's motivation to racially balance its schools, even using the means of a facially neutral policy, must be tested under exacting judicial scrutiny."), *cert. denied*, 218 L. Ed. 2d 71 (2024).

OCR's subsequent August 24 DCL gives schools the green light to engage in ostensibly "race neutral" measures related to diversity. *See* August 24 DCL at 11 ("[A] program does not violate Title VI merely because it focuses its recruitment efforts on students of a particular race or national origin . . . ."); *id.* at 12 (noting that OCR would likely reject a complaint alleging that a "school district is discriminating on the basis of race by supporting groups and activities that limit their concerns to problems faced more often by people of a certain race, or otherwise focus on people of that race"). Ms. Lhamon further directed schools:

> When I hear a member of Congress, [or] when I hear Attorneys General, [or] when I hear some activist groups, sending letters to schools saying "you should change these practices because the law demands it," I do think it's important to be clear: that *we* issue Dear Colleague Letters. And *we* let people know what the law is.

Center for American Progress, *A Convo With Catherine E. Lhamon, Asst. Sec. for the Office of Civil Rights* (Aug. 29, 2023)[12] (emphasis in the original) (timestamp at 33:03).

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[12] www.youtube.com/watch?v=drdDKG_lrtY&t=1981s.

The documents issued by federal agencies fly directly in the face of the powerful concurrences in *SFFA*. For instance, Justice Thomas's concurrence in *SFFA* explicitly rejects the idea that proxy discrimination is different for constitutional purposes, as opposed to direct discrimination: "These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate." *SFFA*, 600 U.S. at 251 (Thomas, J., concurring).

Justice Gorsuch's concurrence likewise questions the fundamental assumption behind racial classifications: "These classifications rest on incoherent stereotypes," and, "[i]f anything, attempts to divide us all up into a handful of groups have become only more incoherent with time." *Id.* at 291, 293 (Gorsuch, J., concurring). *See also id.* at 276–277 (Thomas, J., concurring) ("[A]ll racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities.").

It is clear that federal agencies are interpreting *SFFA* narrowly to leave open a wide swath of race-conscious decision-making by schools. Without further Court intervention, this is likely to lead to "regulatory whiplash" whenever there is a new occupant in the White House. More immediately, schools are likely to build up significant infrastructure around the agency guidance post-*SFFA*. And as it stands, schools are now caught between following the Court's *SFFA* broad directives and OCR's pre-*SFFA* views of racial diversity directives. OCR will likely win because it controls the purse strings for the schools. This ought

not to be.

The Court should once again address the issue of race-motivated decision-making by schools, to ensure that stakeholders, lower courts, and federal agency officials have the guidance they need to follow the law and the Constitution.

III. The Court should remind lower courts and governmental bodies to respect vertical precedent, especially in the context of the Equal Protection Clause.

Commentators have observed that "[l]ower courts supposedly follow Supreme Court precedent—but they often don't. Instead of adhering to the most persuasive interpretations of the Court's opinions, lower courts often adopt narrower readings." Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016). Professor Re calls this practice "narrowing from below," while Professor Ashutosh Bhagwat refers to it as "underruling." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Fed. Courts, & The Nature of the "Judicial Power"*, 80 B.U.L. Rev. 967, 970 (2000). The dangers of such narrowing or underruling are best expressed by Justice Rehnquist: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis,* 454 U.S. 370, 375 (1982).

Indeed, "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing

precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court." Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 819 (1994). "[B]oth evidence and observation suggest that more subtle, subterranean defiance, [rather than direct noncompliance] through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is far from unusual." Bhagwat, *supra*, at 986. Justice O'Connor also voiced the concern that lower court judges intentionally avoid applying rules that they dislike, noting that some "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp.* v. *All. Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting).

Lamentably, some of our jurisprudential history demonstrates how, without this Court's enforcement of its decisions, lower court judges can frustrate those constitutional rights that are unfashionable. Examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483. Despite the Court's plain holding that "separate but equal" facilities were "inherently unequal," numerous courts clung to *Plessy's* discredited rule, taking great pains to avoid *Brown's* logical conclusion. They just could not accept the concept that all men really are "created equal." The Declaration of Independence ¶ 2 (U.S. 1776). *See, e.g., Flemming* v. *S.C. Elec. & Gas. Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955), *rev'd*, 224 F.2d 752 (4th Cir. 1955)

(reversing a district court holding that *Brown* applied only to "the field of public education," and *Plessy* allowed segregation in public transportation); *Lonesome* v. *Maxwell*, 123 F.Supp. 193, 196–97 (D. Md. 1954) (upholding "segregation of races with respect to recreational facilities . . . ."), *rev'd sub nom*. *Dawson* v. *Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955).

This Court has emphasized the evil of discrimination based on race: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. And, "Eliminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206. Both OCR and the First Circuit are engaging in narrowing or underruling. While they may disagree, they must follow.

IV. The Court should grant certiorari, vacate the First Circuit's decision, and remand.

"Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice." *SFFA*, 600 U.S. at 231.

Yet the Boston School Committee specifically considered race in fashioning its admissions policies. The First Circuit noted that the Committee's working group "completed a so-called 'equity impact statement' that stated the desired outcomes of the revised admissions criteria," which was specifically designed to reweigh the racial makeup of the Exam Schools.

Pet. App. at 6a. "Some School 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 . . . ." *Id.* at 8a.

The Committee's intent to discriminate goes far beyond "remedial affirmative action." Instead, the evidence shows an intent to discriminate because of racial animus. One committee member was caught "making fun of the Chinese names!" *Id.* While two others not only enjoyed the racist comments, see *id.* at 8a–10a, but also made their own racist remarks, *id.* at 10a ("[s]ick of westie whites"). The racially motivated actions taken by the School Committee caused an injury to all white and Asian students who would have otherwise been admitted to the Exam Schools.

The First Circuit's opinion leaves an injury without a remedy, despite this intentional racial discrimination. Petitioners argued below that at least "five children of its members who were denied admission to the Exam Schools in 2021 despite allegedly having higher GPAs than those of some students in other zip codes who were admitted" under the challenged plan. *Id.* at 11a. The evidence presented "leave[s] no material dispute that, at least in part, the purpose of the [committee's] admissions overhaul was to change the racial makeup" of the Exam Schools "to the detriment of Asian-American[]" and white students. *Coal. for TJ* v. *Fairfax Cnty. Sch. Bd.*, 218 L. Ed. 2d 71 (2024) (Alito, J., dissenting from the denial of cert.). Both the trial court and the First Circuit noted the intentional racial discrimination

imbedded in the committee's decision. "[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,'" Pet. App. at 11a, and that the "racist" text messages "showed that '[t]hree of the seven School Committee members harbored some form of racial animus,'" *Id.* at 10a.

Nonetheless, despite finding an injury sufficient for standing, the First Circuit determined that the School Committee's "intent to reduce racial disparities is not by itself enough to sustain the Coalition's claims." Therefore, in the First Circuit, intentional discrimination is not remediable through the courts unless an injured plaintiff can show that a significant—and undefined—number of similarly situated members of their race have also been affected. This could not have been the intent of the ratifiers of the Fourteenth Amendment when they adopted the language that "No State shall . . . deny any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

SFFA correctly held that schools do not have a generalized interest in seeking racial diversity that could meet strict scrutiny under the Equal Protection Clause or Title VI. Instead, students "must be treated based on [their] experiences as an individual—not on the basis of race." *SFFA*, 600 U.S. at 231.

The idea that a school district may adopt specific measures to engage in proxy discrimination in favor of certain racial groups—to the disadvantage of members of other racial groups—was anticipated by the majority in *SFFA*: "[W]hat cannot be done directly

cannot be done indirectly. The Constitution deals with substance, not shadows, and the prohibition against racial discrimination is levelled at the thing, not the name." *Id.* at 230 (internal quotation marks omitted).

Similarly, the assertion that favoring certain racial groups over others is merely a benign effort to seek racial diversity also cannot stand: "While the dissent would certainly not permit university programs that discriminated against black and latino applicants, it is perfectly willing to let the programs here continue." *Id.* at 229.

CONCLUSION

For the reasons stated in this *amicus* brief, the Court should grant the petition for writ of certiorari and reverse the decision of the First Circuit.

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