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.

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

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

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4776
Douglas.Hallward-Driemeier@ropesgray.com

DEANNA BARKETT FITZGERALD
ROPES & GRAY LLP
800 Boylston St.
Boston, MA 02199

KAY H. HODGE
JOHN M. SIMON
STONEMAN, CHANDLER & MILLER LLP
99 High Street
Boston, MA 02110

TRISTAN M. LIM
ROPES & GRAY LLP
Three Embarcadero Center
San Francisco, CA 94111

QUESTIONS PRESENTED

When the COVID pandemic made the prior admissions process for Boston's selective Exam Schools unavailable, the Boston School Committee unanimously adopted a new process solely for the 2020 admissions cycle. That process allocated placements based on race-neutral criteria that used grades and geographic distribution, and yielded a more diverse student body than in prior years. The percentages of incoming students of White or Asian ethnicity continued to exceed their respective representation in the school-age population, but by less than under the exam-based system that the pandemic had foreclosed or under a GPA-only policy. Petitioner represents five White or Asian students who claim they would have been admitted under a speculative GPA-only policy, which had not been used for decades, and where the School Committee had concerns about inconsistent grading approaches—especially during the pandemic. The same students were eligible to apply again in 2022 under a new process that they do not challenge, and (if they applied) were either unsuccessful or already admitted. The questions presented are:

Whether petitioner presents a justiciable controversy when the students it represents claim injury compared to a speculative process that would not have been adopted and have already had a chance to compete for admission under a process petitioner does not challenge.

Whether students from over-represented ethnic groups prove a disparate-impact challenge to a facially race-neutral admissions process by comparison without evidentiary support to a speculative process that allegedly would have over-represented those ethnicities by even greater margins.

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INTRODUCTION

Petitioner asks the Court to opine on an abstract legal question, not an actual case or controversy. That is most evident from the fact that petitioner fails to mention, even once, *the most critical fact of this case*—that the policy change petitioner challenges was adopted for a single year, in response to the COVID pandemic, which made the existing exam-based school assignment process impossible to administer. Petitioner likewise fails to mention that this emergency stop-gap selection

process was used for one year only and replaced by a policy that petitioner has not challenged. Petitioner's students already had a chance to apply again under that unchallenged policy, but (if they applied) either were unsuccessful or already admitted. Those facts, which petitioner entirely ignores, are crucial to understanding this case, including appreciating why petitioner does not present a justiciable controversy and why this is not an appropriate vehicle for the Court to consider any issue that petitioner might want the Court to take up.

Even apart from petitioner's failure to grapple with the facts of the *actual* case, there are innumerable reasons why the Court should not grant review here. Petitioner rushes to ask the Court to issue sweeping statements about the scope of its opinion in *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*), before the ink is even dry on that decision. There is no circuit conflict regarding *SFFA*'s application to the entirely different context of race-neutral policies for assigning students to selective local public schools; the decision here was the very first to do so. And the Court can glean even less from this case about local schools' attempts to wrestle with *SFFA*'s holding in that context—indeed, the policy here was adopted years before the *SFFA* decision issued and so cannot shed any light on how public school districts are attempting to apply the principles of that opinion to critically important issues in public K-12 schools.

Finally, the procedural history of this case is extraordinarily complicated, which would confound any attempt by the Court to issue clear guidance on the issue petitioner seeks to present. Tellingly, petitioner does not even include in the petition appendix the substantive

decision of the district court regarding petitioner's disparate impact claim. That is because *after* petitioner appealed that decision and jurisdiction was with the court of appeals, the district court withdrew its decision, leaving only the judgment in place. The district court later asked for (and the court of appeals granted) limited jurisdictional permission to the district court to issue an indicative ruling on petitioner's Rule 60(b) motion for relief from that judgment. Yet both the district court and court of appeals seemed to treat the district court's original withdrawn decision as providing critical factual findings regarding the merits of petitioner's disparate impact claim.

To the extent petitioner tries to inject suggestions of a disparate treatment claim based on text messages by two (former) School Committee members, the district court's Rule 60(b) order rejected consideration of that evidence on the ground that the evidence was available to petitioner before the merits trial, but had not been pursued because of petitioner's own chosen litigation strategy. That ruling was affirmed by the court of appeals as a proper exercise of the district court's discretion. And, while petitioner and its amici freely reference those texts, at no point does petitioner ask this Court to review the court of appeals' affirmance of the district court's discretionary ruling not to permit petitioner to belatedly insert into the litigation new evidence that petitioner had chosen not to pursue in a timely fashion.

At base, this is an entirely *sui generis* case involving a public school board that confronted an unprecedented situation and adopted a stop-gap policy to fairly allocate positions at the district's selective schools during a time of emergency, when the traditional tools for evaluating

candidates were unavailable or unreliable. In that extraordinary context, the School Committee's decision to adopt a policy that more equitably allocated placement opportunities across the community was entirely consistent with this Court's precedent. Contrary to petitioner's contentions, nothing in this Court's precedent at the time (or now) provides that public bodies must structure policy changes so as to maintain the historic advantages of certain racial or ethnic groups that may have benefitted disproportionately from earlier policies. No such rule could ever be squared with the constitutional mandate of equal protection. But, even if the Court were interested in considering that question, the numerous procedural and substantive obstacles posed by the facts and history of this case make it a wholly inappropriate vehicle through which to do so.

STATEMENT

I. FACTUAL BACKGROUND

A. BPS and the Exam Schools

Seventy percent of the approximately 80,000 school-aged children in Boston attend Boston Public Schools (BPS). Pet. App. 35a. BPS is governed by the Boston School Committee (Committee), comprised of seven members appointed by the Mayor of Boston. *Id.* at 32a. Three BPS schools serving grades 7 through 12 are referred to as "Exam Schools"—Boston Latin School (BLS), Boston Latin Academy (BLA), and the John D. O'Bryant School of Mathematics and Science (O'Bryant). *Ibid.* As relevant here, 6th grade students apply for admission into the 7th grade, and 8th grade students apply for admission in the 9th grade. *Id.* at 36a.

For at least 20 years before the COVID-19 pandemic, admission to the Exam Schools had been based on a combination of the applicant's score on a standardized test, grade point average, and student preference. Pet. App. 37a; C.A. App. 168 (¶15). Specifically, BPS averaged the student's grades in English Language Arts (ELA) and Math using their grades from the spring of the prior school year and the fall/winter grading period of their current school year and assigned a point value to that average. C.A. App. 168 (¶15), 1130-1137. Each student received a composite score based on a combination of the student's GPA and performance on the standardized test. Pet. App. 37a. Available seats were filled based on the students' ranked choices among the three Exam Schools, starting with the student with the highest composite score. *Ibid.* If a student's first choice school was full, they would be placed at their next choice until all seats were filled. *Ibid.* In school year (SY) 2020-2021, approximately thirty-five percent of the almost 4,000 students who applied to the Exam Schools were admitted. *Id.* at 36a.

The student body of the Exam Schools has not historically reflected the diversity of Boston's school-age population. Pet. App. 47a. In March 2020, the Massachusetts Department of Elementary and Secondary Education (DESE), which had conducted a review of BPS in the fall of 2019, reported, among other things, that "significant racial and economic disparities persist" among students represented at the Exam Schools, particularly BLS. C.A. App. 1175.

In 2019, the Committee was considering potential changes to Exam School admission criteria as its contract with the test vendor for the administration of the

admissions test was set to expire in June 2020. Pet. App. 37a-38a; C.A. App. 171-172 (¶27). BPS issued a Request for Proposal for a new test vendor with the goal of finding a test that was aligned with Massachusetts curriculum standards, was validated for use with students of all racial identities as not yielding biased results, and provided accommodation for English learners and students with disabilities. C.A. App. 172 (¶28), 198-199. BPS selected a new entrance exam, and in July 2020 announced its intention to administer the new exam to applicants seeking admission to the Exam Schools for SY 2021-2022. Pet. App. 38a. The ongoing COVID pandemic forced BPS to change course, however.

B. COVID-19 and the Exam School Admissions Criteria Working Group

COVID-19 struck in the spring of 2020. On March 10, 2020, then Massachusetts Governor Charlie Baker declared a State of Emergency in the Commonwealth; five days later, the Governor suspended all normal, in-person instruction and other educational operations of K-12 public schools through the end of the 2019-2020 school year. Pet. App. 38a. The Governor's March 15, 2020 Order directed all public school superintendents to "consult with their school boards, teaching staff, and other stakeholders how best to provide students access to alternative learning opportunities * * * based on considerations of equity and the availability of resources to support such efforts." C.A. App. 1598.

COVID's Impact on BPS

COVID had a significant impact on BPS students and was regularly discussed at Committee meetings. Pet. App. 38a. Within days of the Governor's March 15,

2020 Order, BPS transitioned to fully remote learning. *Ibid.* Among other things, DESE issued remote-learning guidance to Massachusetts school districts on how best to support "special populations, including students with disabilities and English learners" and recommended a change to grading standards, noting that "academic content" should be "graded as 'credit/no credit' so as to incentivize continuous learning while acknowledging the challenging situation we face." C.A. App. 1660-1661. In guidance to BPS schools, BPS Superintendent, Dr. Brenda Cassellius, explained that BPS's "core value of equity is front and center in this emergent crisis" noting that the pandemic cast "more starkly than ever the underlying systemic inequities and barriers facing too many of our students, especially those who are experiencing poverty, have a lack of access and opportunity" with "[a]ccess to devices and broadband internet" being "the clearest example." C.A. App. 1637. To that end, BPS provided students who lacked resources with Chromebook laptops and internet "hot spots" to assist students in accessing remote education. C.A. App. 171 (¶25).

The day-to-day administration of schools was only one of many COVID-related issues confronting BPS. The pandemic also impacted the administration of standardized exams and student assessments. In April 2020, "in light of the on-going health crisis," DESE cancelled the administration of the Massachusetts Comprehensive Assessment System (MCAS) test, the annual statewide assessment for students in grades 3 through 10. C.A. App. 171 (¶26), 1705.

Exam School Admissions Criteria Working Group

All these issues forced BPS to reconsider how to handle selection of students for the Exam Schools during the pandemic. In July 2020, the Committee established an advisory Exam School Admissions Criteria Working Group (Working Group) to evaluate and recommend revised admissions procedures.[1] Pet. App. 39a. As stated in its charter, the Working Group's purpose was to "develop and submit a recommendation to the Superintendent on revised exam school admissions criteria for SY 21-22 entrance in light of the potential impact of the COVID-19 pandemic on prospective applicants during the latter half of SY 2019-2020 and potential impact on SY 20-21." *Ibid.*; C.A. App. 1712-1714.

The Working Group met frequently from August to October 2020. Pet. App. 39a. It considered a wide variety of admissions criteria and analyzed how implementing new criteria would impact socioeconomic, geographic, and racial diversity in the Exam Schools. See generally *id.* at 39a-40a. BPS provided the Working Group with data regarding admissions criteria used by other cities, results of existing admissions criteria, use of standardized test scores, variability of grades within and outside BPS, and median family income by zip code.

[1] The Working Group was composed of the following members: Samuel Acevedo, BPS Opportunity and Achievement Gap Task Force Co-Chair; Acacia Aguirre, O'Bryant Parent; Michael Contompasis, Former BLS Headmaster and BPS Superintendent; Matt Cregor, Staff Attorney, Mental Health Legal Advisors Committee; Tanya Freeman-Wisdom, O'Bryant Head of School; Katherine Grassa, Curley K-8 School, Principal; Zena Lum, BLA Parent; Rachel Skerritt, BLS Head of School; and, Tanisha Sullivan, President of the NAACP – Boston Branch. Pet. App. 39 n. 7.

Ibid. The Working Group considered simulations to better understand the potentially disparate impact of various admission criteria across a range of demographic categories such as socioeconomic status, gender, race, English language learners, and disability status. C.A. App. 1758-1772. The simulations also examined the impact of various admissions criteria on the percentage of selected students coming from BPS and non-BPS schools. C.A. App. 1772-1774. In addition, the Working Group considered the effects of admission criteria on the percentage breakdown of invitees by neighborhood. C.A. App. 1773-1780. One simulation mirrored the City of Chicago's methodology of creating tiers with census tract data. C.A. App. 1713-1743. The variables used to determine socioeconomic tiers were median household income, percent of families headed by a single parent, percent of families where a language other than English is spoken, percent of household occupied by the owner, and educational attainment. *Ibid.*

The Working Group completed an Equity Impact Statement for the Exam Schools Admission Criteria. Pet. App. 40a-41a. The Equity Impact Statement is a District-mandated six-step process for every major policy program, initiative, and budget decision that reviews how proposed action will affect gaps and opportunities for students of color, English learners, students with disabilities, and economically disadvantaged students. *Id.* at 41a. The Working Group's stated desire was:

> Ensure that students will be enrolled (in the three exam high schools) through a clear and fair process for admission in the 21-22 school year that takes into account the circumstances of the COVID-19 global pandemic that

> disproportionately affected families in the city of Boston.
>
> Working towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic, and geographic diversity of all students (K-12) in the city of Boston.

Id. at 41a-42a.

In describing the data it analyzed, the Working Group explained that it reviewed "the feasibility of conducting an exam in the fall 2020, the availability of grades and prior exams for this year's applicants, historical admissions data, and admissions policies for selective high schools in other states." C.A. App. 1918-1919. The Working Group "considered the impact of COVID-19 in Boston including the racial, socioeconomic and geographic disparities in infection rates, limited technology access, potential academic gaps and educational disparities." C.A. App. 1919. Additionally, the Working Group "examined the racial, socioeconomic and geographic disparities between the school-age population in Boston and enrollment at Boston's exam schools." *Ibid.*

Working Group Admissions Recommendation

The Working Group presented its recommendation to the Superintendent at its September 29, 2020 meeting, and in a written memo dated October 5, 2020, which was provided to the Committee before its meeting on October 8, 2020. See C.A. App. 175-176 (¶¶45-46), 1129-1137.

On October 8, the Working Group presented its recommendation to the Committee, with the

Superintendent's support. Pet. App. 40a. The Working Group explained that it was charged with making "recommendations for a revised admissions criteria for SY21-22 in light of the current pandemic and the seven months of interrupted learning that students have experienced across the city," and it presented its recommendation for "a one-year exception to the current exam schools admissions for School Year 2021-22 (admissions cycle 2020-21)." C.A. App. 243-244.

The Working Group proposed eliminating the exam requirement for SY 21-22 admissions and establishing a two-step invitation process to consider COVID's impact. Pet. App. 45a. It recommended that: (1) up to 20% of the seats at each exam school be reserved for the top-ranking students citywide based on GPA; and (2) the remainder of invitations be distributed using a combination of GPA and student home zip code. *Ibid.* See also Part I.C, *infra*.

It also recommended modifying student eligibility requirements for the Exam Schools to mitigate COVID-related challenges, disparities in existing achievement data, and test administration logistics during the pandemic. C.A. App. 245. To be an eligible applicant, a sixth or eighth grade student had to: (1) reside in one of Boston's 29 zip codes; (2) have a minimum B average in ELA and Math during the fall and winter of SY 2019-2020 or have received a "Meets Expectations" or "Exceeds Expectations" score in ELA and Math on the MCAS test administered in the spring of 2019; and (3) provide school district (or equivalent) verification that the student was performing at grade level based on Massachusetts curriculum standards. Pet. App. 44a; C.A. App. 177 (¶51).

Students were also required to submit their preference for one or more of the Exam Schools. *Ibid.*

Reliance on grades alone to assess student performance was problematic to the Working Group because of the lack of uniformity among grading systems used by BPS and non-BPS schools (*i.e.*, charter schools, parochial schools, private schools, and other public schools). C.A. App. 1135. Pre-COVID grades were also problematic because of inconsistencies.[2] Pet. App. 40a. The Working Group was additionally concerned about the accuracy of spring 2020 grades, during which semester BPS implemented a special grading process due to COVID. C.A. App. 1130, 1135. It considered reviewing the availability of any standardized tests students had taken before the pandemic but found significant variability in the many different standardized tests taken by students from BPS and non-BPS schools. C.A. App. 1134-1135. Ultimately, the Working Group recommended using pre-COVID grades and did not recommend admission be based solely on GPA because of these concerns about lack of uniformity in grading, grade inflation, and the impact of remote learning during COVID. C.A. App. 175 (¶¶42-43), 1130, 1135.

The Working Group did not recommend the administration of an entrance exam for SY 21-22 because of difficulties presented by the pandemic, including: (i) administering the exam in a manner that allowed "students

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[2] In 2016, for example, 69% of students applying to BLS from one private parochial school in West Roxbury had an A+ average, resulting in a disproportionate representation among BLS's entering class of students from that school. Pet. App. 40a; C.A. App. 175 (¶43), 1860.

to remain socially distant and honored the choice of families who chose not to send their children to school in person"; (ii) the "impossibility of administering the exam remotely due to test security"; (iii) "significant concern over any exam's ability to assess student preparedness" given pandemic-related educational disruptions; (iv) the "disparate impact of that educational disruption on low-income families and families of color, who contracted COVID-19 in higher rates and had greater challenges with accessing remote learning [in spring 2020] due to the disproportionate effects of the pandemic"; and (v) the potential disruption to exam administration in the fall of 2020 "should Boston's COVID-19 rates continue escalating." C.A. App. 1134.

C. School Committee Adopts and Implements Revised Exam School Admissions Criteria

Adoption of the SY 21-22 Admissions Plan

At a meeting on October 21, 2020, the Committee discussed and adopted the SY 21-22 temporary admissions plan (Plan) as proposed by the Working Group, with only two changes. Pet. App. 42a; C.A. App. 176-177 (¶48). The Committee (i) added a special zip code for students who were homeless or in the custody of the Massachusetts Department of Children and Families (DCF); and (ii) changed the criteria for the ordering of zip codes from median household income to median family income with children under 18. C.A. App. 176-177 (¶48). The new special zip code would be treated as the zip code with the lowest median family income. C.A. App. 1950.

Under the Plan, the admissions process was conducted in two rounds, with invitations for both rounds issued at the same time. Pet. App. 45a-46a; C.A. App.

180 (¶61). In the first round, 20% of seats at each exam school were distributed to students with the highest GPA citywide. Pet. App. 45a. Applicants not selected in the first round moved on to the second round, in which applicants were ranked by GPA within their zip codes. *Ibid.* Each zip code was allocated a percentage of the remaining 80% of seats based on the proportion of school-aged children residing in that zip code. *Ibid.*; C.A. App. 179 (¶60). Students were assigned to exam schools over ten rounds until all seats were filled. Pet. App. 45a. Starting with the homeless/DCF zip code then proceeding to the zip code with lowest median family income, invitations were issued to the students with the highest GPA within that zip code until 10 percent of that zip code's allocated seats were filled. *Id.* at 45a-46a. Then the process continued with the zip code with the next-lowest median income and so on. *Id.* at 46a. Zip codes were not limited to a specific number of seats at each exam school; rather, seats within the zip code rounds were assigned based on the student's preference—that is, if their first-choice seat was not available, then they were assigned to their next choice seat. C.A. App. 180-181 (¶¶61, 65), 1953.

The Committee adopted the Working Group's proposed plan, with these two modifications, by unanimous votes of its seven members.[3] C.A. App. 990-994.

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[3] During the October 21, 2020 meeting, then Committee Chairperson Michael Loconto made statements picked up on his microphone "that were perceived as mocking the names of Asian members of the community who had come to the meeting to comment on the 2021 Admission Plan." Pet. App. 43a. He later apologized and resigned from the Committee. *Id.* at 8a. After judgment had been

Implementation of the SY 21-22 Admissions Plan

The Plan opened on November 23, 2020, and closed on January 15, 2021. Pet App. 43a-44a. Under the Plan, 43% of admitted students were economically disadvantaged, C.A. App. 2902, as compared to 35% in the prior year, *ibid*. The breakdown by race of students admitted to the Exam Schools for SY 21-22 was: 18% Asian; 23% Black; 23% Latinx; 6% Multi-Racial; and 31% White. Pet. App. 47a. This compared to a school-aged population in Boston for SY 20-21 with a racial composition of: 7% Asian; 35% Black; 36% Latinx; 5% Multi-Racial/Other; and 16% White. *Id.* at 46a. The Plan was in effect only for one year. For the 2022-2023 school year and subsequent years, BPS adopted a new admissions plan (which has not been challenged) that relies on a combination of grades, performance on a standardized exam, and census tracts. See *Id.* at 11a; July 14, 2021 Exam Schools Admissions Policy, https://www.bostonpublicschools.org/site/Default.aspx?PageID=9035.

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entered on petitioner's lawsuit, the Committee released, pursuant to public records requests, text messages exchanged during the October 21 meeting between two other committee members, Vice-Chairperson Alexandra Oliver-Dávila and voting member, Dr. Lorna Rivera, that used racial terms in reference to the Plan's opponents. *Id.* at 50a-51a. See n.5, *infra*. Those two members also subsequently resigned. Max Larkin, *Second Boston School Committee Member Resigns Following Leaked Text Messages*, WBUR (June 8, 2021), https://www.wbur.org/news/2021/06/08/second-resignationboston-school-committee.

II. PROCEDURAL BACKGROUND

A. Preliminary Injunction Rulings

Petitioner, Boston Parent Coalition for Academic Excellence Corp. (Coalition), sued the Committee, its members, and the Superintendent all in their official capacity in February 2021 on behalf of 14 unnamed students who were White or of Asian ethnicity who it claimed were then 6th graders applying for admission to the Exam Schools for the fall of 2021. C.A. App. 18-43. Petitioner sought injunctive relief barring the Committee from implementing the Plan. C.A. App. 40. Upon receiving the parties' Joint Agreed Statement of Facts, the district court collapsed the preliminary injunction hearing with a trial on the merits. Pet. App. 9a. On April 15, 2021, the district court ruled in favor of the Committee, finding that the Plan did not violate the Equal Protection Clause of the Fourteenth Amendment. *Boston Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Boston*, 2021 WL 1422827, at *17 (D. Mass. Apr. 15, 2021).[4] The district court held that the Plan was facially race neutral and, therefore, applied rational basis review. *Id.* at *11-12. The court found that petitioner failed to establish a disparate impact because it did not provide sufficient evidence of a disparate impact as a result of the Plan. *Id.* at *15. The court also concluded that petitioner failed to show an invidious discriminatory purpose. *Id.* at *15-16. The district court entered judgment for the School Committee on April 15, 2021 "*[i]n accordance with the Findings of Fact, Rulings of Law, and Order for Judgement entered on April 15, 2021*."

[4] See discussion of subsequent procedural history, Part II.B, *infra*.

Judgment, D. Ct. Doc. 105 (April 15, 2021) (emphasis added).

Petitioner appealed the district court's order and unsuccessfully sought injunctive relief pending appeal. See *Boston Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Boston*, 996 F.3d 37, 50 (1st Cir. 2021) (denying petitioner's request for injunctive relief, finding that petitioner had not shown a strong likelihood of prevailing on the merits).

B. Rule 60(b) Motion and District Court "Indicative Ruling"

While petitioner's merits appeal was being briefed, The Boston Globe published previously undisclosed text messages exchanged between Oliver-Dávila and Rivera during the Committee meeting on October 21, 2020.[5]

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[5] The messages read as follows (Pet. App. 50a-51a):

Rivera: "Best s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry"

Oliver-Dávila: "Me too!! Wait [un]til the white racists start yelling [a]t us!"

Rivera: "Whatever . . . they are delusional"

* * *

Rivera: "Ouch I guess that was for me!"

Rivera: "I still stand by my statement"

Oliver-Dávila: "I said [BPS] students should get preference and stand by this."

Rivera: "Oh then it was both of us!"

Oliver-Dávila: "This guy wrote to me twice"

Pet. App. 9a. On June 22, 2021, petitioner filed a motion under Fed. R. Civ. P. 60(b) in the district court, seeking relief from the district court's April 15, 2021 Order and Judgment. C.A. App. 2290. In support of that motion, petitioner asserted that "six of the 14 students named in the complaint failed to gain admission to the Exam Schools," but five of the six students who were not admitted would have been had BPS based admissions on a citywide competition based only on GPA. Pet. C.A. Br. 16-17, 22-1144 Docket Entry (1st Cir. June 7, 2022).

On July 9, 2021 (while jurisdiction was with the court of appeals), the district court held a hearing where it withdrew the April 15, 2021 opinion in light of the previously undisclosed text messages. C.A. App. 2612-2614 ("After hearing arguments of counsel, *the Court withdraws it's [sic] opinion on the basis that it is factually inaccurate* and sets a further briefing schedule * * * .") (emphasis added). During the hearing, the district court explained that its *judgment* denying the preliminary injunction and ruling in favor of the Committee would

Rivera: "Me too"

Oliver-Dávila: "White guy who is silent majority. He writes for [B]oston [H]erald"

Rivera: "Not good"

Oliver-Dávila: "He complains becaise [sic] he wants to have a vote. I do think the students should vote. But his tweets are excessive"

Rivera: "Agree"

Rivera: "I hate W[est] R[oxbury]"

Oliver-Dávila: "Sick of westie whites"

Rivera: "Me too I really feel [l]ike saying that!!!!"

stand, but the underlying *opinion* with the court's findings of fact and conclusions of law was withdrawn. See C.A. App. 2645 (31:1-9).

Though the district court lacked jurisdiction due to the pending appeal, on October 1, 2021, the court issued an "Indicative Rule 60(b) Ruling," Pet. App. 31a-79a, in which it ruled in favor of the Committee, stating that "*if granted jurisdiction*, this Court would DENY [petitioner's Rule 60(b) motion]." *Id.* at 35a (emphasis added). See also *id.* at 78a ("[T]he motion under Rule 60(b) would be denied were this Court granted jurisdiction by the First Circuit.") While the court found that "three of the seven School Committee members harbored some form of racial animus," the court found the text message evidence could have been discovered through ordinary due diligence by petitioner. *Id.* at 71a-72a. The court explained that petitioner tactically elected to forgo a theory of liability based upon racial animus and instead pursued a theory based on disparate impact. *Id.* at 72a, 76a-77a. And, the court held, the evidence was "*not* of such a nature that it would probably change the result were a new trial to be granted," *id.* at. 72a, as petitioner had utterly failed to establish a disparate impact from the Plan. *Id.* at 73a-75a.

On December 2, 2021, "[i]n light of the district court's 'Indicative Rule 60(b) Ruling,'" the court of appeals issued an order in which it "ceded" jurisdiction to the district court only "to the extent necessary" for the district court to "proceed as indicated." 21-1303 Docket Entry (1st Cir. Dec. 2, 2021). Accordingly, on February 24, 2022, the district court issued a judgment denying the Rule 60(b) motion. C.A. App. 16.

C. The Court of Appeals Affirms

The court of appeals subsequently consolidated petitioner's appeal of the district court's April 15, 2021 Judgment (for which the supporting opinion had been withdrawn) with its appeal of the district court's denial of its Rule 60(b) motion. On December 19, 2023, the court of appeals again ruled in favor of the Committee and affirmed the district court's orders. First, the court held petitioner failed to show a disparate impact because "as between equally valid, facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more." Pet. App. 18a-19a. The court noted that petitioner did not present any expert analysis and merely relied on a comparison of the raw percentage of White and Asian students admitted to the Exam Schools under the Plan with the percentage of White and Asian students admitted in the prior year. *Id.* at 16a. Petitioner's statistical analysis—which the court described as "backfilled analysis * * * crafted by counsel in an appellate brief"—also was "woefully" insufficient. *Id.* at 20a. Among petitioner's statistical shortcomings, it compared GPA data from only ten of the twenty zip codes that petitioner described as "predominantly" White and Asian, and neglected zip codes that had neither a predominantly "White/Asian nor Black/Latinx population under the Coalition's definition." *Ibid.* Ultimately, the court held that use of the Plan "caused no relevant disparate impact" on White and Asian students, noting that White and Asian students respectively constituted 16% and 7% of Boston's school-age population, and received 31% and 18% of the invitations. *Id.* at 20a-21a & n.5.

Second, the court stressed that employing facially neutral selection criteria to increase racial diversity is permissible under this Court's long-standing precedent, and was not changed by this Court's most recent decision in *SFFA*. Pet. App. 22a.

Third, the court found that the district court did not abuse its discretion when it denied petitioner's Rule 60(b) motion. Pet. App. 30a. The court agreed with the district court's findings (i) that petitioner's decision to forgo discovery of potential racial animus was tactical, which did not warrant relief from a final judgment, and, (ii) in any event, would not have changed the result were a new trial to be granted. *Id.* at 28a-29a. The court noted that while the text messages "evince animus toward those White parents who opposed the Plan," the district court "supportably found as fact that the added element of animus played no causal role" because the permissible "motive of reducing the under-representation of Black and Latinx students" had "fully and sufficiently" caused the adoption of the plan. *Id.* at 29a-30a (citing *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979) (distinguishing "action taken *because of* animus" from action taken "*in spite of* [its] necessary effect on a group")).

ARGUMENT

I. PETITIONER LACKS A JUSTICIABLE CONTROVERSY, WHICH WOULD PREVENT THE COURT FROM REACHING THE MERITS

Although the court of appeals ultimately held that petitioner's claims were justiciable, because it believed that the Committee's justiciability arguments were "better suited to challenging the merits of the Coalition's

claims, not its standing to assert these claims," Pet. App. 14a, any standing petitioner may have had at the outset has since been overtaken by events. This Court, therefore, would never be able to reach the merits issues petitioner seeks to present. See *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (noting that an appeal must be dismissed when "an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party").

Petitioner's standing argument after the admissions process was completed—that five unnamed students they purport to represent would have been admitted if BPS had based admissions decisions on a citywide, GPA-only competition—never adequately established its standing. There is no evidentiary basis to believe that the Committee would have chosen to use citywide GPAs as the sole selection criteria had it not used zip codes in combination with GPAs; BPS had not used a GPA-only admissions plan for over twenty years, and, moreover, had specific concerns in 2020 about grade variability, potential manipulation, and reliability of grades during the pandemic. Thus, petitioner's standing argument was entirely speculative. There is, moreover, no evidentiary basis on which to evaluate the assertions made about the five unnamed students—petitioner has only provided vague and anonymous information about them via declaration from a parent-member of petitioner thereby preventing any verification.

But even if petitioner had standing at earlier phases of the litigation, it no longer does; the five students have already had an opportunity to compete in an application process they have not challenged as unconstitutional.

Thus, the "remedy" of a constitutionally compliant application process would not benefit petitioner's students. The students purportedly applied in the fall of 2020, when they were in 6th grade, for prospective enrollment at an Exam School in the fall of 2021, during their 7th grade year. Petitioner's students thus were eligible to apply again in the fall of 2022 (*i.e.*, the fall of their 8th grade year) for admission in the fall of 2023 (*i.e.*, their 9th grade year), by which time the emergency COVID admissions process petitioner challenges was no longer being used.[6] It was replaced by the current admissions process employing a new examination, which petitioner has never challenged. Whether or not petitioner's students were admitted under the current admissions plan (which was in place when they were again eligible to apply for admission to the Exam Schools), their claims are moot, as they have already had the opportunity to compete under a selection process that they do not challenge as unconstitutional. If the Court were to grant review, it would need to dismiss the suit for want of a case or controversy, which is reason enough to deny certiorari in the first place.

II. THE TEMPORARY ADMISSIONS PLAN IN THIS CASE WAS DEVELOPED WELL BEFORE *SFFA* AND THERE ARE NO OTHER CIRCUIT COURT DECISIONS INTERPRETING *SFFA* IN THE CONTEXT OF K-12 PUBLIC SCHOOL ASSIGNMENTS, MUCH LESS A CIRCUIT SPLIT

There is no reason for the Court to grant certiorari to decide how the Court's *SFFA* decision applies in the

[6] The school year for which the Plan determined admissions ended on June 27, 2022. C.A. App. 2812.

context of a facially race-neutral policy regarding K-12 public school assignments, because the temporary Plan at issue was developed (and ended) well before, and without the benefit of, the *SFFA* decision, and no other federal courts of appeals' decisions have interpreted *SFFA* in that context, much less applied it in a way that conflicts with the court of appeals' decision here.

Petitioner urges (Pet. 23-27) the Court to take up this case to address what petitioner believes is the correct application of the Court's decision in *SFFA* which was issued just a year ago. The temporary Plan at issue here was put in place for one year only, and ended well before the *SFFA* decision. Thus, the Committee did not (and could not) have the benefit of that decision in developing the Plan. (Indeed, the Court did not even grant certiorari in the *SFFA* case until January 24, 2022, almost a year after the start of this litigation, which commenced in February 2021.) The Court should not take up a case to determine whether governmental actors are correctly considering and implementing the principles at issue in *SFFA* based on this case, where *all of the actions* of the relevant government body—the Committee—concluded long before the *SFFA* decision was even issued.

It would also be premature to grant the petition because lower courts are only just beginning to consider and apply the *SFFA* decision, and there is no other court of appeals decision, much less a circuit split, concerning *SFFA*'s application for the Court to review and consider. The court of appeals' decision (issued Dec. 19, 2023) is the only circuit court decision since *SFFA* in a case challenging the admissions process for K-12 schools. That includes the decision in *Coalition for TJ* v. *Fairfax*

County School Board, 68 F.4th 864 (4th Cir. 2023), which petitioner cites repeatedly, but which was issued on May 23, 2023—one month *before* this Court's decision in *SFFA*.

The Court should give governmental bodies time to actually consider the *SFFA* decision and allow those actions to percolate through lower courts rather than rush to take this case, especially where the court of appeals carefully considered and applied this Court's precedent. See Part III, *infra*. At the very least, the Court should await a case that presents the issue cleanly, without the numerous, unique factual and procedural complications and obstacles that would prevent the Court from issuing an opinion with clear guidance for more common circumstances. See Part IV, *infra*.

III. THE COURT OF APPEALS' DECISION WAS CORRECT AND FAITHFULLY APPLIED THIS COURT'S PRECEDENT

Petitioner asks this Court to review the court of appeals' decision because petitioner disagrees with its disparate impact ruling. Pet. (i), 17-22. Yet, petitioner's argument hinges on: (i) a selective and incomplete rendition of the facts that ignores both the actual context in which the Plan was adopted and petitioner's own failures to adduce sufficient evidence to prove disparate impact; (ii) a mischaracterization of the circuit court's opinion; and (iii) a manufactured split among circuits regarding the proper way to measure disparate impact under *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). In upholding the Plan, the court of appeals faithfully applied this Court's precedent.

A. Petitioner Ignores the Actual Context in Which the Plan Was Adopted and Race-Neutral Criteria Used, Which Is Consistent with This Court's Precedent

Petitioner's rendition of the facts completely ignores the essential context—the global COVID-19 pandemic—which drove the Committee's adoption of the temporary Plan and which the courts below considered in ruling for the Committee.[7] For example, petitioner's lament (Pet. 9) that "the venerable standardized test was no more," disregards the actual record evidence that the Committee decided to suspend the test requirement for one year only because pandemic-related risks made it unsafe and impractical to administer, and subsequently re-instituted the standardized test requirement (once safe to do so) as part of the current admissions process. Pet. App. 11a (explaining that the temporary 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."). Similarly, petitioner's hyperfocus (Pet. 9, 12) on its *preferred* admissions method—a hypothetical GPA-only citywide competition—as a comparator for determining disparate impact, is purely speculative. BPS had not relied on such a plan for more than 20 years. And the Working Group recommended using pre-pandemic grades and *not* placing too great a reliance on grades alone for entirely legitimate, non-discriminatory reasons: the adoption of a special grading process for half (spring semester) of grades that were traditionally

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[7] The words COVID or pandemic do not even appear in the petition.

relied upon for Exam School admissions; a lack of uniformity in grading among BPS and non-BPS schools serving Boston students during the pandemic; and concerns about overall educational disruption and potential grade manipulation. See, *e.g.*, C.A. App. 1129-1137.

Despite petitioner's (Pet. 2-3, 13-17) repeated reference to the enactment of a "zip code quota" purportedly adopted to achieve "racial balance," the Plan did nothing of the sort. Nor, contrary to petitioner's assertions, did the court of appeals adopt a "rule" permitting "racial balancing" as long as the disadvantaged racial or ethnic group was "overrepresented." *Id.* at 3, 13-17. The court explicitly noted that "where race itself is used as a selection criterion * * * any 'negative' effect resulting from the use of race would be relevant" to an equal protection challenge "because 'race may never be used as a negative.' " Pet. App. 18a (quoting *SFFA*, 600 U.S. at 218). However, here, the Plan simply "did not use the race of any individual student to determine his or her admission to an Exam School." *Ibid.* And, as the court noted, "the Coalition offers no evidence that geography, family income and GPA were in any way unreasonable or invalid as selection criteria for public-school admissions programs." *Id.* at 18a. See also *id.* at 26a (Plan's "prosaic selection criteria—residence, family income, and GPA—can hardly be deemed * * * unreasonable").

To the contrary, this Court has repeatedly endorsed the use of such race-neutral factors, including to ameliorate the disparate impact of other factors in K-12 education. In his concurring opinion in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, Justice Kennedy (who provided the majority's fifth vote)

explicitly states that K-12 schools can pursue racial diversity through facially race-neutral means:

> 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 * * * . School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

551 U.S. 701, 788-789 (2007) (Kennedy, J., concurring) (internal citations omitted).

This Court's recent *SFFA* decision, while in the university context, did not change this established precedent on the use of facially race-neutral policies. In *SFFA*, Justice Kavanaugh, who joined the majority, emphasized in his concurrence that race-neutral policies aimed at achieving racial diversity were permissible. 600 U.S. at 317 (Kavanaugh, J., concurring) (citations omitted) ("And governments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."). Justice Gorsuch (also in the majority) separately noted that the *SFFA* plaintiff—which challenged the universities' race-based admissions policies—itself

endorsed race-neutral policies (including use of socioeconomic factors) as constitutionally permissible ways to achieve diversity. *Id.* at 299-300 (Gorsuch, J., with Thomas, J., concurring) ("[T]he parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices * * * . As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty.").

This Court has similarly supported the adoption of facially neutral policies that seek to increase racial diversity in other contexts, such as housing and government contracting. For example, the Court has noted 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." *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Cmtys., Inc*, 576 U.S. 519, 545 (2015). Similarly, in *City of Richmond* v. *J.A. Croson Co.*, on which petitioner relies, the Court observed that "the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races" that could permissibly further the city's goal "to increase the opportunities available to minority business without classifying individuals on the basis of race." 488 U.S. 469, 509 (1989); see *id.* at 526 (Scalia, J., concurring) ("A State can, of

course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race * * * . Such programs may well have racially disproportionate impact, but they are not based on race.").

In short, this Court's precedent fully supports the ability of a governmental actor like the Committee to consider, as it selects among race-neutral criteria, whether one or another choice will ameliorate or exacerbate the disparate impact of prior race-neutral criteria.[8] Nothing in this Court's precedent mandates that a public body be blind to whether its race-neutral policies will have a disparate impact on historically disadvantaged groups, or even help reduce past disparate impacts. Similarly, no precedent of this Court remotely suggests, as petitioner's argument does, that a historically advantaged racial group has a right to insist that public bodies choose any new criteria with an eye toward preserving that group's historic privilege.

[8] Although petitioner criticizes (Pet. 6) the Working Group for reviewing data concerning the potential demographic impact on race of alternative race-neutral admissions criteria, nothing in this Court's precedent prohibits this; indeed, it would be irresponsible for governmental actors *not* to consider such data when making decisions to avoid unintentionally creating a disparate impact, especially against groups who have been historically disadvantaged.

B. The Court of Appeals Correctly Determined Under *Arlington Heights* That Petitioner Failed to Establish Disparate Impact or That the Plan Was Enacted with Invidious Discriminatory Intent, and There Is No Circuit Split

In challenging a facially neutral policy as a violation of the Equal Protection Clause, petitioner must prove not only that the policy had a disparate impact on a particular racial group but also that such impact is traceable to an invidious discriminatory intent. *Arlington Heights*, 429 U.S. at 264-265. The *Arlington Heights* analysis concerning discriminatory intent is a highly factual, "sensitive inquiry," *id.* at 266, to determine whether the policymaker acted "because of" and "not merely 'in spite of'" the policy's alleged adverse impact. *Feeney*, 442 U.S. at 279.

Here, as the court of appeals held, "the record provides no evidence of a relevant disparate impact," Pet. App. 16a, and evidence of the Committee's intent to reduce racial disparities, which is a permissible goal, does not prove invidious discriminatory intent. See p. 20, *supra*; Pet. App. 21a-27a; *id.* at 27a ("There is nothing constitutionally impermissible about a school district including racial diversity as a consideration and goal in the enactment of a facially neutral plan. * * * [T]reating students differently based on the zip codes in which they reside was not like treating them differently because of their skin color.").

As discussed above, petitioner simply failed to adduce sufficient evidence of disparate impact. Petitioner offered no expert analysis, and the analysis it did offer

amounted to the equivalent of back-of-the-envelope math by its attorneys based on unsupported and unexplained assumptions. See pp. 19-20, *supra*. For example, in selectively identifying certain zip codes as "predominantly" White and Asian and ignoring others where "ostensibly, there was neither a predominantly White/Asian nor Black/Latinx population" under petitioner's definition, petitioner "never explains why 55%"—its chosen threshold for "predominance"—"should be the relevant threshold," nor does it explain "why aggregating populations of separate racial groups is methodologically coherent." Pet. App. 20a. Similarly, petitioner "counterfactually assumes that if White/Asian students comprised 55% or more of the students in a given zip code, then every marginal student in that zip code who just missed out on an acceptance was also White or Asian"—an assumption for which there was "zero evidence." *Ibid.*

Yet petitioner (Pet. 17-20) ignores these failings and instead attempts to manufacture a circuit split concerning the proper disparate impact analysis under *Arlington Heights*—an argument that petitioner's counsel made unsuccessfully in *Coalition for TJ* v. *Fairfax County School Board*, cert denied, No. 23-170 (Feb. 20, 2024). However, petitioner acknowledges (Pet. 20) that the court of appeals' approach to determining disparate impact does not differ from other circuits in the relevant context here of school admissions. And the circuit court cases upon which petitioner relies—*N.C. State Conf. of NAACP* v. *McCrory*, 831 F.3d 204 (4th Cir. 2016) and *Pryor* v. *Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002)—do not indicate a split among the courts of appeal.

Petitioner's argument (Pet. 19) that *McCrory* "endorsed a before-and-after comparison approach," for a finding of disparate impact is incorrect. Examining an equal protection challenge to a North Carolina election law, the Fourth Circuit in *McCrory* refused to apply an election-by-election voter turnout comparison when examining the supposed disproportionate impact on Black voters. 831 F.3d at 232. The court reasoned that a "before-and-after" voter turnout comparison would not be an accurate measure of disparate impact due to, in part, the "highly sensitive * * * factors likely to vary from election to election." *Ibid.* Petitioner's claim (Pet. 21-22) that *Pryor* supports a "before-and-after" comparison, is similarly mistaken. In *Pryor*, the Third Circuit held that plaintiffs sufficiently alleged a claim of purposeful discrimination under Title VI of the Civil Rights Act of 1964 when the NCAA adopted heightened academic requirements to reduce the percentage of black athletes who could qualify for athletic scholarships. 288 F.3d at 564. But the Third Circuit did not discuss the proper approach to select the relevant baseline for calculating a disparate impact. Indeed, nothing in *Pryor* suggests that the proper method in calculating a disparate impact is petitioner's "before-and-after" comparison.

In sum, petitioner's mere disagreement with the court of appeals' disparate impact decision simply does not warrant this Court's review.

IV. Numerous Procedural And Substantive Obstacles Make This Case A Poor Vehicle For The Court's Review

Beyond the issues raised above, numerous additional procedural and substantive obstacles make this case a poor vehicle for the Court's review.

First, the procedural history is highly convoluted. Though the district court denied petitioner's Rule 60(b) motion for relief from the court's April 15, 2021 Judgment, the district court's opinion supporting that judgment—which contained its "findings of fact" and "rulings of law"— was withdrawn by the court on July 9, 2021 (when the decision was already on appeal). See p. 18, *supra*. The Indicative Rule 60(b) Ruling (also issued when the district court lacked jurisdiction because of the pending appeal) only decided petitioner's Rule 60(b) motion; it did not replace the court's findings of fact that supported the original judgment rejecting petitioner's disparate impact claim. In explaining the applicable standards of review of both petitioner's appeal of the merits and denial of its Rule 60(b) motion, the court of appeals distinguished between the two. It stated that when it reviews "the merits of a district court's decision on a stipulated record, we review legal conclusions de novo and *factual findings for clear error*," Pet. App. 14a (emphasis added), but reviews the lower court's denial of petitioner's Rule 60(b) motion for "abuse of discretion." *Id.* at 28a. This only begs the question: what are the factual findings the court of appeals reviewed for "clear error," and where did it find them? Not in the Rule 60(b) decision—that was reviewed for abuse of discretion. That leaves only the April 15, 2021 opinion, but that was withdrawn. In short, the procedural history is, at best,

hopelessly muddled, and would only confound any attempt by the Court to issue clear guidance.

Second, petitioner asks this Court to review the court of appeals' disparate impact analysis, but the *sui generis* nature of this case makes such a determination difficult at least, and unable to provide precedent for any other case. To properly evaluate a disparate impact claim, the Court must necessarily have a comparator against which to assess whether the policy at issue had an adverse impact. Yet here, the pre-COVID status quo did not exist: COVID rendered the standardized admissions exam unadministrable and grades alone problematic. And petitioner's proposed (Pet. 9) "comparator" to actual admission rates—*i.e.*, what admission rates would have looked like under a hypothetical, GPA-only citywide competition—is purely speculative, because there is no evidentiary basis to believe that a citywide GPA-only selection process was a realistic option. Indeed, the Working Group had rejected it for several legitimate reasons, including inconsistency in how grades were awarded. See p. 12, *supra*. Nor did petitioner ever attempt to isolate the effect of factors that petitioner would have to concede are legitimate, such as increasing socioeconomic diversity (*e.g.*, by inclusion of the homeless/DCF student population as its own group) from other factors that petitioner deems illegitimate. Indeed, the court of appeals expressly called out petitioner's failure to develop and introduce more robust statistical evidence that might have supported its claims. Pet. App. 16a, 19a-21a. The absence of a more well-developed evidentiary record would also frustrate this Court's review. The Court should not grant review of a question that it

simply cannot answer due to the specific, unique factual circumstances this case presents.

Finally, to the extent petitioner (like its amici) attempts to argue that the text message evidence supports a disparate *treatment* claim, such claim is not properly before the Court. The court of appeals affirmed the lower court's denial of petitioner's Rule 60(b) motion in which the district court ruled that petitioner could have discovered the text messages with due diligence and any failure to do so was because of petitioner's own litigation strategy. See pp. 19-20, *supra*; Pet. App. 29a (noting that petitioner "made a deliberate decision to forego discovery, despite its apparent suspicion that the two School Committee members harbored racial animus, and even discouraged further development of the record at trial. The Coalition purportedly did so because it was, and remains, adamant that it did not need to make a showing of racial animus to prevail." (citation omitted)). Petitioner has not sought review of that decision, and instead only asks this Court to review the court of appeals' disparate impact decision, which was based on the woefully lacking nature of petitioner's purported evidence. Thus, petitioner's reliance in its petition on the "newly discovered" text messages, which were only part of its unsuccessful Rule 60(b) motion, is improper.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
DEANNA BARKETT FITZGERALD
TRISTAN M. LIM
ROPES & GRAY LLP

KAY H. HODGE
JOHN M. SIMON
STONEMAN, CHANDLER & MILLER LLP

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