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

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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

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

In the Supreme Court of the United States

No. 23-1137

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

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

In its Supplemental Brief, petitioner wrongly asserts that the Second Circuit's recent decision in *Chinese Am. Citizens All. of Greater New York* v. *Adams*, 2024 WL 4270578 (2d Cir. Sept. 24, 2024) (*Adams*), created a circuit split with the First Circuit's decision here concerning application of the *Arlington Heights* equal protection framework, even though the Second Circuit disavowed any such conflict. In its attempt to manufacture a conflict that the respective courts have disclaimed, petitioner resorts to mischaracterizing the decisions of both the First and Second Circuits. Any purported inconsistency between the cases is the product of their distinct procedural histories and petitioner's own litigation choices, which meant that, unlike the plaintiffs in *Adams*, petitioner lacked evidence of *either* invidious

discriminatory intent *or* discriminatory effect. There is, thus, no conflict for this Court to resolve. And, in any event, petitioner's Supplemental Brief offers nothing to overcome the vehicle problems posed by the present case, in which the unique circumstances of the COVID-19 pandemic made the preexisting admissions process—and any comparison to it—impossible, and led to the adoption of a one-off approach to admissions that was completed and abandoned years ago.

To begin, *Adams* expressly reaffirmed "the well-settled proposition that a plaintiff must prove both discriminatory effect *and* intent under *Arlington Heights*." Supp. Br. Ex. 27a. Thus, contrary to petitioner's contention (Supp. Br. 2, 7), there is no conflict between *Adams* and the First Circuit's holding here that petitioner's failure to prove a disparate impact doomed their claim without regard to any discriminatory intent. Pet. App. 16a, 21a-27a. Indeed, the Second Circuit went out of its way to stress that it did "not suggest that an equal protection claim challenging a facially neutral policy does not require a showing of discriminatory effect." Supp. Br. Ex. 25a.

The two cases' different outcomes were the result of different evidentiary records concerning discriminatory effect, which petitioner failed to develop due to its own litigation choices. Petitioner repeatedly cites the Second Circuit's rejection of the district court's "aggregate disparate harm" standard to suggest that the Second Circuit would have disagreed with the First Circuit's assessment of petitioner's failure to produce reliable evidence of discriminatory effect on White and Asian-American students. But that misunderstands the factual record in *Adams*. While the Second Circuit held that the

absence of an aggregate reduction in Asian-American students' admissions rates to selective high schools was not dispositive, that was because the plaintiffs had provided *other*, *more direct* evidence of discriminatory effect. According to the plaintiffs in *Adams*, the defendants had set out to reduce the number of Asian-American students admitted to the selective high schools by disqualifying students at certain middle schools from admissions through the "Discovery Program." Supp. Br. Ex. 15a, 26a, 31a-32a. The new policy had precisely this intended discriminatory effect on "many Asian-American students [who] were excluded from eligibility for the Discovery Program" because "all of the students at 11 majority-Asian-American middle schools" were excluded under the new policy. *Id.* at 15a. Thus, while acknowledging the significance in many cases of aggregate disparate impact, the Second Circuit held the absence of such impact was not dispositive in *Adams* because disparate impact was demonstrated more directly: "the Asian-American students who have been rendered ineligible for the Discovery Program by virtue of the middle school they attend—despite otherwise having qualified for admission on an individual basis under the previous criteria—were excluded from those designated SHS seats precisely because of their race." *Id.* at 26a.

Petitioner, by contrast, simply failed to produce any such evidence of discriminatory effect, due to the combination of the unique circumstances of the single-year, COVID-era policy and petitioner's own litigation choices. Unlike *Adams*, there was no utility in comparisons to "the previous criteria," because the COVID-19 pandemic had made the traditional admissions process impossible to implement. See Resp.

Br. in Opp. 35. And, unlike *Adams*, no student was categorically excluded from competing for any admissions spots on the basis of their race.

In the absence of any direct evidence of discriminatory effect similar to that in *Adams*, petitioner sought to demonstrate disparate impact through statistics, but failed even to proffer an expert to support that argument. Petitioner's purported "analysis" amounted to unsupported and unexplained calculations and assumptions manufactured by its own attorneys. See Resp. Br. in Opp. 29-30. Indeed, the First Circuit called out this "backfilled analysis—crafted by counsel in an appellate brief" as "fall[ing] woefully short of the mark." Pet. App. 20a. See also *ibid.* ("Moreover, the Coalition's analysis rests on a sleight of hand. It 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 acceptance was also White or Asian. Suffice it to say, there is zero evidence for this assumption."). Petitioner failed to offer expert evidence analyzing the disparate impact of the temporary admissions plan, choosing instead to forgo discovery and proceed on a stipulated record. See *id.* at 28a-29a ("The district court—buttressed by its experience closely supervising this litigation and the parties' arguments along the way—reasonably determined that the Coalition made a deliberate decision to forgo discovery * * * .").

The two cases also differ entirely with respect to the discriminatory intent prong of the *Arlington Heights* test. Due to *Adams*' peculiar procedural posture (with discovery on discriminatory effect and intent having been bifurcated), the Second Circuit's decision relied

heavily on the *assumption* that the plaintiffs in that case could prove an invidious discriminatory intent on the part of the defendants to harm Asian-American students by eliminating their middle schools from the Discovery Program. Supp. Br. Ex. 3a, 6a, 20a, 24a, 26a, 29a, 31a-33a, 35a, 37a-38a. *Adams* expressly noted that it confronted an entirely different factual context than the First Circuit faced here. See *id.* at 28a-29a (distinguishing the decision in this case because petitioner had not established discriminatory intent). Petitioner attempts to rewrite history to imply that it had established, or the First Circuit presumed, invidious discriminatory intent here. Supp. Br. 1. To the contrary, petitioner's purported evidence of discriminatory animus was not part of the record below. The district court (in its Rule 60(b) ruling that the First Circuit affirmed, and which petitioner does not ask this Court to review) refused to allow petitioner to reopen the case to introduce that evidence because its belated production was entirely the consequence of petitioner's chosen litigation strategy. See Resp. Br. in Opp. 19-20, 36. The First Circuit also affirmed the district court's reasoning to deny relief because, even if that evidence had been admitted, it would not have provided evidence that those individuals' discriminatory views had caused the Committee's selection, in the extraordinary context of the COVID-19 pandemic, of the admissions policy based on geography, family income, and GPA, which was already fully supported by other, non-discriminatory purposes. See Pet. App. 18a, 26a; see also Resp. Br. in Opp. 21.

The differences between this case and *Adams* highlight why this case is a particularly poor vehicle to resolve any issue concerning *Arlington Heights* that this

Court might want to consider post-*Students for Fair Admissions*. The COVID-19 context infused the Committee's emergency decision to adopt a necessarily imperfect system for a single school year and, at the same time, made certain types of evidence (such as comparisons to "the existing system") unavailable. Coupled with petitioner's own litigation strategy, which led it not to present any expert analysis regarding disparate impact and to forego discovery that might have led to evidence of discriminatory intent, the COVID-19 context of these events make it *sui generis* and not an appropriate vehicle for the Court to explore any broader issues.

CONCLUSION

For the foregoing reasons and those stated in Respondents' principal brief, 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

SEPTEMBER 2024