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., RESPONDENTS.

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

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT, MANHATTAN INSTITUTE, AND HAMILTON LINCOLN LAW INSTITUTE AS AMICI CURIAE SUPPORTING THE PETITIONER

Daniel I. Morenoff
Counsel of Record
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivilrightsproject.org

Ilya Shapiro
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Counsel for Amici Curiae
[Additional counsel listed on signature page]

TABLE OF CONTENTS

Table of Contents i
Table of Authorities iii
Interest of Amici Curiae 2
Summary of Argument 2
Argument 4
I. Lower Court Endorsement of Intentional Racial Discrimination is Untenable 4
A. The Court Below Endorsed Intentional Discrimination in the Form of Racial Balancing against High-Performing Racial Groups Because They are High-Performing Racial Groups 4
B. Disparate Impact is Disparate Impact, Even When its Victims are More Qualified Than Members of the Group You Prefer 5
II. Strict Scrutiny Applies to Intentionally Discriminatory Racial Balancing Regardless of Disparate Impact 7
A. Strict Scrutiny Applies to Any and All Racial Balancing 7
B. Misreading *Arlington Heights* and Mismeasuring Disparate Impact Leads to Perverse Results 9
III. This Court's Precedents Establish that Race-Balancing Cannot *Ever* Satisfy Strict Scrutiny 14

IV. The First Circuit's Decision—Like the Fourth Circuit's—Misconstrues This Court's "Narrow Tailoring" Jurisprudence as Endorsing Race-Balancing through Nominally Race-Neutral Means 18

Conclusion 20

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) ----------14

Coalition for TJ v. Fairfax County School Board,
601 U.S. __ (Feb. 20, 2024) ---------- 3

Cummings v. Mo.,
71 U.S. 277 (1867) ---------- 9

Fisher v. Univ. of Tex. at Austin,
570 U.S. 297 (2013) ---------- 8, 14, 20

Freeman v. Pitts,
503 U.S. 467 (1992) ----------16

Grutter v. Bollinger,
539 U.S. 306 (2003) ----------14, 17, 19

Lewis v. Ascension Parish Sch. Bd.,
662 F.3d 343 (5th Cir. 2011) ---------- 8

Martin v. Blessing,
571 U.S. 1040 (2013) ---------- 2

Miller v. Johnson,
515 U.S. 900 (1995) ---------- 8

Palmore v. Sidoti,
466 U.S. 429 (1984) ---------- 6

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) ----------2, 7, 15, 17, 19

Shaw v. Reno,
509 U.S. 630 (1993) ---------- 8

Students for Fair Admissions v. Harvard,
143 S.Ct. 2141 (2023) ----------3, 6, 8, 9, 14

Tuttle by Tuttle v. Arlington County Sch. Bd.,
195 F.3d 698 (4th Cir. 1999) ---------- 8

Village of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) ----------6, 7, 9, 10

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) ---------- 10, 11

Washington v. Davis,
426 U.S. 229 (1976) ---------- 6

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ---------- 8

STATUTES

Declaration of Independence ---------- 2
The Civil Rights Act of 1964 ---------- 2

OTHER AUTHORITIES

Katy June-Friesen, *Humanities*,
Sept./Oct. 2013, Vol. 34, No. 5,
Nat. Endowment for the Humanities ---------- 2

Petitioner's App. ---------- 5, 7, 9, 10, 11, 12, 18

Petition for Cert. ---------- 4, 5, 6

CONSTITUTIONAL PROVISIONS

Equal Protection Clause ----------8, 14

Fourteenth Amendment ---------- 2, 6

INTEREST OF AMICI CURIAE[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley and Wai Wah Chin, continue this research, including at the policy nexus of education and race underlying this litigation.

Hamilton Lincoln Law Institute ("HLLI") is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking. In its litigation practice HLLI has directly confronted, and unsuccessfully sought this Court's intervention to halt, the pervasive expansion of race-conscious decision-making into areas outside school admissions. *Martin v. Blessing*, 571 U.S. 1040 (2013).

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[1] No counsel for a party authored any part of this brief. No one other than the amici curiae, their members, or their counsel financed the preparation or submission of this brief. Parties were timely notified.

This case interests *amici* because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on educational excellence and racial nondiscrimination, policy commitments that we share.

SUMMARY OF ARGUMENT

When racial segregation of public education ended fewer than 60 years ago, our country finally enjoyed a national consensus that no child's race should have any bearing on the character or quality of his education.[2] So ended, for a time, our most glaring failure to live up to the Declaration of Independence, the Fourteenth Amendment, and finally the Civil Rights Act of 1964.

Some still insist on allocating children's educational opportunities based on race. They were wrong during Jim Crow. They were wrong 16 years ago in Washington State, as this Court ruled in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

They are wrong in Virginia, when the Fairfax County School Board adopted a race-balancing mechanism to exclude "overrepresented" Asians from Thomas Jefferson High School for Science & Technology and wrong to uphold that adoption as Constitutional at the Fourth Circuit. *Coalition for TJ v. Fairfax County School Board*, 601 U.S.

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[2] *See* Katy June-Friesen, *Humanities*, Sept./Oct. 2013, Vol. 34, No. 5, Nat. Endowment for the Humanities, https://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town.

__ (Feb. 20, 2024) (Alito, J., dissenting from denial of cert.).

And here, Boston's School Committee (the "Committee") was wrong to implement its own system in service of the same racist purposes.

American law has disallowed intentional racial discrimination for generations. Strict scrutiny exists to stop such race-based policies—whether thinly veiled by proxies or not. To avoid applying it and approve the Committee's racial balancing, the First Circuit effectively turned to *pig* Latin, construing this Court's directives incoherently to make everything backwards and silly.

Cogent or not, the Fourth and First Circuits' endorsement of open racial balancing is monumental. It threatens to undo this Court's course correction in *Students for Fair Admissions v. Harvard*, 143 S.Ct. 2141 (2023). The Court should take this case and reverse to prevent this legal and moral cancer's spreading through the entire educational landscape.

ARGUMENT

I. LOWER COURT ENDORSEMENT OF INTENTIONAL RACIAL DISCRIMINATION IS UNTENABLE

A. The court below endorsed intentional discrimination in the form of racial balancing against high-performing racial groups *because* they are high-performing racial groups

The courts below correctly found that the Coalition had amply demonstrated both intentional discrimination by the Committee—and with regard to at least three members, genuine bigotry. *See* Pet. at 14. But it held the intentionally discriminatory plan lawful nevertheless, it said, because the Plan had less impact on (e.g.) Asian applicants than the Asian applicants' superior performance had on the (e.g.) Black applicants they outperformed.

The lower Courts' perverse formula finds no home in our Constitution, which empowers neither courts nor committees to sit as melanin-micromanaging Handicappers-General.

Having written off both the acknowledged and egregiously racist intentions of the Committee and the documented disparate impact of the Committee's racial balancing as "[ir]relevant," the First Circuit declined to apply strict scrutiny. *See* Pet. App. at 29a (concluding

"[m]ore evidence of intent does not change the result of this case" because its "analysis assumes" the Plan was chosen for its racial balance). Review under that standard—the standard required by this Court's precedent—would have doomed the Plan and its ilk.

B. Disparate impact is disparate impact, even when its victims are more qualified than members of the group you prefer

In order to show an equal protection violation based on facially-neutral racial balancing, the Court below, like the Fourth Circuit in *Coalition for TJ*, required that victims demonstrate (1) discriminatory intent, and (2) disparate impact. *See* Pet. App. at 15a-16a. Imposing that requirement was wrong.[3] Nonetheless, the Courts below *agreed* with the Committee's victims that it intentionally discriminated against Asian and White applicants and chose the Plan *because* it would handicap those racial groups to the benefit of worse-performing but more favored racial groups. *See id.* at 29a, 72a. *See also* Pet. at 14. Still, the First Circuit argued, like the Fourth Circuit in *Coalition for TJ*, that the (intended) disparate impact was too small to be "relevant," Pet. App. at 16a, or "legally cognizable," *id.* at 11a.

The Court below could've avoided many errors by referring to its own introductory reminder that "The Fourteenth Amendment prohibits 'all governmentally imposed

[3] *See infra* at Sec. II.

discrimination based on race,'" save for those rare and compelling circumstances that can survive the daunting review of strict scrutiny." *Id.* at 15a (quoting *Harvard*, 600 U.S. at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). *That* is the principle in light of which cases like *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976) must be read. And *that* principle is incompatible with the Fourth and First Circuit's holdings that you can have a little governmentally imposed discrimination based on race as a treat, as long as the races you target continue to outperform the races you like, despite imposition of the handicap.

"Racial balancing isn't racial discrimination," is a nonstarter Constitutional theory. This Court has virtually spoken with one voice for almost 50 years not only that racial balancing *is* racial discrimination, but that it's a *particularly ugly and obvious* instance that's "patently unconstitutional." That was true even where, and during decades when, many educational institutions enjoyed a partial waiver of the Constitution's bar on racial discrimination. *See* Pet. at 13 (gathering cases).

The Court rightly withdrew that license to discriminate when it decided *Harvard*. But even if the Committee could have tried to find shelter beneath such a license in the past, it would've searched to no avail, because that license emphatically did *not* extend to the grotesque race-balancing at issue here. Strict scrutiny applies to the Committee's racism here, and it easily resolves this case.

II. STRICT SCRUTINY APPLIES TO INTENTIONALLY DISCRIMINATORY RACIAL BALANCING REGARDLESS OF DISPARATE IMPACT

According to the First (and earlier the Fourth) Circuits, under *Arlington Heights*, to prove an equal protection violation, a plaintiff must show both that a policymaker intended to discriminate *and* that its acts had a disparate impact. *Coalition for TJ*, 68 F.4th at 879; Pet. App. at 21a-22a. To test for the latter, the courts below contort from *Arlington Heights* a version of disparate impact that excuses the documented impact of the Committee's new admissions plan. But these courts misread *Arlington Heights* on both scores: it compels neither proof of disparate impact nor adoption of what the First and Fourth Circuits call disparate-impact analysis.

Had the First Circuit applied the correct standard, this case would have easily resolved itself. There is no compelling interest in racial balancing, and the Committee had no *legitimate* interest to which racial balancing is narrowly tailored. The degree of scrutiny applied determines the outcome in this case. Regardless, the Court's ruling in *Parents Involved* dictates that the Committee's race-balancing *cannot* satisfy strict scrutiny.

A. Strict scrutiny applies to any and all racial balancing

This Court has long held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (citing cases ranging from *Shaw v. Reno*, 509 U.S. 630, 644 (1993), to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). It has repeatedly held that intentional race-balancing is unconstitutional. *E.g.*, *Harvard*, 143 S. Ct. at 2172 ("'[O]utright racial balancing' is 'patently unconstitutional.") (citing *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 311 (2013)).

Evidence of intentional race-balancing, even through facially race-neutral means, triggers strict scrutiny. *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 352, 349 (5th Cir. 2011) (holding district court "erred in awarding summary judgment under a rational basis test" to school board that had approved facially neutral school redistricting undertaken "in an effort at maintaining the racial balance already existing"). Indeed, even the Fourth Circuit previously applied strict scrutiny to rule that the Equal Protection Clause forbids Virginia school boards from choosing admissions criteria for their alternative schools "to obtain a student body 'in proportions that approximate the distribution of students from [racial] groups in the district's overall student population.'" *Tuttle by Tuttle v.*

Arlington County Sch. Bd., 195 F.3d 698, 701 (4th Cir. 1999) (quoting the unconstitutional policy).

This Court recently reiterated that "'what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name[,]'" *Harvard*, 143 S. Ct. at 2176 (citing *Cummings v. Mo.*, 71 U.S. 277 (1867)). The wayward courts of appeals seem to have taken this to mean that the prohibition of racial discrimination is "leveled at the thing [racial discrimination we dislike], not the name ["racial discrimination"]." A better reading is that the prohibition is aimed at the thing (intentional racial discrimination) not at labels such as intentional racial discrimination dismissible as having only "[ir]relevant disparate impact," Pet. App. at 16a, or intentional "[non-]cognizable disparate impact," Pet. App. at 11a., even if accomplished through "facially neutral" means.

B. Misreading *Arlington Heights* and Mismeasuring Disparate Impact Leads to Perverse Results

When applying strict scrutiny, the First Circuit should have focused its inquiry on the Committee's open and avowed discriminatory intent in developing and adopting the new admissions policy. *Arlington Heights*, 429 U.S. at 265. *See also* Pet. App. at 6a-7a (quoting Committee's announcement of its intent to reduce the representation of whites and Asians and its running of simulations to

measure Plan outcomes against that goal). Under *Arlington Heights*, a court *may* consider the presence of a disparate impact as *one kind* of circumstantial evidence of a government's intent to discriminate. *Id.* at 267-68. But *Arlington Heights* does not require a showing of disparate impact, recognizing that different cases would see different plaintiffs prove intent through different kinds of evidence.

That's not how the First and Fourth Circuits read *Arlington Heights*. They say it requires as part of an equal protection violation proof both that a challenged policy was adopted with a discriminatory intent *and* that it succeeded in its goal of disparately impacting certain racial groups. *Coalition for TJ*, 68 F.4th at 879; Pet. App. at 17a, 21a-27a. These courts then turn this new element of an intentional discrimination claim on its head. *Coalition for TJ* announced that to gauge a disparate impact, one must ignore the "baseline comparison" of the challenged policy's impact on the affected class; both the Fourth Circuit's lead opinion and concurrence deride such before-and-after comparisons as turning "the previous status quo into an immutable quota[.]"). *Id.* at 880, 881 and 890. Instead, in nominal reliance on employment cases like *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Fourth Circuit claimed that disparate impact must be weighed by comparing "a given racial or ethnic group's share of the number of applications to TJ versus that group's share of the offers extended – in other words, the group's 'success rate' … to how separate, otherwise similarly situated groups fared in securing offers of admission." *Id.* at 881.

The First Circuit adopted the same analysis but went even further. Where the Fourth Circuit treated admissions as a magical category of claims that transforms the proper analysis, the First Circuit adopted the same analysis without even such limiting language. Literally everything about the First Circuit's resulting analysis is wrong. The Fourth Circuit created a circuit split, on the wrong side of which it's now been joined by the First. Pet. App. at 19-22. The depravity of their position is illustrated by the Fourth Circuit's perversion, in *Coalition for TJ*, of *Wards Cove*. As the Fourth Circuit noted, in *Wards Cove* the Court established that in employment-law-disparate-impact cases, "the 'proper basis' for inquiring into disparate impact [i]s comparing 'the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Coalition for TJ*, 68 F.4th at 881. The Fourth Circuit put no emphasis on the word "*qualified*." That absence of emphasis did all the work in the Fourth Circuit's analysis.

The entire theory of *Wards Cove* is that, absent discrimination, any group *should* wind up with approximately the same percentage of any kind of job as its share of the qualified workforce. But the Fourth Circuit skipped any consideration of the relative percentages of different groups among the *qualified* applicants to TJ. Necessarily, its adoption as a baseline for disparate-impact analysis of the "success rates" of different communities assumes away any differences in the qualifications of different groups and presumed that TJ applicants of each race or ethnicity *should* have the same "success rate." Relying on

Coalition for TJ's analysis, the First Circuit, below, followed suit. Pet. App. at 18a-21a.

But there is no reason to think under the prior policies—which no one has argued were illegal or that either the Board in *Coalition for TJ* or the Committee, here, had a strong basis in evidence to believe were illegal—that any group's superior performance arose from anything other than its members' ability and hard work resulting in better-than-average qualifications. Is it so fantastical to imagine that Asian-Americans could do better in academics than other groups *without* a thumb on the scale? As it is, the First and Fourth Circuits hold it *against* Asian applicants they *continue* to outperform Black and Hispanic applicants even *with* school officials' anti-Asian thumbs weighting the scale in those groups' favor. The thumb can apparently keep pushing down until it fully counteracts the greater ability and/or effort of Asian applicants relative to others.

Measuring the impact of the Committee's intentional racial balancing by comparing the victims' current "success rate" to that of other groups imposes a structurally invalid comparator. The comparison embeds into its logic the assumption that an admissions policy *should* achieve a racial balance mirroring that of the (qualified or unqualified) greater population. The test the First and Fourth Circuits adopted to measure whether the policies of the Board in *Coalition for TJ* and the Committee, here, had a disparate impact instead test for illegal race-balancing by asking whether the policy has harmed the targeted

community *so much* that despite its greater-than-average qualifications, the policy affords it *less* than its race-balanced share of enrollment.

This test perversely makes explicit, intentional race-balancing legal until its effects *exceed* a perfect racial balance. That does not prevent racial balancing; it enforces it.

The purported concern that before-and-after comparisons turn past performance into a floor suffers from the same defect. If the previous policy was not illegally discriminatory, unless group qualifications radically alter from year to year, one *should* expect to see only incremental changes in the demography of sequential admitted classes. One *should* expect that, barring intentional discrimination through the adoption of a new admissions policy, one will not see massive reductions in the Asian percentage of admitted students in a single year.

Given the record's trove of *direct* evidence of the Committee's discriminatory intent, the First Circuit did not need to engage in *any* disparate-impact analysis in this case. The First and Fourth Circuits' claims that the new policies lacked a disparate impact should be irrelevant. As the *Coalition for TJ* district court and First Circuit found: the Board in *Coalition for TJ* and the Committee, here, *intended to harm* Asian applicants, they *have harmed* them, and their policies *will continue to harm* them wherever and whenever the rebalancing plans are in effect.

The Equal Protection Clause requires no further "disparity" finding.

If lower courts were going to consider disparity, however, they should have used a version of the doctrine consistent with American law, not an altered one that could only produce approval of what it exists to condemn.

III. THIS COURT'S PRECEDENTS ESTABLISH THAT RACE-BALANCING CANNOT *EVER* SATISFY STRICT SCRUTINY

In the presence of discriminatory intent, strict scrutiny's "two-step examination … asks first whether the [discriminatory policy] is used to 'further compelling governmental interests' … and second whether the government's [discriminatory policy] is 'narrowly tailored,' *i.e.*, 'necessary,' to achieve that interest.'" *Harvard*, 143 S. Ct. at 2162 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Fisher I*, 570 U.S. at 311).). Since the Committee cannot point to *any* compelling purpose in seeking to racially balance students, that examination can rightly end only one way.

In *Parents Involved*, the Court established bright redlines for school districts to respect, which the Committee violated, and the First Circuit ignored. The multiplicity of opinions there may obscure the clarity of the holdings. Chief Justice Roberts wrote the lead opinion, which

Justices Alito, Scalia, and Thomas joined in full and Justice Kennedy joined except as to parts III-B and IV. Part III-A of the Chief Justice's opinion, then, constitutes the decision of the Court. It applied strict scrutiny to gauge the constitutionality of the districts' racially discriminatory policy of assigning children to schools. It restated that in modern jurisprudence, the Court had only ever allowed race-conscious assignments of children to schools in two contexts: (a) where undertaken to "remedy[] the effects of past intentional discrimination," *Parents Involved*, 551 U.S. at 720; and (b) "in higher education" where serving to create a "diversity … not focused on race alone." *Id.* at 722. It noted the first had no application to the cases before it, because neither school district remained under a court-ordered desegregation decree. *Id.* at 720-721. *Harvard* ended judicial approval of the second subset, so it, too, has no further application.

In part III-B, four justices further faulted the tying of children's access to schools to "each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." *Id.* at 726. They specifically attacked the districts' assumption, supported by "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts." *Id.* at 727. They described such engineering of a school's demography as "working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides

the purported benefits ... a fatal flaw under our existing precedent [as] 'racial balance is not to be achieved for its own sake.'" *Id.* at 729-730 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

Although Justice Kennedy did not join that analysis, his own separate opinion went nearly as far. Although it asserted that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means [than race-based admissions]," *id.* at 789, it recognized a "compelling interest" only "in avoiding racial isolation," *id.* at 797.

Together, these opinions establish for race-balancing in K-12 schools that:

1. Strict scrutiny applies;

2. Strict scrutiny requires of a racially motivated school system altering an admissions policy either (a) a recent history of intentional discrimination to be redressed; or (b) a goal of ending documented racial isolation; and

3. Strict scrutiny *cannot* be satisfied by a goal of matching schools' demography to that of the surrounding districts, because intentional racial balancing of K-12 schools is "patently unconstitutional."

Here, as in *Parents Involved*, the Committee by its own admission was motivated by a desire to racially balance schools, not to remedy some sort of racial isolation. This case presents what part III-A of *Parents Involved* identified as "patently unconstitutional"—not Justice Kennedy's hypothetical where a district's governing body valiantly seeks to break children out of an isolated, educational ghetto.

This Court established clear red lines for districts seeking to racially balance their K-12 schools. The Committee and the First Circuit ignored them. While there are other reasons the Court should take this case and reverse the First Circuit, reaffirming those red lines would more than justify this Court in granting the cert. petition.

IV. THE FIRST CIRCUIT'S DECISION—LIKE THE FOURTH CIRCUIT'S—MISCONSTRUES THIS COURT'S "NARROW TAILORING" JURISPRUDENCE AS ENDORSING RACE-BALANCING THROUGH NOMINALLY RACE-NEUTRAL MEANS

In *Coalition for TJ*, Judge Heytens took the additional step of defending the propriety of the Board's race-balancing. Besmirching decades of this Court's decisions, he claimed that this Court "has repeatedly blessed seeking to increase racial diversity in government programs through race-neutral means." *Coalition for TJ*, 68 F.4th at 891. According to the concurrence, Justice Scalia

embraced this end in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989), as did Justice Thomas in *Grutter*, and Chief Justice Roberts in *Parents Involved*. *Id.*

The First Circuit below didn't apply strict scrutiny. But it *did* rely on the same conclusion—that this Court endorses racial balancing—as an argument against strict scrutiny's application, claiming that disparate impacts effected by intentional racial discrimination *must* be legal, because otherwise racial balancing wouldn't be legal, and "the message is clear" that this Court simply *adores* racial balancing under race-neutral pretexts. Pet. App. at 22a-23a. Moreover, holding school officials liable for intentional racial discrimination by means of race-neutral criteria chosen because they harm Asian representation would apparently be improper, because it would discourage them from the vital goal of reducing Asian representation! Pet. App. at 24a. The First and Fourth Circuits, protecting intentional racial discrimination *on the explicit basis that they want to ensure that intentional racial discrimination continues*, have become foxes in the Constitutional henhouse.

Their contention, of course, is false. Put bluntly, the cases on which they purport to rely say no such thing. In *Grutter, Croson*, and *Parents Involved*, the Court applied strict scrutiny. *Grutter*, 539 U.S. at 326, *Croson*, 488 U.S. at 493, *Parents Involved*, 551 U.S. at 720. In each, as part of the Court's assessment of whether the discriminatory policy was sufficiently narrowly tailored to survive strict-scrutiny, it discussed the degree to which the defendant

had considered less discriminatory and race-neutral alternatives. *Grutter*, 539 U.S. at 361-62, *Croson*, 488 U.S. at 509, *Parents Involved*, 551 U.S. at 735. These narrow-tailoring discussions mattered to the Court's decisions only to the extent that a compelling interest had been asserted and held to be in play. They rightly asked whether a lesser afront to equal protection was available that would be preferable to the policies at issue.

In no way did they "bless" the pursuit of "racial diversity" for its own sake, whether through open racial discrimination or through intentional proxies. This Court should take this case and correct the lower court's slander, rather than allow their misrepresentation of the Justices' work to remain unchallenged.

CONCLUSION

Members of all racial groups deserve to be treated the same—and indeed the Constitution demands this equal protection of the laws. The Constitution promises every American that the government will treat him as an individual without regard to his race. But two courts of appeals have now openly deemed some racial groups more equal than others. In the First and Fourth Circuits, the constitutional promise of equal treatment now extends only as far as the collective *failures* of an individual's race. In these circuits, the same illusory promise allows open racists like the Committee to punish someone right up to the point of counteracting the collective successes of that person's perceived racial group. These holdings are

unreasonable, un-American, and immoral. They demonstrate contempt for this Court and the judicial oath.

The petition for a writ of certiorari should be granted, and the would-be architects of a new Jim Crow brought to heel.

Respectfully submitted,

Daniel I. Morenoff
Counsel of Record
The American Civil Rights Project
P.O. Box 12207
Dallas, Texas 75225
(214) 504-1835
dan@americancivilrightsproject.org

Ilya Shapiro
Manhattan Institute
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

Adam E. Schulman
Anna St. John
Hamilton Lincoln Law Institute
1629 K St. NW Suite 300
Washington, DC 20006
(917) 327-2392
anna.stjohn@hlli.org

Counsel for Amici Curiae