No. 23-170

In the Supreme Court of the United States

COALITION FOR TJ, *Petitioner*,

v.

FAIRFAX COUNTY SCHOOL BOARD, *Respondent*.

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

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; AMERICAN HINDU COALITION; AMERICAN FAMILY ASSOCIATION ACTION; AMERICA FIRST POLICY INSTITUTE; AMERICAN PRINCIPLES PROJECT; BLACK LATIN ASIAN KNOWLEDGE POLITICAL ACTION COMMITTEE; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION; EAGLE FORUM; FRONTLINE POLICY COUNCIL; CHARLIE GEROW; GLOBAL LIBERTY ALLIANCE; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; KEN MASUGI, SENIOR FELLOW, CLAREMONT INSTITUTE; MEN AND WOMEN FOR A REPRESENTATIVE DEMOCRACY IN AMERICA, INC.; TIM JONES, YAEL LEVIN-SHELDON, MISSOURI CENTER-RIGHT COALITION; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; MELISSA ORTIZ; POWER2PARENT UNION; PROJECT21 BLACK LEADERSHIP NETWORK; PUBLIC INTEREST LEGAL FOUNDATION; SETTING THINGS RIGHT; STAND UP MICHIGAN; AND YOUNG AMERICA'S FOUNDATION; IN SUPPORT OF PETITIONERS

SUE STRICKLETT
42618 Trade West Dr.
Sterling, VA 20166
(301) 785-1041
sueghosh@stricklettgroup.com

Counsel for American Hindu Coalition

J. MARC WHEAT
Counsel of Record
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W.
Suite 930
Washington, D.C. 20004
(202) 780-4848
mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Board violated the Equal Protection Clause when it altered the admissions criteria for Thomas Jefferson High School for Science and Technology ("TJ").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law. AAF believes that every American has a right to be treated equally by the government, without regard to irrelevant characteristics like race.[1]

The American Hindu Coalition (AHC) is a national nonprofit organization that promotes the civil rights of American Hindus, among which is the right to education opportunities without facing discrimination based on race, color, religion, sex, and national origin. The Fairfax County School Board's policy changes for admission to the prestigious Thomas Jefferson High School for Science and Technology (TJ) has violated the civil rights of Hindu Americans, as a majority of the Asian American students affected are also Hindu. The American Hindu Coalition (AHC), Virginia Chapter is largely comprised of residents of Fairfax County, including members who are TJ alumni, parents who have children that are currently enrolled in TJ, and parents who have children that are enrolled in Fairfax County elementary and middle schools and aspirants for admission to TJ in future admission cycles.

---

[1] All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

This case is important to *amici* American Family Association Action; America First Policy Institute; American Principles Project; Black Latin Asian Knowledge Political Action Committee; Center for Political Renewal; Center for Urban Renewal and Education; Eagle Forum; Frontline Policy Council; Charlie Gerow; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; Ken Masugi, Senior Fellow, Claremont Institute; Men and Women for a Representative Democracy in America, Inc.; Tim Jones, Yael Levin-Sheldon, Missouri Center-Right Coalition; National Center for Public Policy Research; Melissa Ortiz; Power2Parent Union; Project21 Black Leadership Network; Public Interest Legal Foundation; Setting Things Right; Stand Up Michigan; and Young America's Foundation because they believe that the bedrock principle of the Equal Protection Clause of the Fourteenth Amendment is that equal treatment before the law cannot be modified by race or ethnicity.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

America is the greatest country in the world. Most immigrants know that. They come because they see what those born in America so often forget: in America, it does not matter who you are, or who your parents were, or what you look like. If you work hard and treat people as you would wish to be treated, you can build a life for yourself, even from nothing, and in so doing, build the foundation for generations of success for your children and your children's children. In America, there are no arbitrary barriers. There is freedom not only to succeed, but to succeed in the

pursuit to which you are called. At no time in American history has that been true for every person. Yet, American history is the story of all kinds of people demanding not special treatment because of who they are, but to be treated equally regardless of who they are.

This year, we celebrated the 60th anniversary of Dr. Martin Luther King's dream that his children might "one day live in a nation where they [would] not be judged by the color of their skin but by the content of their character."[2] That dream echoes the Equal Protection Clause of the Fourteenth Amendment, which establishes that "no State" shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. In his famous dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Justice Harlan, better than his colleagues, understood the Court's role in safeguarding the dignity of equality before the law.

The debate over how people ought to be judged continues to roil America, but the Equal Protection Clause is clear. Before the law, race does not matter. America's long history of racial injustices were the result of an insistence that it did. In this case, the Fourth Circuit incorrectly applied the Fourteenth

---

[2] Dr. Martin Luther King, Jr., I Have a Dream Speech Transcript,https://www.archives.gov/files/social-media/transcripts/transcript-march-pt3-of-3-2602934.pdf (last visited Sept. 11, 2023).

Amendment's equal protection guarantee. This Court should grant certiorari and reverse.

Thomas Jefferson High School for Science and Technology ("TJ") is one of the best high schools in the country. In the years preceding the events from which this case arose, Asian American applicants, as a group, were highly successful, securing between 65% and 75% of admissions offers. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 876 (4th Cir. 2023). The 2020 release of the demographic information for that year's incoming TJ class sparked controversy because of the small number of admitted black students. *Id.* at 895. The following month, as rioters and looters wreaked havoc on American cities in the aftermath of the death of George Floyd, TJ Principal Ann Bonitatibus sent a message to the school concerning TJ's admissions data. She wrote, "recent events in our nation with black citizens facing death and continued injustices remind us that we each have a responsibility to our community to speak up and take actions that counter racism and discrimination in our society." *Id.* She noted that "the TJ community did 'not reflect the racial composition in [Fairfax County Public Schools],'" and her message called for adopting a curriculum geared toward "prepar[ing] TJ graduates for a truly diverse and culturally responsive world.'" *Id.* at 873, 895 (alteration in original).

The Chair of the Fairfax County School Board ("Board") and a Board member expressed similar sentiments. Board Chair Karen Corbett Sanders said that the Board "'needed to be explicit in how we are going to address the underrepresentation' of Black

and Hispanic students at TJ." *Id.* at 895 Similarly, Board Member Karen Keys-Gamarra said, "we must recognize the . . . unacceptable numbers of African Americans that have been accepted to TJ." *Id.* (internal quotation marks omitted).

As the process of considering new admissions policies proceeded that fall, it was apparently not lost on members of the board that increasing the "representation" of one racial group in a school with limited admissions necessarily hurts students of at least one other race. Nor were they unaware that those harmed by the policy would be Asian Americans. As Judge Rushing explained in her dissent below, "Board members Stella Pekarsky and Abrar Omeish agreed that 'there has been an anti [A]sian feel underlying some of this, hate to say it lol' and that Asian students were 'discriminated against in this process.'" *Id.* at 901 (Rushing, J., dissenting) (alteration in original). Further, those board members believed that the Superintendent "'ha[d] made it obvious' with 'racist' and 'demeaning' remarks' and that he '[c]ame right out of the gate blaming' Asian students and parents." *Id.* (Rushing, J., dissenting) (alteration in original).

After considering proposals to alter TJ's admissions criteria over several months, in December 2020, the Board adopted a new admissions policy designed to admit more black and Latino students. The effect of that policy change was a 26% decrease in offers of admissions for Asian American students compared to the previous year. *Id.* at 902. Though facially race neutral, the background of the policy's adoption demonstrates its intent: to decrease the

number of Asian American students at TJ. Those students' applications were rejected under the new policy, *de facto* even if not *de jure*, not because they were less qualified, but because those in power believed they could make society more equitable by redistributing TJ admissions according to skin color and ethnicity.

As was argued before the Court in *Brown v. Board of Education*, "no State has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2160 (2023) (hereinafter *SFFA*) (quoting Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952)) (internal quotation marks omitted). Yet that is exactly what the Board did here. In response, the Coalition for TJ, an advocacy group interested in the future of TJ, challenged the policy as a violation of the Equal Protection Clause. *Coal. for TJ*, 68 F.4th at 871.

Encouraging or discouraging messages we send to our young people can have a dramatic effect on their lives; "[S]ome emphasis on racism can even be counterproductive." Thomas Sowell, *Social Justice Fallacies*, 27 (1st ed. 2023). Dr. Sowell relates that one young black man considered joining the U.S. Air Force but decided against it because he believed "that the Air Force 'would never let a black man fly a plane.'" *Id.* That young man's life was altered by a lie, and an obvious one given that it came "*decades after there was a whole squadron of black American fighter pilots during World War II*," and after "two black pilots went

on to become *generals* in the U.S. Air Force." *Id.* (emphasis in original). Policies like the one adopted by the Board only serve to make such racist lies a reality. Such policies tell Asian American students that despite their hard work and qualifications, if too many people who look like them are likely to be admitted, they will be barred from an academic opportunity they were otherwise qualified to pursue. Such a message is "cancerous to young minds seeking to push through barriers." *SFFA*, 143 S. Ct. at 2203 (Thomas, J., concurring).

This Court's decision in *SFFA* recognized the essential purpose of the Equal Protection Clause: the protection of individuals from invidious government treatment because of their race or other characteristics irrelevant to a given government action. *See id.* at 2161-62 (majority opinion). This case represents an important opportunity to further clarify the Equal Protection Clause and anchor it in the Western tradition of the dignity of the individual. That principle is likely to come under assault in the near future as colleges, universities, and even high schools like TJ, modify their admissions criteria to accomplish racial discrimination by proxy in a massive resistance campaign to *SFFA*. The Court should grant certiorari so that it may clarify the application of the disproportionate impact factor of *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977) in cases of racial discrimination by proxy. Finally, this Court should grant certiorari because TJ's use of discrimination by proxy and the group-centric understanding of equal protection upon which its constitutionality depends are inconsistent with the fundamental philosophy of American government

expressed in the Declaration of Independence and the Constitution.

ARGUMENT

I. The Court Should Grant Certiorari in this Case to Further Clarify that the Equal Protection Clause Protects the Interest of Individuals, not Groups, in Equal Protection of the Laws.

"[A]dmissions are zero sum." *SFFA*, 143 S. Ct. at 2169. In zero-sum situations, discrimination in favor of the individuals of one racial group is necessarily discrimination to the detriment of the individual members of some disfavored racial group. *See id*. The Equal Protection Clause protects individuals without regard to their group identities; it does not protect government action to manipulate group outcomes. Because the Fourth Circuit assessed this case only in terms of its effects on groups as groups, it failed to address the central question in Equal Protection Clause analysis: whether individuals were treated differently because of their group identity. The Court should grant certiorari in this case to ensure that lower courts apply the Equal Protection Clause for the protection of individuals rather than groups.

A. The Equal Protection Clause of the Fourteenth Amendment protects individuals, not groups, against discrimination.

The Equal Protection Clause of the Fourteenth Amendment establishes that "no State" shall "deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added). Thus, the Equal Protection Clause protects

the right of individuals, "persons," to equal treatment before the law. Its application to groups as opposed to individuals leads to results fundamentally at odds with the language of the Equal Protection Clause, as occurred in this case below.

The fundamental conflict between the group-centric and individual-centric views of the Equal Protection Clause is the difference between equality before the law and mandated equality of outcome. The competing opinions in *SFFA* illustrated that conflict. There, Justice Sotomayor espoused the group-protection view, writing, "In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law." *SFFA*, 143 S. Ct. at 2250 (Sotomayor, J., dissenting). Of course, "making room" for one group, without regard to individual qualification, necessarily displaces more qualified individuals of other groups. To achieve equality of outcome, unequal individuals must be treated unequally.[3] Under this conception of the Equal

[3] People, of course, are all equal in rights and thus are entitled to equal protection under law. However, no two people are equal in any other way. Even children born to the same family have disparate outcomes. "Neither society nor government comprehends or controls all the many and highly varied circumstances—including a large element of luck—that can influence the fate of individuals, classes, races or nations. . .[T]he firstborn child of five-child families constituted 52 percent of the children from such families to become National Merit Scholarship finalists, while the fifth-born child in those families become the finalist just 6 percent of the time." Thomas Sowell, *Social Justice Fallacies*, 102 (1st ed. 2023).

Protection Clause, the individual must either suffer or benefit because of the relative success of his group.

On the other hand, as this Court recognized, "the transcendent aims of the Equal Protection Clause" were "that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States[.]" *SFFA*, 143 S. Ct. at 2159 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880) (internal quotation marks omitted). In other words, under the Equal Protection Clause, the law must apply the same standard to every individual, regardless of race. That reading is consistent with the fundamental purpose of government, which is the protection of individual rights. As this Court said, "Eliminating racial discrimination means eliminating all of it." *Id*. at 2161.

B. The Fourth Circuit panel majority in this case applied the erroneous group protection view of the Equal Protection Clause.

The circuit court, without the benefit of *SFFA*, applied the group protection view of the Equal Protection Clause. In *Arlington Heights*, 429 U.S. 252, this Court laid out a non-exhaustive list of factors to consider when reviewing facially race-neutral government policies which are challenged as racially discriminatory. One of those factors is whether "the official action" "bears more heavily on one race than another." *Id*. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)) (internal quotation marks omitted). In its assessment of that factor, the circuit court rejected the Coalition for TJ's claim of disproportionate impact because even after the

adoption of the new policy, Asian Americans still outperformed every other racial group in admissions. *Coal. for TJ*, 68 F.4th at 881-82.

As the circuit court understood it, "'disproportionate' impact necessitates a relative inquiry among racial groups, not a simple appraisal of one group's performance over time." *Id.* at 881. On that basis, the court assessed disproportionate impact according to, "an evaluation of a given racial or ethnic group's share of the number of applications to TJ versus that group's share of the offers extended . . . compared to how separate, otherwise similarly situated groups fared in securing offers of admission." *Id.* Asian Americans comprised only 48.59% of the applicant pool but received 54.36% of the offers of admission, while every other racial groups' percentage of admissions offers were either nearly equal to, or were less than, their percentage of the applicant pool. *Id.* On this basis, the court concluded, "Asian American applicants were thus the only racial or ethnic group to receive offers notably in excess of its share of the applicant pool in 2021," and thus that, "an application of elementary arithmetic shows that Asian American students, *as a class*, experience no material disadvantage under the policy's functioning." *Id.* at 882 (emphasis added).

Thus, because Asian American individuals *as a group* outperformed every other group in their share of offers of admission as compared to their proportion in the applicant pool, the court found that there was no basis for concluding that the Board's new policy bore more heavily on that group. That his racial group still outperformed all others would undoubtedly be

cold comfort to an Asian American kid who would now be in his senior year at TJ but for the adoption of a policy designed to keep him out.

As shown above, the Equal Protection Clause protects the interest of every individual to be assessed equally before the law regardless of irrelevant characteristics like race. As discussed in Section III below, when the admissions policy at issue here is assessed according to its disproportionate impact on individuals, it becomes clear that the policy violates the Equal Protection Clause. The Fourth Circuit's application of this Court's Equal Protection Clause jurisprudence to Asian American applicants "as a class" rather than to individuals despite their class betrays a fundamental misunderstanding of the Fourteenth Amendment that ought to be corrected in advance of the significant litigation likely to arise after *SFFA*.

II. The Court Should Grant Certiorari Because Lower Courts Are Likely to Face Similar Cases in the Near Future as a Result of the Coming Massive Resistance to *SFFA v. Harvard*.

Some people are determined to discriminate. "[N]either voters nor state officials can end university racial preferences by a single stroke. Like the ancient Hydra of Greek myth, two heads are likely to grow in place of the original." Richard H. Sander, Stuart Taylor, *Mismatch*, 169 (1st ed. 2012). But, as this Court explained last term, "Eliminating racial discrimination means eliminating all of it," and "the prohibition against racial discrimination is 'levelled at the thing, not the name.'" *SFFA*, 143 S. Ct. at 2176

(quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). For that reason, the Court should grant certiorari in this case to make clear that facially race-neutral admissions policies will still be subject to review and will be struck down where they engage in racial discrimination by proxy.

SFFA was an essential step towards equality before the law for all Americans, regardless of race. Yet those who insist on racialized school admissions appear to be marshalling their forces for a massive resistance campaign designed to circumvent the protections afforded by the Equal Protection Clause. In response to *SFFA*, U.S. Secretary of Education Miguel Cardona released a statement claiming that the decision "takes our country decades backward, sharply limiting a vital tool that colleges have used to create vibrant, diverse campus communities."[4] He then encouraged "higher education leaders" to maintain their "commitment to campus communities that reflect the rich diversity of this nation."[5] Similarly, President Biden, in a speech responding to *SFFA*, said America needs "a new path forward" that "protects diversity."[6] President Biden encouraged "our

---

[4] Miguel Cardona, *Secretary Cardona Statement on supreme Court Ruling on College Affirmative Action Programs*, US Dept. of Ed. (June 29, 2023), https://www.ed.gov/news/press-releases/secretary-cardona-statement-supreme-court-ruling-college-affirmative-action-programs

[5] *Id.*

[6] Joe Biden, *Remarks by President Biden on the Supreme Court's Decision on Affirmative Action*, The White House (June 29, 2023, 12:48 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/29/remarks-by-president-biden-on-the-supreme-courts-decision-on-affirmative-action/

nation's colleges" to maintain "their commitment to ensure student bodies of diverse backgrounds," while describing the decision as "a severe disappointment."[7]

Colleges and universities, however, were not waiting for the Administration's encouragement. In the wake of the Court's decision, the president of the American Association of Universities and the heads of many higher education institutions released statements expressing their disappointment in the decision, but assuring their audience that, while they would follow the law, they also remained committed to diversity, by which they meant primarily diversity of skin color, not ways of thinking.[8]

---

[7] *Id.*

[8] *See, e.g.*, Barbara R. Snyder, *AAU President Reiterates the Value of Diverse Campus Communities*, Association of American Universities (June 29, 2023), https://www.aau.edu/newsroom/press-releases/aau-president-reiterates-value-diverse-campus-communities; John J. DeGioia, *Today's Supreme Court Ruling and our Commitment to Diversity, Equity, and Inclusion*, Georgetown University (June 29, 2023), https://president.georgetown.edu/todays-supreme-court-ruling-and-our-commitment-to-diversity-equity-and-inclusion/; Christina H. Paxson, *Brown president responds to Supreme Court's decision on affirmative action*, Brown University (June 29, 2023), https://www.brown.edu/news/2023-06-29/scotus-affirmative-action; Lawrence S. Bacow et al., *Supreme Court Decision*, Harvard University (June 29, 2023), https://www.harvard.edu/admissionscase/2023/06/29/supreme-court-decision/; Christopher L. Eisgruber, *President Eisgruber's statement on the Supreme Court affirmative action decision*, Princeton University (June 29, 2023, 1:31 PM), https://www.princeton.edu/news/2023/06/29/president-eisgrubers-statement-supreme-court-affirmative-action-decision; R. Gerald Turner, *Message from the President*, Southern Methodist University (June 29, 2023)

Several of the presidents' statements express displeasure with *SFFA* and suggest an intent to circumvent it. President Ronald Daniels of Johns Hopkins University described the decision as "a significant setback in our efforts to build a university community that represents the rich diversity of America."[9] President Christopher Eisgruber of Princeton University wrote that *SFFA* was "unwelcome and disappointing" but telegraphed to the Princeton community that the university "has been preparing for this possibility with the assistance of legal counsel."[10] He went on to write that, "[w]hile today's decision will make our work more difficult, we will work vigorously to preserve – and, indeed, grow – the diversity of our community while fully respecting the law as announced today."[11] Similarly, President John DeGioia of Georgetown University wrote, "While we are deeply disappointed in today's decision and will

---

https://www.smu.edu/diversityinclusion/statements-on-diversity-and-inclusion; Marc Tessier-Lavigne, *President's message regarding Supreme Court ruling on race-conscious university admissions*, Stanford University (June 29, 2023), https://news.stanford.edu/report/2023/06/29/presidents-message-regarding-supreme-court-ruling-race-conscious-university-admissions; Peter Salovey, *Supreme Court Decisions Regarding Admissions in Higher Education*, Yale University (June 29, 2023), https://president.yale.edu/president/statements/supreme-court-decisions-regarding-admissions-higher-education; Ronald Daniels, *Johns Hopkins unwavering commitment to diversity*, Johns Hopkins University (June 29, 2023) https://president.jhu.edu/messages/2023/06/29/johns-hopkins-unwavering-commitment-to-diversity/

[9] Daniels, *supra* note 6

[10] Eisgruber, *supra* note 6

[11] *Id.*

continue to comply with the law, we remain committed to our efforts to recruit, enroll, and support students from all backgrounds."[12] There is no reason to be disappointed in a decision striking down racial discrimination unless racial discrimination is the favored policy. These presidents insist they will follow the law while at the same time making clear their intent to find ways of maintaining the *status quo ante*. The only way to accomplish that goal while maintaining apparent compliance with the law is to engage in racial discrimination by proxy.

Efforts at racial discrimination by proxy are not new. In the University of California system, where race-based affirmative action was outlawed by voter initiative 1996, significant efforts and money have been expended to achieve outcomes based on race without resort to facially obvious admissions and rejections according to race.[13]

Further, just as colleges and universities today appear to be organizing a widespread effort to maintain their power to discriminate in contravention of *SFFA* and the Equal Protection Clause, so earlier authorities engaged in massive resistance to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In "1956, Senator [Harry] Byrd coined the term 'Massive Resistance,' and ninety percent of

---

[12] DeGioia, *supra* note 6

[13] Emma Bowman, *Here's what happened when affirmative action ended at California public colleges*, National Public Radio (June 30, 2023, 5:01 AM) https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges

the congressional delegation from the South signed a 'Southern Manifesto,' castigating *Brown* as a 'clear abuse of judicial power' and vowing to reverse it." Carl Tobias, *Public School Desegregation in Virginia During the Post-Brown Decade*, 37 W. & Mary Law Rev. 1261, 1269 (1996). For example, in Virginia, "When a federal district court ordered the Norfolk School Board to assign black children to white schools . . . Governor Lindsey Almond closed the affected schools." Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. Ark. Little Rock L. Rev. 327, 345 (1997).

Nor were courts oblivious to the discriminatory intent of many of the supposedly race-neutral laws they reviewed. The district court in one case found, "Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body." *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 442 (E.D. Va. 1957). Or, as the same court wrote two years later, "We need hardly discuss the factor of race to arrive at the conclusion that this is not equal protection of laws. Equality of treatment is not achieved through indiscriminate imposition of inequalities." *James v. Almond*, 170 F. Supp. 331, 339 (E.D. Va. 1959). Thus, "all eligible children must be accorded equal treatment with respect to admission or attendance in public schools, subject to reasonable rules and regulations dissociated with racial questions." *Id*. As noted above, the sordid race relations of American history have all arisen from the insistence by some that racial differences permit different applications of justice.

The Court should grant certiorari in this case and strike down racial preferences by proxy to preempt their propagation throughout the educational ecosystem. The Court rightly rejected racial discrimination by proxy in *SFFA*. *See* 143 S. Ct. at 2176 (quoting *Cummings*, 4 Wall. At 325 ("'The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'")). It should reiterate its commitment to that doctrine for all those who would continue their racial discrimination behind a mask of race neutrality.

III. The Court Should Grant Certiorari in this Case to Clarify How the *Arlington Heights* Disproportionate Impact Factor Applies to Facially Race-Neutral Admissions Policies.

In *Arlington Heights*, 429 U.S. 252, this Court established factors with which courts are to assess facially race-neutral policies challenged as discriminatory under the Equal Protection Clause. One of those factors was whether "the impact of the official action" "bears more heavily on one race than another." *Id*. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976) (internal quotation marks omitted)). The Court should grant certiorari in this case to clarify the disproportionate impact analysis.

A. The Court should grant certiorari to clarify the disproportionate impact factor so that it ensures that individuals, regardless of their race, are held to the same standard by state actors.

A facially race-neutral policy nonetheless discriminates based on race if it were adopted to

accomplish a discriminatory purpose. *See Arlington Heights*, 429 U.S. at 265-66. When assessing whether a policy were adopted for a discriminatory purpose, whether it "bears more heavily on one race than another" "may provide an important starting point." *Id*.

Mere disparity of outcome does not imply discrimination.[14] The Equal Protection Clause is violated where individuals face different standards because of their race, or where proxies are used to accomplish that goal without direct discrimination. In school admissions, standardized test scores provide a useful tool for measuring discriminatory admissions policies. For example, in *SFFA*, Students for Fair Admissions provided data showing that similarly academically qualified Asian American students were admitted at lower rates than every other racial group. Petition for Writ of Certiorari at 11, *SFFA*, 143 S. Ct. 2141 (2023) (No. 20-1199). In this case, a similar analysis would be relevant. Before the adoption of the new policy, Asian American "students consistently performed better than students of other races on the TJ standardized tests." *Coal. for TJ*, 68 F.4th 897 (Rushing, J., dissenting). However, in the same year the Board adopted its new admissions policy, it also

[14] "In American sports, for example, blacks are very over-represented in professional basketball, whites in professional tennis, and Hispanics in Major League Baseball. In professional hockey, where there are more teams in the United States than in Canada, there are more Canadian players than American players." Thomas Sowell, *Social Justice Fallacies*, 1 (1st ed. 2023).

dropped the standardized test, complicating review of the policy's disparate racial impact. [15]

In such cases, courts should compare racial composition before and after the adoption of the policy to what change in racial composition might have otherwise been expected given the totality of the circumstances. Thus, in this case, where there is no demographic or academic change that explains the sudden drop in offers of admissions to Asian American students, the Court should infer that the policy had a racially disparate impact. The disparity in impact is not simply that different groups were admitted at different rates, but that it was disparate from what would have been expected given a non-discriminatory policy, namely, one centered on objective measures of performance.[16] Because the racial composition of the admitted class changed dramatically from the previous trend, courts should be skeptical. Where, as here, that change is accompanied by clear evidence of

---

[15] "Academic institutions across the country, that proclaim the benefits of affirmative action "diversity," refuse to release data that would put such claims to the test." Thomas Sowell, *Social Justice Fallacies* 123 (1st ed. 2023). Further, "Universities are generally reluctant to make available information on admissions and student outcomes, no doubt in large part because of the large size of racial preferences and the poor outcomes of many students admitted with those preferences." Richard H. Sander, Stuart Taylor, *Mismatch*, 172 (1st ed. 2012).

[16] On the other hand, if a university alters its admissions policy in light of *SFFA*, a change in admissions along racial lines may be the expected outcome. Where such a change does not occur, the court should be skeptical of the continuation of a pre-existing trend just as it should be here of a deviation from the existing trend.

discriminatory intent, courts should apply strict scrutiny.

B. The disproportionate impact of the Board's admissions policy is clear when considered in light of the available data.

In this case, the circuit court's application of the disproportionate impact factor amounted to putting on blinders and taking the narrowest and most mathematically illiterate interpretation of the disproportionate impact factor.[17] The comparison between Asian Americans' representation in the applicant pool and their representation in the group of admitted students is irrelevant to whether individuals from that group have suffered discrimination because of their skin color.

Applying the standard articulated above, the disproportionate impact in this case is clear. In the years preceding the Board's adoption of the new policy, Asian Americans received between 65% and 75% of admissions offers from TJ. *Id*. at 876. For the class of 2024, the first class after the adoption of the policy, Asian American students received only 54% of offers, a 26% decline from the previous year. *Id*. at 892 (Rushing, J., dissenting). Absent an alternative explanation (for example, evidence of a demographic shift in the community or changes in academic achievement in particular groups), this sudden, significant change in racial composition should at

---

[17] The Fourth Circuit's opinion below also creates a circuit split on the application of the disproportionate impact factor, further justifying Supreme Court review. Petition for Writ of Certiorari at 6, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.* (No. 22-1280).

least induce a closer look by the courts. *See Arlington Heights*, 429 U.S. at 267 ("Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence."). Because the context here makes clear the Board's intent to discriminate, and because the evidence shows that the policy accomplished that purpose, the Court should grant certiorari and apply strict scrutiny.

IV. The Court Should Grant Certiorari in This Case Because the Board's Policy is Inconsistent with the Fundamental Justification Underlying American Government.

No person can be presumed to have consented to a government that would treat him differently from others based on arbitrary characteristics. At issue in this case are two competing conceptions of how race should be understood in the United States. Chief Justice Roberts articulated the first: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Ibram Kendi expressed the opposing view: "The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination."[18] In fact, according to Kendi, "The most threatening racist movement is . . . the regular American's drive for a

[18] Ibram X. Kendi, *Ibram X. Kendi defines what it means to be an antiracist*, Penguin Books (June 9, 2020) https://www.penguin.co.uk/articles/2020/06/ibram-x-kendi-definition-of-antiracist

'race-neutral [state]."[19] In Kendi's world, once there has been any individual instance of discrimination, the first domino has fallen and an unending chain of discriminatory retribution into the future is the only equitable remedy.[20] Only the first of these views is consistent with the Equal Protection Clause.

The Declaration of Independence imbues meaning into the later documents of our Republic, including the Constitution. "Governments are instituted among Men," to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). The use of the word "secure" in the Declaration demonstrates "that governments are instituted to secure the preexisting natural rights that are retained by the people." Randy Barnett, *Our Republican Constitution* 41 (1st ed. 2016).

Government, in turn, "deriv[es its] just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). The consent of the governed does not mean majority rule. Rather, "the 'consent of the governed' tells us which government gets to undertake the mission of 'securing.'" the people's natural rights. Randy Barnett, *Our*

---

[19] *Id*.

[20] In summarizing Kendi's *How to be an Antiracist* for his talk at Germanna Community College, college publicists state that the book "argues that neutrality is not an option to the racism struggle—people must take active measures if they wish to end discrimination." Germanna Community College, Facebook (Mar. 16, 2022) https://m.facebook.com/gccva/photos/a.118459220637/10159531669120638/?type=3

Republican Constitution 42 (1st ed. 2016). That consent, in turn, is "presumed." *Id.* at 73-77. As Justice Samuel Chase explained in *Calder v. Bull*,

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

3 U.S. 386, 388 (1798) (Chase, J.) (emphasis in original). If it is "against all reason and justice, for a people to entrust a Legislature," with a certain power, the exercise of that power cannot be justly called law and the legislative acts resulting from that exercise must be overruled. *Id.* ("There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law . . . for the protection whereof the government was established.")

That the people would consent to a government that treats them differently depending on their race is "against all reason and justice." *See id.* The Equal Protection Clause enshrines in law that same principle. That principle is violated where, as here, a government actor treats different individuals differently, as merely representatives of their racial groups. Because all citizens are presumed to have consented to delegate certain powers to the government to secure their own rights, they are all

entitled to be treated as individuals by that government. Because the Board acted contrary to that principle here, the Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Marc Wheat
Counsel of Record
Advancing American Freedom, Inc.
801 Pennsylvania Avenue, N.W. Suite 930
Washington, D.C. 20004
(202) 780-4848
mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae