No. 23-1137

IN THE

Supreme Court of the United States

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Petitioner,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; BRANDON CARDET-HERNANDEZ; STEPHEN ALKINS; CHANTAL LIMA BARBOSA; RAFAELA POLANCO GARCIA; MICHAEL O'NEIL; JERI ROBINSON; QUOC TRAN; MARY SKIPPER,

Respondents,

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Intervenors-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION

Counsel for Intervenors-Respondents

June 20, 2024 * Counsel of Record

[counsel on inside cover]

DOREEN M. RACHAL *
CHRISTIAN R. BABIN
SIDLEY AUSTIN LLP
60 State Street
36th Floor
Boston, MA 02109
617-223-0300
drachal@sidley.com
cbabin@sidley.com

MELANIE BERDECIA
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
212-839-7351
mberdecia@sidley.com

LAKEISHA F. MAYS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
202-736-8000
Lakeisha.mays@sidley.com

JANET H. VO
GREATER BOSTON LEGAL SERVICES
197 Friend Street
Boston, MA 02114
617-371-1234
jvo@gbls.org

* Counsel of Record

SUSAN M. FINEGAN
ANDREW M. NATHANSON
MATHILDA S. MCGEE-TUBB
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
617-542-6000
smfinegan@mintz.com
annathanson@mintz.com
msmcgee-tubb@mintz.com

OREN SELLSTROM
IVAN ESPINOZA-MADRIGAL
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street,
Fifth Floor
Boston, MA 02110
617-988-0609
osellstrom@lawyersforcivilrights.org
iespinoza@lawyersforcivilrights.org

BETHANY Y. LI
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013
212-966-5932
bli@aaldef.org

QUESTION PRESENTED

In response to the COVID-19 pandemic, the Boston School Committee (the "Committee") implemented a race-neutral interim admissions policy (the "Interim Plan") that was carefully designed to address the severe challenges posed by the pandemic. The Interim Plan considered grades and students' zip codes in admissions to Boston's three selective public schools: Boston Latin School, Boston Latin Academy, and John D. O'Bryant School of Mathematics and Science. The Interim Plan did not rely on standardized testing, given the impracticability of administering such tests during the public health emergency. The Interim Plan was expressly limited to admissions for the 2021–2022 school year and is no longer in effect. Admissions for these selective schools are now governed by a new policy that has not been challenged—not in this case and not in any other. Both courts below upheld the constitutionality of the Interim Plan upon an intensive and fact-sensitive review of the record before them.

The question presented is whether the court of appeals correctly held that the Petitioner presented insufficient evidence to support its claim of invidious discrimination against white and Asian American students, when Petitioner adduced no expert testimony as to the alleged disparate impact of the Interim Plan; deliberately forewent discovery and otherwise failed meaningfully to develop the evidentiary record; and advanced legal theories with no grounding in settled precedent.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is the Boston Parent Coalition for Academic Excellence (the "Petitioner").

Respondents are The School Committee of the City of Boston, Brandon Cardet-Hernandez, Stephen Alkins, Chantal Lima Barbosa, Rafaela Polanco Garcia, Michael O'Neil, Jeri Robinson, Quoc Tran, and Mary Skipper. Respondents were defendants below.[1]

Intervenors-Respondents are the Boston Branch of the NAACP, the Greater Boston Latino Network, the Asian Pacific Islander Civic Action Network, the Asian American Resource Workshop, Maireny Pimentel, and H.D.

The Boston Branch of the NAACP is a chapter branch of the National Association for the Advancement of Colored People. No public corporation owns 10% or more of its stock.

Greater Boston Latino Network has no parent company, and no public company owns 10% or more of its stock.

Asian Pacific Islander Civic Action Network has no parent company, and no public company owns 10% or more of its stock.

Asian American Resource Workshop has no parent company, and no public company owns 10% or more of its stock.

---

[1] Certain individual respondents have been substituted pursuant to Supreme Court Rule 35.3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

INTRODUCTION

The petition obscures the critical context in which this case arose: Boston Public Schools ("BPS") adopted a *temporary* admissions policy during the height of the COVID-19 pandemic, when it was impracticable to administer the standardized test that previously had been part of the admissions criteria for the city's selective public schools. The Committee therefore crafted an interim, race-neutral policy that was used once, for one admissions season only. That Interim Plan is now gone; it has been replaced by a new policy that neither Petitioner nor anyone else has challenged.

As for the Interim Plan, the district court and the court of appeals carefully scrutinized the record, applied settled equal protection standards to those facts, and determined on the facts that the Interim Plan did not violate those standards. The district court's ruling and the unanimous First Circuit ruling denying Petitioner relief are unexceptional and fully aligned with decades of clearly established precedent. Even if there were a legal issue worthy of this Court's attention—which there is not—this case presents an exceedingly poor vehicle for review. Petitioner made strategic decisions throughout the litigation—including failing to adduce any expert evidence of disparate impact and failing to request or conduct any discovery—that resulted in a threadbare record. Indeed, the petition presents a litany of fact-bound infirmities.

Simply put, Petitioner failed to carry its burden to prove that the Interim Plan created a cognizable disparate impact. Petitioner's request for further review of that splitless, fact-bound, and eminently correct decision should be denied.

Boston's selective public schools: Boston Latin Academy, Boston Latin School ("BLS"), and the John D. O'Bryant School of Mathematics and Science (collectively, "selective public schools") generally require prospective students to apply for admission. App. 35a–36a. In the years immediately prior to the COVID-19 pandemic, prospective students were evaluated based on a standardized test score and the student's recent grades in English Language Arts and Mathematics.

The admissions criteria for these schools are determined by the Committee. When the COVID-19 pandemic hit, the Committee convened a Working Group to analyze potential changes to the admissions criteria in light of the unprecedented challenges that the pandemic posed—including the inability to safely administer a standardized admissions test. Reliance on grades alone was also considered problematic, given pandemic-necessitated changes to teaching and grading practices during Spring 2020, the lack of a uniform citywide grading system, and the realities of grade inflation at certain schools. The Working Group ultimately recommended, and the Committee adopted, the Interim Plan, an indisputably race-neutral admissions process based on students' grades and zip codes. At no point did the Interim Plan consider the race of any applicant in deciding whether to admit a student to one of the selective public schools, nor did the Interim Plan involve any racial balancing. Under the Interim Plan, white and Asian American students were offered admission to the selective public schools at rates more than double their representation in the citywide school-age population.

Relying on a minimalist record with no discovery and no expert analysis, Petitioner claimed the policy was discriminatory. The district court correctly relied

on the uncontested evidence when it twice considered and rejected the Petitioner's challenge to the Interim Plan. Contrary to Petitioner's argument, the court of appeals created no "new rule," but rather applied settled precedent to the specific facts of this case—including the unique challenges of the pandemic and the strategic choices Petitioner made during litigation.

First, the court of appeals correctly held that the Interim Plan was race-neutral, which Petitioner did not dispute. *See* App. 18a. ("[T]he Plan did not use the race of any individual student to determine his or her admission to [one of the selective public schools]."). The court of appeals also correctly held that Petitioner did not demonstrate that the Committee acted with invidious discriminatory intent. Applying the well-established analytic framework of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the court of appeals found that Petitioner had failed at the outset to demonstrate disparate impact. App. 26a. In fact, Petitioner adduced no expert statistical analysis at all. As to the lawyer-generated statistics that Petitioner presented (used again in its petition to this Court), the court of appeals correctly held that this "backfilled analysis—crafted by counsel in an appellate brief—[fell] woefully short." App. 20a. Among other reasons, that analysis failed to consider the Interim Plan as a whole—it considered certain zip codes and neglected others—and relied on a series of entirely speculative assumptions.

Further, the court of appeals correctly applied settled law in rejecting Petitioner's assertion that a challenger need not prove disparate impact where the defendant considers the impact on racial diversity as one of many factors in enacting a facially neutral

plan. The case law is instead one-sided in rejecting Petitioner's theory that facially neutral selection policies that rely on reasonable criteria, such as geography, family income, and GPA, violate the Equal Protection Clause simply because the policymakers consider the impact of those criteria on racial diversity, particularly where no disparate racial impact is proved.

The petition does not meaningfully address the evidentiary failings that doomed the Petitioner's case below. Instead, the petition largely attempts to offer this case as a substitute vehicle for the theories that were unsuccessfully advanced in *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 2024 WL 674659 (U.S. Feb. 20, 2024). This case, however, is a far worse vehicle than *TJ* for consideration of those questions, as to which there is no division in the courts below. Certainly, there is no reason for this Court to take up those questions in this case, when both the Interim Plan challenged below and the emergency that prompted its adoption are gone. Thus, the petition for certiorari should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case concerns Boston's selective public schools. Prior to the onset of the COVID-19 pandemic, admission to the selective public schools was based in part on a standardized test. App. 20a. Admission also relied on an applicant's grades in English Language Arts and Mathematics, despite significant community concerns about whether grades accurately reflected applicants' relative merit. *See, e.g.*, App. 37a; 1st Cir. App. 175 ¶ 42, 1st Cir. App. 1797–1846 (noting variability of grades across schools); 1st Cir. App. 175 ¶ 43

(69% of the applicants to BLS from one school had an A+ average, and 10% of the students ultimately admitted to BLS came from that school). Successful applicants received invitations to schools according to their ranked preferences until all seats were filled. App. 5a.

In March 2020, Massachusetts declared a state of emergency due to the COVID-19 pandemic and suspended in-person instruction in K–12 public schools through the end of the school year. App. 6a. In response, the Massachusetts Department of Elementary and Secondary Education ("DESE") cancelled administration of the Spring 2020 Massachusetts Comprehensive Assessment System test, the statewide standards-based assessment administered to public school students. 1st Cir. App. 171 ¶ 26.

The Committee convened a Working Group to recommend changes to the selective public schools' admissions process in light of the pandemic and suspension of standardized testing. App. 6a. The Working Group was asked to "[d]evelop and submit a recommendation to the Superintendent on revised [selective public] school admissions criteria for [2021–2022 school year] entrance in light of the potential impact of the COVID-19 pandemic on the prospective applicants." 1st Cir. App. 172 ¶ 31. The Working Group had nine members, none of whom were members of the Committee. 1st Cir. App. 1471.

From August through October 2020, the Working Group met and reviewed data on admissions methods used by other school systems and the impact of different admissions criteria on students. App. 39a–40a. It examined various race-neutral admissions criteria, such as pre-pandemic grades, pre-pandemic assessments, and qualitative assessments, such as interviews, essays, and recommendations. App. 40a; 1st

Cir. App. 1915. It considered a wide variety of race-neutral admissions options, including inviting students based on grades; allocating a percentage of seats to each sending school or each zip code; allocating seats based on socioeconomic status; and a lottery system. 1st Cir. App. 1916.

The Working Group considered the challenges of test administration at the height of the pandemic and determined that an exam could not serve as a basis for admissions decisions. An in-person test could not be safely administered. Nor did the new vendor retained for test administration support remote test-taking. 1st Cir. App. 1134. Additionally, the Working Group had concerns regarding any exam's ability to assess students' preparedness given the pandemic's overall disruption to education. *Id.*

The Working Group also rejected an admissions methodology relying solely on grades. It was concerned that grades from Spring 2020 were impacted by special grading implemented during the pandemic and that Fall 2020 grades were poor predictors of success for students "hardest hit by the pandemic," including students from low-income communities. 1st Cir. App. 175 ¶ 42, 1135, 1797–1846. It also found that "[p]lacing too great a reliance on grades [was] problematic given the lack of uniformity between the grading systems used by BPS, charter schools, parochial schools, private schools, and other public schools serving Boston students." 1st Cir. App. 1135.

As it considered various alternatives, the Working Group was aware that, as the district court noted, "[h]istorically, the student body of the [selective public] [s]chools has not reflected the same level of diversity" as Boston's school-age population. App. 47a. For example, in March 2020, DESE reported that "significant racial and economic disparities" persist in BPS.

1st Cir. App. 1175. Specifically, "[w]hile 58.3 percent of students meet the state's measure of economic disadvantage, only 29.3 percent of students meeting this criterion are enrolled in [the selective public] schools" and "while 87.5 percent of district students are children of color, only 68.8 percent of students attending [the selective public] schools are students of color," *Id.* As it analyzed various admissions options, the Working Group considered the potential impact any alternative might have on geographic, socioeconomic, and racial diversity.

On October 5, 2020, the Working Group presented an initial recommendation to the Committee. 1st Cir. App. 1130. During that meeting, some members of the Committee and Working Group expressed disappointment about performance and admissions disparities among different demographics and a desire for the selective public schools to better reflect all students and communities in Boston. 1st Cir. App. 414–15, 462. The Working Group also completed an Equity Impact Statement. App. 40a–41a. The Equity Impact Statement included the goals of "[e]nsur[ing] that students will be enrolled [in the selective public schools] through a clear and fair process for admission in the [2021–2022] school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston." App. 6a–7a. A separate goal was to "[w]ork towards an admissions process that will support enrollment at each of the [selective public] schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K–12) in the city of Boston." App. 7a.

The Working Group then proposed the Interim Plan, which the Committee adopted on October 21, 2020. App. 8a. The Interim Plan based admissions on

grades and zip codes. It ranked zip codes by median income of families with school-aged children (rather than median household income) to better reflect the socioeconomic conditions of student applicants. It also created a special zip code for applicants who were homeless or in the custody of the Department of Children and Families. App. 44a. The Interim Plan ranked applicants by their grades in English Language Arts and Mathematics for the 2019–2020 school year. *Id.* Admissions then proceeded in two phases. In phase one, invitations for the first 20% of seats were issued to the students with the highest grades on a citywide basis. App. 8a. In phase two, students within each zip code were ranked by GPA. Then, starting with the zip code with the lowest median family income, invitations were issued to the highest grade-ranked students within that zip code until 10% of that zip code's allocated seats were filled. App. 8a–9a. Next, the process moved to the zip code with the next-lowest median income. *Id.* After all zip codes had filled the first 10% of their allocated seats, the process started over for a second round. *Id.* Seats were filled after a total of 10 rounds. App. 9a. No student's race was ever known or considered in the process.

During the October 21, 2020 meeting, the Committee and Working Group discussed the impact that the Interim Plan might have on geographic, socioeconomic, and racial diversity. Some members acknowledged the Interim Plan's potential to advance racial equality, 1st Cir. App. 940–41 (Tr. 365:18–366:2); expressed their desire for BPS to better reflect the student population as a whole, 1st Cir. App. 972–74 (Tr. 397:19–398:2, 399:5–8); and discussed the Interim Plan's limitations for achieving a student body that more close-

ly reflects the demographics of Boston's school-age children, 1st Cir. App. 943 (Tr. 368:5–14).

At that same meeting, the Committee Chair "made statements that were perceived as mocking the names of Asian members of the community." App. 43a. The Committee Vice-Chair and a Committee voting member later exchanged text messages expressing sympathy about the backlash from the Chair's comments that followed. All subsequently resigned. App. 8a; 1st Cir. App. 2327 ¶ 21.

Admissions under the Interim Plan opened on November 23, 2020 and closed on January 15, 2021. App. 43a–44a. Under the Interim Plan, 18 percent of admitted students were Asian American, 23 percent were Black, 23 percent were Latinx, 6 percent were multi-racial, 31 percent were White, and 43 percent were economically disadvantaged. 1st Cir. App. 2902.

The school year for which the Interim Plan governed admissions began on September 9, 2021, and ended on June 27, 2022. 1st Cir. App. 2812. The Interim Plan has come and gone. It expired by its own terms and is no longer in effect. It was replaced with a plan that reinstated a standardized test and that also considers applicants' GPA and the census tract where they live. App. 11a. The Petitioner does not challenge the current admissions plan. *Id.*

II. PROCEDURAL BACKGROUND

The Petitioner filed its lawsuit against the Committee, its members, and the BPS Superintendent four months after the adoption of the Interim Plan, seeking to enjoin the Interim Plan. App. 9a. The Petitioner, a non-profit organization, is the only plaintiff; its Complaint asserted no individual claims and sought no individualized relief. *Id.*

The district court granted permissive intervention to the undersigned: two non-profit membership organizations representing Boston's Black and Latinx communities, a statewide Asian American civic engagement network, an Asian American membership-led organization based in Boston, and two families with Latinx and Asian American students. App. 49a–50a.

The Petitioner conceded, as it does here, Pet. 14, that the Interim Plan was facially race-neutral. But, it nonetheless alleged that the Committee acted with the intent to discriminate against white and Asian American students. Petitioner declined to conduct discovery, put forth no expert statistical analysis, and agreed to proceed to a bench trial based on stipulated facts. *See* App. 9a. Although Petitioner now bemoans that when the Committee adopted the Interim Plan, "the venerable standardized test was no more," Pet. 9, Petitioner took no issue at trial with the Committee's decision to forego the test in the midst of a global pandemic.[2]

Following a bench trial, the district court found that the Interim Plan was race-neutral and, therefore, applied rational basis review. App. 34a. The Petitioner denied that it needed to show racial animus and failed to offer *any* expert or statistical analysis of the Interim Plan's alleged disparate impact, as is required to prove disparate impact under governing legal precedent. App. 72a–75a. Accordingly, the court entered judgment in favor of the Committee. App.

---

[2] And, the Committee re-introduced a standardized test component into the admissions process when it was safe to do so. App. 11a (noting Interim Plan "was replaced with a plan based on GPA, a new standardized examination, and census tracts. The Coalition does not challenge the current admissions plan in this appeal.").

34a. The Petitioner appealed and asked the court of appeals to reverse the district court's judgment and order interim injunctive relief, which was denied. App. 9a. Petitioner did not ask this Court to review the denial of injunctive relief.

Following the *Boston Globe's* publication of text messages from the October 21, 2020 meeting, the Petitioner filed a Rule 60(b) motion, arguing that the text messages reflected discriminatory intent. App. 10a. The district court withdrew its initial opinion, held additional oral argument, and issued an indicative ruling explaining that if it had jurisdiction (which it did not because the case had been transferred to the court of appeals), it would deny the motion. *Id.* Following the indicative ruling, the court of appeals remanded the case to the district court. *Id.* In support of its indicative ruling, the district court noted that the Petitioner chose to forgo discovery and could have discovered the new evidence with due diligence, and that it was because of Petitioner's "deliberate litigation strategy—namely, its theory that it need not show animus to prove intentional discrimination—that no such evidence was discovered." App. 74a n. 20. Moreover, the district court found that the new evidence would not impact the result even if a new trial were granted. Finding that the new evidence did not cure the Petitioner's failure to show disparate impact on white or Asian American students under the Interim Plan, the district court entered a final order denying the Rule 60(b) motion. App. 10a–11a. The Petitioner appealed.

The court of appeals unanimously affirmed the district court's final order. App. 16a. The court of appeals noted that Petitioner failed to adduce any expert analysis, and "offer[ed] no evidence that geography, family income, and GPA were in any way unrea-

sonable or invalid as selection criteria for public-school admissions programs." App. 18a. Moreover, Petitioner's statistical analysis presented only on appeal was "woefully" inadequate, because it used GPA data from only ten of the twenty zip codes the Petitioner characterized as "predominantly" white and Asian American and neglected zip codes where there was neither a predominantly White/Asian or Black/Latinx population under its definition. App. 19a–20a. The court of appeals reasoned that "as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more." App. 18a–19a.

The court of appeals also rejected Petitioner's argument that it need not prove disparate impact because one of the factors the Committee considered was how the Interim Plan might affect geographic, socioeconomic, and racial diversity. The court of appeals reasoned that, along with Petitioner's failure to cite any supporting precedent, this theory ran counter to views expressed by members of the Court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), where separate opinions of the justices stressed there is nothing constitutionally problematic about employing race-neutral measures that may promote increased racial diversity. App. 22a–23a.

Moreover, dismissing Petitioner's claim that strict scrutiny applies, the court of appeals found that rational basis review applied to the facially neutral Interim Plan and also concluded that Petitioner waived any claim that the plan fails under rational basis review. App. 27a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DISPARATE IMPACT RULING IS CORRECT AND CREATES NO CIRCUIT SPLIT.

A party challenging a facially neutral policy under the Equal Protection Clause must show that the defendant acted with invidious discriminatory intent, *see Arlington Heights*, 429 U.S. at 265, that is, that the policy was enacted "because of" and not merely "in spite of" any alleged adverse impact. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). This inquiry begins with analyzing whether the policy "exacts a disproportionate impact on a certain racial group." *Coal. for TJ*, 68 F.4th at 879; *accord Arlington Heights*, 429 U.S. at 265. Here, Petitioner's argument is predicated on the view that the court of appeals' disparate impact ruling—a holding supported by this Court's and other circuits' precedent—was wrong. This argument is no reason to grant the petition. The court of appeals' opinion faithfully applied well-settled equal protection principles in rejecting Petitioner's argument.

A. Petitioner failed to prove disparate impact with sufficient evidence.

Petitioner's flawed disparate impact argument is premised on the decreased percentage of white and Asian American students admitted to the selective public schools under the Interim Plan compared to the percentage admitted the prior year under the previous plan. Pet. 9–10. Petitioner's argument fails for the simple reason that it did not prove the Interim Plan caused the decrease it challenges. Indeed, Petitioner failed to offer any expert statistical analysis that showed the Interim Plan actually caused the decrease in admissions invitations to white and Asian

American students. App. 16a. Even if such a decrease had been shown, "those changes simply show that as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more." App. 18a–19a.

The court of appeals also correctly found that Petitioner's lawyer-generated statistical analysis attempting to show disparate impact "when measured against a process of random selection" fares even worse. App. 19a. As the court of appeals correctly held, "this backfilled analysis—crafted by counsel in an appellate brief—falls woefully short of the mark." App. 20a.

Such statistical evidence is fundamental to disparate impact claims, especially where, as here, outcomes are independent year to year. *Cf. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 542 (2015) ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."). Such a finding on a fatally flawed argument, unmoored from facts and devoid of record evidence, does not warrant this Court's review.

B. This case does not involve any racial balancing or quotas, but instead concerns race-neutral alternatives, which this Court has endorsed.

Ignoring its evidentiary failures, Petitioner contends that the court of appeals' ruling permits racial balancing by proxy and precludes equal-protection claims so long as overrepresented groups remain overrepresented. Pet. 13–17. It does no such thing. The court of appeals made a specific determination,

on a stipulated factual record, that no evidence suggested that the Interim Plan's selection criteria—GPA, family income, and zip codes—were "unreasonable or invalid" and "that as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that" decreased racial disparities. App. 18a–19a. Nothing in the court of appeals' opinion prevents equal-protection claims from being brought solely because overrepresented groups remain overrepresented. *See* App. 19a–22a; *see also* App. 75a ("[T]his Court does not suggest that remaining overrepresented alone precludes a disparate impact."). Nor does the court of appeals' opinion permit the use of race-neutral criteria to pursue racial balancing—a term that denotes fixed, mechanical quotas, and reliance on race and nothing else to achieve a pre-ordained racial result. *Gratz v. Bollinger*, 539 U.S. 244, 276, 280 (2003) (O'Connor, J., concurring). This case undisputedly involved no such balancing or quotas; indeed, under the Interim Plan, an individual student's race was never even known, much less considered. Thus, Petitioner's reliance on this Court's precedents involving such mechanisms is misplaced, Pet. 16–17, and its slippery-slope argument that depends on this misreading of the court of appeals' opinion is pure speculation.

The Committee here did exactly what this Court has advocated in numerous different contexts and on many different occasions: it employed race-neutral alternatives. In the housing context, for example, this Court has held that "local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset." *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 545. Similarly, in

striking down race-conscious policies, this Court has explicitly required public entities to consider race-neutral alternatives instead and has pointed to such alternatives approvingly. *See Students for Fair Admissions*, 600 U.S. at 284 (Thomas, J., concurring) ("Race-neutral policies may achieve the same benefits of racial harmony and equality [as race-conscious policies]."); *id.* at 317 (Kavanaugh, J., concurring) (endorsing use of race-neutral alternatives); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (striking down affirmative action admission plan for university's failure to consider race-neutral alternatives); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) ("The districts have also failed to show that they considered methods other than explicit racial classification to achieve their stated [diversity] goals."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (striking down race-conscious contracting program for government's failure to consider race-neutral alternatives). In implementing the Interim Plan, the Committee employed race-neutral alternatives to address racial disparities, which fully comports with these precedents. In this context, the underlying facts are entirely uneventful and unremarkable, particularly because the challenged policy is no longer in effect.

C. The circuits are not split on what constitutes a disparate impact.

Finally, Petitioner's flawed attempt to contrive a split among the courts of appeal on this issue is wishful thinking. No such split exists. Petitioner's counsel made this same argument—unsuccessfully—in *Coalition for TJ v. Fairfax County School Board,* No 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (*cert. denied*). Petitioner incorrectly states that the court of appeals' approach to measuring disparate impact is

different than how other circuit courts assess disparate impact.

As Petitioner concedes, circuit court decisions in the analogous education context are all aligned. Accordingly, Petitioner reaches to a voting case, *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016), and an employment case, *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002), in an attempt to manufacture a circuit split. But even there, Petitioner's reliance on *McCrory* and *Pryor* in this regard is misguided.

Petitioner's contention that *McCrory* "endorsed a before-and-after comparison approach" is wrong. Pet. 19. In *McCrory*, Black voter turnout *increased* 1.8% compared to the previous midterm elections after the North Carolina legislature implemented voting restrictions targeting Black voters. 831 F.3d at 232. The Fourth Circuit rejected a disparate impact analysis that merely compared voter turnout to the previous midterm election. *See id*. Instead, the Fourth Circuit recognized that election turnout was "highly sensitive to factors likely to vary from election to election." *Id*. (quoting *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927, 927 (2014) (Ginsburg, J., dissenting)). Despite Petitioner's arguments to the contrary, the *McCrory* court's approach to disparate impact does not conflict with the court of appeals' approach. It supports it. *See Coal. for TJ*, 68 F.4th at 880 (holding that *McCrory* rejects, rather than mandates, a before-and-after comparison in analyzing disparate impact).

Petitioner's reliance on *Pryor* is similarly ineffective. The Third Circuit's decision in *Pryor* simply held that plaintiffs pleaded a viable Title VII claim when they alleged that the NCAA implemented a new athletic scholarship eligibility rule knowing it would ex-

clude more Black students from eligibility. *Pryor*, 288 F.3d at 552. Nothing in the *Pryor* court's opinion suggests that a single-year decrease in the admission percentage of certain groups is sufficient *as a matter of law* to constitute a disparate impact. Rather, *Pryor* as well as *McCrory* make clear that analyzing whether a disparate impact exists requires a "sensitive [factual] inquiry." *Arlington Heights*, 429 U.S. at 266. This is just the kind of fact-bound conclusion that the Supreme Court declines to review.

Ultimately, there is no divergence of legal standard. The law is clear that proving disparate impact as part of an intentional discrimination claim is a context-specific inquiry that must be supported by robust statistical analysis. And in this case, the court of appeals held that Petitioner's disparate impact argument failed on the facts. Again, Petitioner failed to demonstrate that the use of geography, family income, and GPA as admissions criteria was "unreasonable or invalid." App. 18a. The Interim Plan did not set racial quotas, *see Wessmann v. Gittens*, 160 F.3d 790, 794 (1st Cir. 1998), utilize "racial tiebreaker[s]," *see Parents Involved*, 551 U.S. at 719, nor did it consider an applicant's race at all in the admissions process. Petitioner's lawyer-crafted statistical analyses were insufficient to prove a disparate impact due to the numerous flaws in the analysis. That fact alone makes this case unworthy of the Court's review.

II. FAR FROM PRESENTING "A CLEAN VEHICLE TO ADDRESS A LIVE QUESTION OF NATIONAL IMPORTANCE," THIS IS A FACT-BOUND CASE ABOUT A DEFUNCT POLICY, BROUGHT BY AN ORGANIZATION THAT HAS NO STANDING TO PURSUE THE RELIEF IT ORIGINALLY SOUGHT.

Petitioner claims that this case "provides an exceptionally clean vehicle" for review—then devotes just one sentence to trying to evade the many reasons why this is emphatically not true. App. 27. In fact, this is a uniquely fact-bound case about an expired policy and hobbled further by an utterly undeveloped record due to Petitioner's strategic litigation choices.

Petitioner originally sued to enjoin the Interim Plan, which has long since expired on its own terms. As part of its Rule 60(b) motion, Petitioner for the first time began asserting that individual students could still secure relief—though there are no individual plaintiffs and next to nothing in the record about any alleged members of Petitioner's organization. Though the court of appeals found the matter to be justiciable, the standing and mootness issues would present themselves anew were the petition to be granted. *See* App. 12a–14a.

Moreover, the record contains no expert statistical evidence (because Petitioner failed to adduce it) and no deposition testimony or other discovery (because Petitioner failed to request or conduct it).

And try as it might, Petitioner cannot transform this into an unsettled issue of national importance. Petitioner misrepresents the facially neutral Interim Plan as "racial balancing" as a ploy to attract the Court's attention to what is otherwise a fact-intensive

ruling by the lower courts. It is undisputed that the Interim Plan used facially neutral criteria: geography, family income, and GPA. It did not involve any use of racial quotas or racial balancing. Rather, it is settled that the use of facially neutral criteria may violate Equal Protection when it is proved that the use of such criteria was motivated by invidious intent. *Arlington Heights*, 429 U.S. at 265. As the courts below cogently explained, Petitioner simply failed to carry its evidentiary burden on that question. The use of facially neutral criteria is not an unsettled question of national importance.

Petitioner's attempt to manufacture national importance requiring this Court's intervention fails. Petitioner relies heavily on irrelevant admissions policies from other jurisdictions to justify its theory that there is a national admissions crisis in K–12 schools "in pursuit of racial balance" and that this crisis is not going away. Pet. 23–26. Whatever the merits of that argument as it might apply in other jurisdictions, it is utterly irrelevant to Boston. This case is only about a single-year, pandemic-era plan, the use of which did not create a disparate impact.

***

The law is clear. Because the Interim Plan is race-neutral, the plan is subject to rational basis review and must be rationally related to a legitimate governmental interest. Petitioner below did not challenge the Interim Plan on rational basis and thus that is not an issue before the Court.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

DOREEN M. RACHAL *
CHRISTIAN R. BABIN
SIDLEY AUSTIN LLP
60 State Street
36th Floor
Boston, MA 02109
617-223-0300
drachal@sidley.com
cbabin@sidley.com

MELANIE BERDECIA
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
212-839-7351
mberdecia@sidley.com

LAKEISHA F. MAYS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
Lakeisha.mays@sidley.com

JANET H. VO
GREATER BOSTON LEGAL SERVICES
197 Friend Street
Boston, MA 02114
617-371-1234
jvo@gbls.org

SUSAN M. FINEGAN
ANDREW M. NATHANSON
MATHILDA S. MCGEE-TUBB
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
617-542-6000
smfinegan@mintz.com
annathanson@mintz.com
msmcgee-tubb@mintz.com

OREN SELLSTROM
IVAN ESPINOZA-MADRIGAL
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street, Fifth Floor
Boston, MA 02110
617-988-0609
osellstrom@lawyersforcivilrights.org
iespinoza@lawyersforcivilrights.org

BETHANY Y. LI
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013
212-966-5932
bli@aaldef.org

Counsel for Intervenors-Respondents

June 20, 2024 * Counsel of Record