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; ALEXANDRA OLIVER-DÁVILA;
MICHAEL O'NEILL; HARDIN COLEMAN;
LORNA RIVERA; JERI ROBINSON; QUOC TRAN;
ERNANI DEARAUJO; BRENDA CASSELLIUS,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM H. HURD
Eckert Seamans Cherin
& Mellott, LLC
919 E. Main St., Suite 1300
Richmond, VA 23219
Telephone: (804) 788-9638

CHRISTOPHER M. KIESER
Counsel of Record
JOSHUA P. THOMPSON
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
CKieser@pacificlegal.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulation

Other Authority

REPLY BRIEF OF PETITIONER

In its haste to convince the Court not to take this case, the Boston School Committee has mangled the case beyond recognition. The Boston Parent Coalition's case is not analogous to a Title VII disparate impact claim. It is not a disparate impact claim at all. The case instead concerns whether the School Committee chose an admissions policy "precisely to alter racial demographics" of the Exam Schools while "[t]hree of the seven School Committee members harbored some form of racial animus." App. 29a, 72a. Disparate impact is only part of the evidence of the intent that renders the School Committee's facially race-neutral plan discriminatory. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

This confusion shows why this Court should grant the petition. Like the School Committee, the First Circuit treated the disparate-impact question as outcome determinative. The importance the Court of Appeals placed on disparate impact in its *Arlington Heights* analysis, and the corresponding question of how it ought to be measured, are issues central to the future of equal protection litigation. This Court should take them up sooner rather than later.

I. The Coalition Has Standing

The School Committee first renews its challenge to the Coalition's standing. None of its arguments undermine the lower courts' conclusion that the Coalition retains standing to challenge the zip code quota used to determine admissions to the Exam Schools when 14 of the Coalition's members applied in 2021.

First. The School Committee questions the "evidentiary basis on which to evaluate the assertions made about the five unnamed students," as it asserts that "petitioner has only provided vague and anonymous information about them via declaration from a parent-member of petitioner thereby preventing any verification." School Committee Br. at 22. The First Circuit was rightly untroubled by this argument. App. 13a–14a. It presents no obstacle for this Court, either.

The form of the evidence is a direct result of the case's procedural journey. Initially, on behalf of the 14 students, the Coalition sought relief that would have prevented the School Committee from implementing the zip code quota. But once Boston Public Schools released admissions decisions, such an injunction was not possible. So when the Coalition moved for reconsideration in the district court under Rule 60(b), it presented evidence that five of the 14 students had been denied admission to any Exam School due to the zip code quota. The uncontroverted evidence showed that these students' GPAs would have warranted admission in a Citywide competition, and, for that matter, in the favored zip codes. *See* Record Below at 2885–86 (Declaration of Coalition member Darragh Murphy).[1]

This was new evidence only because the district court had initially decided the case before admissions decisions were released. But it is also uncontroverted evidence. *See* App. 13a (describing the evidence as "documented and apparently uncontested"). As the First Circuit explained, "granting the Coalition's

[1] As in the Petition, the Record Below refers to the First Circuit appendix. *See* Petition at 5 n.1.

requested remedy would certainly require some factual showing" on remand, but that showing would be *pro forma*. *See id.* The evidentiary issue is not a jurisdictional bar.[2]

Second. The School Committee argues that the five rejected students can't challenge the policy because "[t]here 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." School Committee Br. at 22. The First Circuit correctly rejected this argument as well, finding it "better suited to challenging the merits of the Coalition's claims." App. 14a. After all, GPA and zip code were the only two admissions criteria, and the Coalition challenged zip code as a proxy for race. If the Coalition is correct on the merits, it follows that the zip code criterion is "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Thus, the

---

[2] Had the Coalition not filed a Rule 60(b) motion after the Boston Globe published the racist text messages between two of the School Committee members, it could have supplemented the record on appeal with this same evidence to demonstrate the case was not moot. *See Redfern v. Napolitano*, 727 F.3d 77, 83 (1st Cir. 2013) (allowing the submission of new evidence in a Rule 28(j) letter, noting that the court had previously "considered new facts presented in one such letter when those facts were verified and relevant to the question of mootness" (citing *United States v. Brown*, 631 F.3d 573, 580 (1st Cir. 2011))); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007) (citing a lodged affidavit in this Court for the assertion that the petitioner association "ha[d] children in the district's elementary, middle, and high schools").

injury the five rejected students sustained was that they were denied admission despite performing better in the only other available admissions criteria—GPA. Federal courts have wide discretion to remedy such an injury once an equal protection violation is found, just as they would in any other case once a student was found to have been denied admission due to his race. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

Third. The School Committee's latest standing argument is that the rejected students' injury could have been cured had they simply applied for admission in eighth grade under the new process that "petitioner has never challenged." School Committee Br. at 23.[3] But even if the current policy were entirely unobjectionable—something the Coalition does not concede—the existence of the eighth-grade admissions process does not moot the case. Sixth-grade admission is overwhelmingly the primary pathway into the Exam Schools—far fewer eighth-grade applicants were admitted, both in raw numbers and as a percentage of each applicant pool.[4] Simply put, the eighth-grade admissions process is not a

[3] The Committee did not raise this argument below. The students were still in eighth grade when the case was argued.

[4] The data is publicly available. *See* Boston Public Schools Office of Data & Accountability, SY23-24 Exam School Invitation Summary, June 7, 2023, *available at* https://docs.google.com/document/d/1z9BA7sAx66q2OvCXix2e7lQ4LBAeYCDzRFQTRLbmQOQ/edit.

replacement for the sixth-grade process.[5] Even if the eighth-grade process was not discriminatory, its existence does not remedy the discrimination the five students faced in sixth grade.

II. The School Committee's Repeated Mischaracterization of the Coalition's Case Underscores the Need for This Court's Review

On the merits, the School Committee's apparent misunderstanding of the Coalition's claim reinforces the need for this Court's review. Beginning with its alternate questions presented, the School Committee presents this case as a "disparate-impact challenge," as opposed to a "disparate treatment claim." School Committee Br. at i, 3, 36. These are terms associated with Title VII employment discrimination cases. This is not a "disparate impact" or "disparate treatment" case, but an equal protection challenge to a facially race-neutral policy of the type this Court has recognized since 1886. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). Disparate impact is merely evidence a plaintiff may use to show discriminatory intent. *See Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (contrasting disparate-impact liability with its legitimate use as "an evidentiary tool used to identify genuine, intentional discrimination"). It is the "racial purpose of state action, not its stark manifestation, that [is] the

[5] The current school placements of the five rejected students are outside the record that was compiled in 2021, but none are currently students at the Exam Schools. In any case, this Court need not concern itself with issues of remedy that are best left for remand.

constitutional violation." *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

The School Committee's error echoed that of the Court of Appeals, which cited only disparate impact cases in faulting the Coalition's evidence—including its lack of expert testimony. *See* App. 17a–18a (citing *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014)), 20a (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)). But intent is completely irrelevant to a Title VII disparate impact claim. *See Jones*, 752 F.3d at 50. Because the impact itself *is* the claim, it makes sense that expert evidence would be necessary to prove that whatever statistical disparity exists is significant. *See, e.g.*, 29 C.F.R. § 1607.4(D) (2024) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group of the highest rate will generally be regarded . . . as evidence of adverse impact[.]"); *see also, e.g.*, *Jones*, 752 F.3d at 47; *Phillips v. Cohen*, 400 F.3d 388, 399, 400–01 (6th Cir. 2005) (relying on experts in Title VII cases). *Arlington Heights*, on the other hand, does not mention the need for expert testimony to show disparate impact in an intentional discrimination claim. Where intent is the claim, and impact is just evidence that can be used to prove intent, the showing required is correspondingly less. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 & n.8 (4th Cir. 2016).

The question the Coalition presents for review focuses on the First Circuit's disparate-impact analysis because that reasoning proved dispositive below. The lower courts understood that the School

Committee's racial intent was virtually uncontested.[6] All that remained was whether the Coalition's claim should nevertheless fail solely due to lack of impact. The answer depends on the proper role of disparate impact in evaluating an intentional discrimination claim. Assuming any showing of impact is required,[7] the case rises or falls based on the method used to measure it. The court below and the Fourth Circuit in *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864, 880–82 (4th Cir. 2023), thought the measure of impact should be tied to the racial composition of the applicant pool, such that a member of a relatively successful group could never prevail even with overwhelming evidence of intent to discriminate against that group. *McCrory* saw it differently, as did Judge Rushing and Justice Alito in their respective dissenting opinions in *Coalition for TJ. Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari); *Coal. for TJ*, 68

---

[6] The School Committee somewhat incredulously disputes that the zip code quota was enacted to achieve racial balance. School Committee Br. at 27. Here it resists the findings of both courts below, which only serves to underscore that this case presents a pure question of law that does not require the Court to delve into the remaining *Arlington Heights* factors.

[7] Although some lower courts—including the First Circuit here—have treated disparate impact as an element that must be satisfied to prevail in an intentional discrimination case, *Arlington Heights* does not support that reading. It merely says that the "impact of the official action . . . may provide an important starting point" in the "sensitive inquiry" into discriminatory purpose. *Arlington Heights*, 429 U.S. at 266. In a case like this one where the racial purpose was so clear, it is far from clear why lack of impact on its own should scuttle the claim. But in any event, the Coalition *has* shown impact from any baseline except the racial composition of the applicant pool.

F.4th at 903 (Rushing, J., dissenting). No amount of expert testimony can bridge this gap. The difference is a pure question of law. The Court should grant this petition to answer it.

III. Race-Neutral Alternatives Analysis Is Irrelevant

In response to the Coalition's argument that the First Circuit's rule flouts this Court's precedent prohibiting racial balancing, both the School Committee and Intervenors rely on the Court's past discussion of race-neutral alternatives to discrimination. School Committee Br. at 27–30; Intervenor Br. at 14–16. This is misplaced.

This Court invariably references race-neutral alternatives only during strict scrutiny analysis, when it has already determined that the challenged policy is a presumptively unconstitutional racial classification.[8] The *Arlington Heights* inquiry, on the other hand, is designed to determine whether a facially race-neutral enactment should be treated as if it were a racial classification because it was adopted with discriminatory intent. Only then would strict scrutiny be appropriate. *See Miller*, 515 U.S. at 913 ("statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain

---

[8] Each mention of race-neutral alternatives since this Court recognized that strict scrutiny applies to all racial classifications fits this characterization. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507–08 (1989); *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003); *Parents Involved*, 551 U.S. at 735; *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (*Fisher I*); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 377 (2016) (*Fisher II*). This excludes Voting Rights Act cases, which involve a different legal standard for proving discriminatory intent.

express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object"). So it makes no sense to argue that race-neutral alternatives are a defense to a showing of discriminatory intent under *Arlington Heights*. Every *Arlington Heights* case involves race-neutral criteria, so the fact that challenged criteria are race-neutral cannot absolve them of all judicial scrutiny.

Moreover, these same cases only discuss the use of race-neutral alternatives to achieve some already-recognized compelling government interest—usually, the educational benefits of diversity in higher education. *See supra* n.5. But this Court never recognized such a compelling interest in K-12 education. *See Parents Involved*, 551 U.S. at 724–25 (noting that *Grutter* "relied upon considerations unique to institutions of higher education"). And even in the context of higher education, the Court reversed course last year and declined to recognize any such interest as compelling. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214–18 (2023) (*SFFA*). Without any recognized government interest that would justify racial discrimination in the first place, the continuing relevance of the race-neutral alternative framework is questionable. Fortunately, the Court need not address this question if it grants the petition, as only the First Circuit's *Arlington Heights* analysis is at issue. If the Coalition prevails on that issue, this Court can remand for application of strict scrutiny.

IV. This Case Is a Good Vehicle to Address the Question Presented

This case is an exceptionally clean vehicle to decide the issue presented. The lower courts' recognition of the School Committee's racial intent serves to isolate the dispositive question involving the proper role of disparate impact in an intentional discrimination case. This means the Court could take this case without having to delve into a full-fledged *Arlington Heights* analysis. Instead, the Court could clarify the role of disparate impact, explain how to define it, then remand to allow the lower courts to reconsider the case under this Court's guidance. Put simply, this case allows the Court the opportunity to answer an important, pressing question without getting too deep in the weeds.

The School Committee says the procedural history is "hopelessly muddled," School Committee Br. at 35, but it isn't. The back-and-forth of the Rule 60(b) motion practice is irrelevant at this point. The School Committee's racial intent is well established—that is why the First Circuit found that the additional racist text messages that were the subject of the Rule 60(b) motion would not have changed the outcome. App. 29a ("More evidence of intent does not change the result of this case, given that our analysis assumes that the Plan was chosen precisely to alter racial demographics."). And it is hard to see how more evidence of impact could be necessary, as the record contains both projections and actual outcomes by race. What remains is not an evidentiary dispute but a legal one.

The School Committee calls this case "sui generis" because it enacted the zip code quota in part in response to the COVID-19 pandemic. School Committee Br. at 3–4, 35. But notwithstanding COVID, the lower courts found that the School Committee enacted the plan to change the racial demographics of the Exam Schools. And the Coalition need not show that the School Committee's racial purpose was all-encompassing—instead, race need only be a "motivating factor." *Arlington Heights*, 429 U.S. at 265–66. While COVID may have spurred the School Committee into action, it does not account for the clear racial purpose of the zip code quota. This case isn't sui generis at all. Instead, it is very much like the many similar cases cited in the petition to illustrate the importance of this question. Petition at 23–26.

The School Committee also urges the Court to wait until the "ink [dries]" on *SFFA*. School Committee Br. at 2. But this case—decided after *SFFA*—reached the same result as *Coalition for TJ*, decided before. While important in many respects, *SFFA* did not even cite *Arlington Heights*. Further percolation is thus no guarantee of clarity on the question of how to calculate disparate impact in a constitutional challenge to a facially race-neutral admissions policy. But with such plans proliferating across the country, this Court should act sooner rather than later, before First Circuit's rule becomes entrenched and it is too late for countless applicants nationwide.

CONCLUSION

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

DATED: August 2024.

Respectfully submitted,

WILLIAM H. HURD
Eckert Seamans Cherin & Mellott, LLC
919 E. Main St., Suite 1300
Richmond, VA 23219
Telephone: (804) 788-9638

CHRISTOPHER M. KIESER
Counsel of Record
JOSHUA P. THOMPSON
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
CKieser@pacificlegal.org

Counsel for Petitioner