

No. 26-12

In the
Supreme Court of the United States

ASSOCIATION FOR EDUCATION FAIRNESS,
Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

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

**BRIEF FOR THE BUCKEYE INSTITUTE AND
MOUNTAIN STATES LEGAL FOUNDATION
AS AMICI CURIAE SUPPORTING PETITIONER**

David C. Tryon
Counsel of Record
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

Grady Block
MOUNTAIN STATES LEGAL
FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
GBlock@mslegal.org

QUESTION PRESENTED

Whether a plaintiff alleging that a school district implemented facially-neutral admissions criteria for a racially discriminatory purpose must show that the criteria produced a disparate impact on the targeted racial group before a court may consider evidence of discriminatory intent.

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INTEREST OF AMICI CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

Mountain States Legal Foundation (MSLF) is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to equality under the law, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023);

¹ As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

Coal. for TJ v. Fairfax Cnty. Sch. Bd., 146 S. Ct. 541 (2024) (MSLF serving as counsel for former officials of the U.S. Department of Education’s Office for Civil Rights).

SUMMARY OF THE ARGUMENT

The Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*) established that public schools and those receiving federal funds may not discriminate based on race—even to increase “diversity” in their matriculating students. The Court rejected the use of race by schools in their admissions process. *Id.* at 206 (“Eliminating racial discrimination means eliminating all of it.”). Instead, schools may use only race-neutral admissions criteria, and such criteria may only incidentally involve potential racial considerations. *Id.* at 230 (“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”); *id.* (“But despite the dissent’s assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.”).

However, uncertainty and resistance to *SFFA* emerged immediately. Specifically, several educational institutions read *SFFA* to apply only to direct race-based decision-making on an individual applicant-by-applicant basis. And the U.S. Department of Education under President Biden fed this confusion by appearing to bless racial proxies immediately after the decision.

For years—long before *SFFA* was decided—federal agency guidance has swung between encouraging race-conscious diversity efforts and warning that Title VI forbids preferences, stereotypes, racial proxies, and indirect racial decision-making. Those shifting positions matter here because Title VI applies to public-school districts like Montgomery County Public Schools that receive federal funds. But only this Court—not vacillating agency guidance—can supply certainty on this issue. While one administration may encourage race-conscious efforts, another may forbid them, and schools and students are entitled to know what the law really is.

The lower courts have compounded the uncertainty. In *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864 (4th Cir. 2023) (*TJ*), the Fourth Circuit required plaintiffs challenging facially neutral admissions criteria to show an outsized degree of disparate impact on the disfavored racial group—even if the school was intentionally discriminating based on race. Bound by *TJ*, the Fourth Circuit affirmed dismissal here, even though AFEF alleged that Montgomery County changed its magnet-school admissions with the purpose of changing the racial makeup of the school to the detriment of the Asian American applicants. Other circuit courts have rejected that very approach, looking to the government’s discriminatory intent and the harm to individuals.

The question presented is especially important in K–12 education. Elementary and secondary schools are compulsory and deeply rooted in our Nation’s history. Selective K–12 programs feed advanced

coursework, college admissions, scholarships, and professional pathways. If the Constitution and Title VI prohibit racial balancing in college admissions, the Court should not permit racial proxies earlier in the pipeline to shape which students will be prepared to compete for those opportunities.

This case is an ideal vehicle for resolving an even circuit split on whether a plaintiff challenging a facially neutral admissions policy must show an outsized level of disparate impact, even when the policy was indisputably adopted for a discriminatory racial purpose. The Fourth Circuit's decision turned on a clean legal rule, not a factual record or alternative holding. The Court should nip in the bud the apparent current resistance to *SFFA*'s rejection of racial discrimination.

ARGUMENT

I. The Department of Education's guidance on proxy discrimination measures has vacillated significantly.

Extraordinary and rapid shifts in federal policy undermine consistency and predictability for thousands of schools and millions of students. Similarly, public confidence erodes when civil rights laws are inconsistently interpreted. Schools must confront this confusing landscape against the backdrop of the particularly severe consequences of losing all federal education funds for failure to follow directives from the U.S. Department of Education's Office for Civil Rights (OCR). 34 C.F.R. § 100.8(a).

This potential penalty is especially concerning in light of the conflict between OCR guidance, on one

hand, and the Constitution and civil rights law on the other. The Equal Protection Clause states, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. This constitutional directive was embedded in Title VI of the Civil Rights Act of 1964: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 42 U.S.C. § 2000d-4a. As a public school and recipient of federal funds, Montgomery County Public Schools is subject to both the Equal Protection Clause and Title VI. And with respect to Title VI, the statute reaches “all of the operations of” a local educational agency when “any part” of that agency receives federal financial assistance.

Despite these constitutional and statutory directives, in 2011, the Obama Administration actively encouraged schools to adopt race-conscious policies by counting Justice Kennedy’s concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), with the four dissenters in that case. See U.S. Dep’t of Educ.’s Off. for C.R. & U.S. Dep’t of Justice’s C.R. Div., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* 5 (Dec. 2, 2011) (*2011 ESE Guidance*) (citing *Parents Involved*, 551 U.S. at 788) (Kennedy, J., concurring)) (“In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse

student body, one aspect of which is its racial composition.”). This Court has specifically cautioned against this sort of “vote tallying” of concurrences and dissents. See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) (advising that when the Court is fragmented, “the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.”).

In both the K–12 and college contexts, the Obama Administration predicted that this Court would be “unlikely” to apply strict scrutiny to generalized race-conscious measures that did not classify individual students by race. *2011 ESE Guidance, supra*, at 5; see also U.S. Dep’t of Educ.’s Off. for C.R. & U.S. Dep’t of Justice’s C.R. Div., *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* at 5 n.11 (Dec. 2, 2011).²

In 2018, the new administration’s OCR withdrew the guidance documents published between 2011 and 2016 on the topic of race-conscious policies in a Dear Colleague Letter: “The Departments have reviewed the documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI.” U.S. Dep’t of Educ.’s Off. for C.R. & U.S. Dep’t of Justice’s C.R. Div., *Updates to Department of Education and Department of Justice Guidance on Title VI* at 2 (July 3, 2018).³

² www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf.

³ www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf.

Yet the 2020 election brought another reversal. The Biden Administration’s incoming Assistant Secretary for Civil Rights, Catherine Lhamon, expressly readopted the Obama administration’s prior position that *Parents Involved* recognized compelling interests in promoting student diversity and avoiding racial isolation. See U.S. Senate Comm. on Health, Educ., Lab. & Pensions, Questions for the Record for Catherine Lhamon, Nominee to Be Assistant Secretary for Civil Rights, U.S. Department of Education 14–15 (July 14, 2021).⁴

In 2023, this Court issued its decision in *SFFA*. The Court explained that “the interests [the universities] view[ed] as compelling cannot be subjected to meaningful judicial review,” which included “better educating [Harvard’s] students through diversity.” *SFFA*, 600 U.S. at 214. Indeed, “[t]he interests that [the universities sought], though plainly worthy, are inescapably imponderable.” *Id.* at 215.

The immediate political response reinforced the Biden Administration’s narrow view of *SFFA*. President Biden urged institutions not to “abandon their commitment to ensure student bodies of diverse backgrounds and experience.” Joseph R. Biden, Jr., President, Remarks on the United States Supreme Court Decision on Affirmative Action in College Admissions and an Exchange with Reporters (June 29,

⁴ <https://mslegal.org/wp-content/uploads/2021/08/Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf>.

2023).⁵ Outside groups also went to work trying to convince the public and schools that *SFFA* meant little. The Lawyers’ Committee for Civil Rights Under Law stated that *SFFA* “does not impact K-12 integration efforts” because the decision “only concern[s] higher education admissions,” while also advising that K–12 schools remain free to use race-neutral plans to pursue greater student-body diversity. Lawyers’ Comm. for C.R. Under Law, *Affirmative Action Q&A*.⁶

OCR soon adopted the same narrow interpretation in its official communications, again stating that schools can and should pursue the interest of “diversity.” First, on August 14, 2023, OCR and DOJ jointly published a Dear Colleague Letter, U.S. Dep’t of Educ.’s Off. for C.R. & U.S. Dep’t of Justice’s C.R. Div., *Dear Colleague Letter Re: Resources on Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al. (SFFA cases) (Aug. 14, 2023 DCL)* (Aug. 14, 2023),⁷ and a Questions and Answers Resource document, U.S. Dep’t of Educ.’s Off. for C.R. & U.S. Dep’t of Justice’s C.R. Div., *Questions and Answers Regarding the Supreme Court’s Decision in Students for Fair Admissions, Inc.*,

⁵ <https://www.presidency.ucsb.edu/documents/remarks-the-united-states-supreme-court-decision-affirmative-action-college-admissions-and>.

⁶ <https://www.lawyerscommittee.org/affirmative-action-qa/> (last visited Aug. 18, 2026).

⁷ www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf.

v. Harvard College and University of North Carolina (August 14, 2023 Q&A) (Aug. 14, 2023)⁸.

These documents attempted to side-step *SFFA*'s directives. For instance, in its *August 14, 2023 Q&A*, OCR and DOJ stated schools can use race-conscious measures affecting student demographics if applicants are not directly preferred on race alone:

In particular, nothing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.

August 14, 2023 Q&A at 3.

Then, on August 24, 2023, OCR issued further sub-regulatory guidance, purporting once again to offer the definitive take on how schools can use and consider race, despite the *SFFA* decision. OCR doubled down on the idea that schools may focus on racial diversity, *i.e.*, the racial demographics of their students, so long as their programs and activities are theoretically open to everyone.

[A] program does not violate Title VI merely because it focuses its recruitment efforts on students of a particular race or national origin if the program is open to

⁸ <https://www.ed.gov/media/document/colleague-20230814pdf-35094..pdf>.

all students without regard to race or ethnicity.

U.S. Dep’t of Educ.’s Off. for C.R., *Dear Colleague Letter Re: Race and School Programming* at 11 (Aug. 24, 2023) (*August 24, 2023 DCL*) (citing *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (*Fisher II*), for the proposition that schools may target specific racial groups for admission as a “race-neutral” alternative). But if *SFFA* disqualified racial diversity as a compelling interest, the institutions have no business pursuing it.

Put simply, the *August 14, 2023 DCL*, the *August 14, 2023 Q&A*, and the *August 24, 2023 DCL* revived OCR’s 2011 theory, which is also echoed in the Fourth Circuit’s decision below: these authorities claim that schools may deliberately consider race to knowingly adopt proxies that will help them gerrymander the racial demographics of their student body. This outdated theory wrongly limits *SFFA* to the issue of direct racial preferences in the admissions process.

The vacillation continued in 2025. To its credit, the Trump Administration’s OCR issued a Dear Colleague Letter clarifying that it viewed *SFFA*’s logic as extending beyond admissions decisions. U.S. Dep’t of Educ.’s Off. for C.R., *Dear Colleague Letter Re: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard* (Feb. 14, 2025).⁹ The letter also warned that “some programs may appear neutral on their face,” but that schools may not use other

⁹ <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf>.

means of “determining or predicting a student’s race and favoring or disfavoring such students.” *Id.* at 2–3.

The accompanying Frequently Asked Questions further discussed how OCR would investigate allegations of covert discrimination. OCR stated that it may “analyze different types of circumstantial evidence that . . . raise an inference of discriminatory intent,” including the historical background of the policy, whether the policy reflected a pattern of decisions affecting a particular race, statistics showing disparate racial effects, and whether the school knew the policy could affect students of a particular race. U.S. Dep’t of Educ.’s Off. for C.R., *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act* at 9 (Feb. 28, 2025).¹⁰

But the latest guidance did not resolve the issue. Instead, the District Court for the District of New Hampshire enjoined OCR from enforcing or implementing the 2025 Dear Colleague Letter and associated FAQs. See *Nat’l Educ. Ass’n v. United States Dep’t of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025). The District Court for the District of Maryland then vacated the Dear Colleague Letter and similar guidance in *American Federation of Teachers v. United States Department of Education*, No. 25-cv-00628-SAG (D. Md. Aug. 14, 2025). The Department then agreed to dismissal of the New Hampshire action, acknowledging that the Maryland vacatur applied to the plaintiffs and stipulating that it would not rely on

¹⁰ <https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf>.

the challenged agency actions in any way, including by seeking to enforce their substance through other civil-rights procedures. See Joint Mot. to Dismiss Compl. Without Prejudice Subject to the Terms of the Parties’ Stipulation at 2, *Nat’l Educ. Ass’n v. United States Dep’t of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025) (No. 1:25-cv-00091-LM). The Department further agreed that the certification demand would not be reinstated “in substance even if under a different name.” *Id.*

Sadly, this vacillation proves the point. Agency guidance cannot supply the rule of decision for constitutional questions about race. One administration may encourage race-conscious efforts, another may warn that facially neutral proxies violate Title VI, and a federal court may enjoin the guidance altogether. Only this Court can provide the stable rule needed to determine when facially neutral admissions policies become unconstitutional racial proxies.

II. The Fourth Circuit’s erroneous requirement of disparate impact on groups creates a contradiction in the case law—and deepens a circuit split.

The Court has held that the government may not use facially neutral means to accomplish a racially discriminatory objective. See *SFFA*, 600 U.S. at 230 (“[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows.” (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867))). Findings related to the extent of the disparate impact may be evidence of discriminatory purpose, but it is not the constitutional injury itself. The injury is an action taken because of race that deprives an individual of equal treatment.

The same constitutional concern recently arose in a different civil-rights context. In *Louisiana v. Callais*, 146 S. Ct. 1131, 1142–43 (2026), the State adopted a race-based congressional district after a lower-court order suggested that the Voting Rights Act required it. *Callais* involved an express use of race, not a facially neutral proxy, but it reinforces the same limiting principle: All race-based decision-making is constitutionally suspect, regardless of the method deployed. The Court explained that “allowing race to play any part in government decision making represents a departure from the constitutional rule that applies in almost every other context.” *Id.* at 1143. Thus, Section 2 of the Voting Rights Act could justify race-based redistricting only when there was a strong basis to believe that the jurisdiction had engaged in intentional discrimination. Put simply, the Court’s precedents ask the key question of *whether* race is part of the decision-making, not *how* race is used.

Bound by *TJ*, the Fourth Circuit affirmed the trial court’s dismissal of AFEF’s claim. Pet. App. 3a–4a. But there are two primary issues with *TJ*: First, *TJ* predates *SFFA*.¹¹ Second, it ignored that “the evidence show[ed] an undisputed racial motivation and an undeniable racial result.” *TJ*, 68 F.4th at 892 (Rushing, J., dissenting). Rather, the court in *TJ* created an illogical test requiring Asian American students to show they faced “proportionally more difficulty in securing admission . . . than do students from other racial or ethnic groups.” *Id.* at 881. There,

¹¹ *TJ* was decided on May 23, 2023; *SFFA* was decided one month later.

because Asian students—as a group—secured 54% of the admission offers but represented 48% of the applications, they could not sustain their claim. *Id.* Justices Alito, joined by Justice Thomas, flagged that problem in dissenting from the denial of certiorari, warning that the holding “effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 545 (2024) (Alito, J., dissenting from denial of certiorari).

The First Circuit made the same mistake. In *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of Boston*, 89 F.4th 46, 57–58 (1st Cir. 2023) (*Boston Parent Coalition*), the First Circuit demanded a disparate impact on a racial group—regardless of the discriminatory intent and impact on individuals. Again, members of this Court appropriately dissented from the denial of certiorari, explaining that the circuit court decisions are both “a patently incorrect and dangerous understanding of disparate impact” and “worse yet” are “mistakenly treat[ing] evidence of disparate impact as a necessary element of an equal-protection claim.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 145 S. Ct. 15, 17 (2024) (Alito, J., joined by Thomas, J., dissenting from denial of certiorari).

By contrast, the Second and Third Circuits properly rejected the need for plaintiffs to prove disparate impact in equal-protection challenges to facially neutral admissions policies. In *Chinese American Citizens Alliance of Greater New York v. Adams*, 116 F.4th 161, 173–74 (2d Cir. 2024), the

Second Circuit held that plaintiffs need not show an aggregate disparate impact on Asian American students if they can show discriminatory intent and harm to individual students. And in *Sargent v. School District of Philadelphia*, 165 F.4th 727, 745 (3d Cir. Feb. 2, 2026), the Third Circuit expressly rejected the First and Fourth Circuits’ disparate-impact analyses, holding that facially neutral zip-code preferences may trigger strict scrutiny when adopted for racial effects and when they disadvantage students because of race.

The First and Fourth Circuits’ rulings do more than mischaracterize the role of disparate impact. Those rulings perversely convert the aggregate success of an ill-defined racial group into a defense to intentional discrimination against its individual members. Under that rule, government officials may deliberately reduce a group’s representation so long as the “group”—which itself may include numerous cultures and countries of origin—continues to perform well enough in comparison with others. The Constitution does not permit government officials to intentionally burden members of a racial group until that group’s aggregate performance falls below some judicially acceptable threshold. Laws that discriminate based on race “or a proxy for race,” are “hallmarks of the race-conscious Jim Crow era [and] are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate.” *SFFA*, 600 U.S. at 251 (Thomas, J., concurring).

This Court denied review in both *Coalition for TJ* and *Boston Parent Coalition*. At the time, no court of appeals had taken the contrary view, and the question was still percolating. That is no longer so. Since the

last denial, two circuits have adopted the opposing rule, and the Third Circuit has explicitly stated that it “cannot abide the First and Fourth Circuit’s flawed disparate impact analyses.” *Sargent*, 165 F.4th at 745. The disagreement is not implicit. One court of appeals has told two others, in as many words, that they are wrong.

The timing removes any remaining doubt. In February 2026, the Third Circuit revived an equal-protection challenge to a Philadelphia admissions policy that used zip-code preferences to alter the racial composition of selective high schools. The very next day, the Fourth Circuit affirmed the dismissal of a materially similar challenge to Montgomery County’s magnet-school admissions—in an unpublished, *per curiam* order. Two federal courts of appeals reached opposite results on consecutive days. This is not a question in need of further development. It is a settled disagreement that only this Court can resolve.

Delay carries a cost that further percolation cannot offset. Each admissions cycle conducted under the Fourth Circuit’s rule denies seats to individual children on the basis of race and forecloses any forum in which the district’s purpose can be tested. The children in these systems will not get those years of education back.

The Court should make clear that equal protection does not depend on how successfully other members of a plaintiff’s racial group continue to perform.

III. The Court should make clear that *SFFA*'s ban on racial discrimination applies to K-12 education.

Some organizations have characterized *SFFA* as concerning only higher-education admissions or as leaving the legal landscape for K-12 schools unchanged. See, e.g., Lawyers' Comm. for C.R. Under Law, *supra* (stating that the *SFFA* decisions "do not impact K-12 integration efforts, as they only concern higher education admissions"); Sarah Hinger, *Moving Beyond the Supreme Court's Affirmative Action Rulings*, ACLU (July 12, 2023)¹² (stating that the decisions "do not alter the legal landscape for K-12 education"). The First Circuit has held that *SFFA* did not change the law governing facially neutral secondary-school admissions policies. See *Boston Parent Coalition*, 89 F.4th at 60–63. Those competing understandings underscore the need for this Court to make clear that *SFFA*'s constitutional rule extends throughout public education and cannot be avoided through facially neutral proxies selected for racial ends.

Elementary and secondary education is not a lesser constitutional concern than higher education. This Court has long recognized that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance," *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), and that education is "perhaps the most important function of state and local governments," *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). That recognition

¹² <https://www.aclu.org/news/racial-justice/moving-beyond-the-supreme-courts-affirmative-action-rulings>.

has deep historical roots. By the time that the Fourteenth Amendment was ratified, “more than thirty of the thirty-seven states had guaranteed a right to a free public school education,” and today all fifty state constitutions impose duties to provide public education. See Steven Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in A Modern-Day Consensus of the States?*, 94 Notre Dame L. Rev. 49, 143–44 (2018).

The Equal Protection Clause’s prohibition on race discrimination is especially important in public K–12 schools. Unlike colleges, elementary and secondary schools operate against the backdrop of compulsory-attendance laws and state authority over children. This Court recently reaffirmed that public schools are not merely an ordinary government service; they involve “direct, coercive interactions between the State and its young residents.” *Mahmoud v. Taylor*, 606 U.S. 522, 557 (2025). And the State has no general power to “standardize its children” through public education. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). If the government may not sort college applicants by race, it cannot use racial proxies even earlier in the educational pipeline to determine which children receive the preparation needed to compete for those same opportunities.

SFFA, therefore, cannot be confined to college admissions. Selective K–12 programs shape students’ educational trajectories by determining access to advanced coursework, specialized instruction, competitive secondary-school placements, and preparation for college. Carrie E. Miller & Meredith

Phillips, *Long-Term Consequences of Early Access to Educational Opportunity*, 62 Am. Educ. Rsch. J. 651, 655–56 (2025) (finding that access to advanced middle-school mathematics placed students on a path toward more rigorous high-school coursework, greater college readiness, and increased enrollment at four-year colleges). Race-based decision-making at that stage does not become harmless because it occurs earlier; it may be more damaging because it shapes the pool of students who will later compete for higher education.

IV. Lower courts cannot “under-rule” this Court.

Lower courts may not narrow this Court’s precedents from below. Commentators have observed that “[l]ower courts supposedly follow Supreme Court precedent—but they often don’t. Instead of adhering to the most persuasive interpretations of the Court’s opinions, lower courts often adopt narrower readings.” Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016). The dangers of such narrowing or “under-ruling” are best expressed by Justice Rehnquist: “[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.” *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Lamentably, some of our jurisprudential history demonstrates how obdurate lower court judges can frustrate those constitutional rights that are unfashionable. Some of the most shameful examples of lower courts “under-ruling” this Court’s clear

holdings occurred immediately following this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite the Court's holding that separate but equal facilities were inherently unequal, numerous courts clung to the discredited rule, taking great pains to avoid *Brown's* conclusion. See, e.g., *Flemming v. S.C. Elec. & Gas Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955) (holding that *Brown* applied only to "the field of public education"); *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954) (upholding a "whites only" swimming facilities), *rev'd sub nom. Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd* 350 U.S. 877 (1955).

This Court confronted the school-segregation problem again in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Even after the board adopted a facially neutral "freedom-of-choice" plan, no white child chose to attend the historically Black school, and that school remained 100% Black. *Id.* at 441. This Court rejected that formalism and required a plan that "promises realistically to work, and promises realistically to work now." *Id.* at 439. *Green* illustrates that this Court sometimes must return to a constitutional rule it has already announced when lower courts and local officials fail to give that rule full effect.

Green did not end the school segregation matter. This Court had to intervene again the next year, explaining that the "all deliberate speed" timeline from *Brown* was "no longer constitutionally permissible" and that school districts were required to "terminate dual school systems at once." *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

Two years later, the Court again addressed the remedial consequences of *Brown*, explaining that desegregation plans must be “reasonable,” “feasible,” “workable,” “effective,” and “realistic.” *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). Only after those repeated interventions did desegregation begin to accelerate in practice. A 1977 U.S. Commission on Civil Rights report found that, among districts with at least 5% non-White enrollment and more than 1,500 students, the number of students in highly segregated districts fell from about 14 million in 1968 to 4.6 million in 1972. U.S. Comm’n on C.R., *Reviewing a Decade of School Desegregation 1966–1975: Report of a National Survey of School Superintendents* 59–60 tbl. 4.3 (1977).

While lower courts have not expressly rejected *SFFA*, they have confined its force to policies that classify applicants explicitly by race. In *TJ*, *Boston Parent Coalition*, and now this case, school officials adopted facially neutral admissions criteria, but in reality, they intended to, and did, alter the racial composition of the admitted class to reduce the number of individuals of a disfavored race who would be admitted. This Court should not allow *SFFA* to travel the same lengthy path as *Brown*. It took seventeen years, from *Brown* to *Swann*, for the Court to confront fully the ways lower courts had narrowed and resisted *Brown*’s command. That history counsels prompt intervention here to make clear that *SFFA* cannot be avoided by replacing express racial classifications with facially neutral criteria selected for the purpose of racial balancing.

V. This case is an ideal vehicle to clarify that *SFFA* cannot be avoided through facially neutral racial proxies.

“Many universities have for too long wrongly concluded that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation’s constitutional history does not tolerate that choice.” *SFFA*, 600 U.S. at 231. This case is an ideal vehicle to enforce that principle in the K–12 setting. The Fourth Circuit affirmed dismissal based on *TJ*’s pre-*SFFA* rule requiring plaintiffs challenging facially neutral admissions policies to plead some legally cognizable level of disparate impact on a group before he or she may assert a claim for intentional racial discrimination.

Montgomery County Public Schools have engaged in racial discrimination since at least 1999. In that year, the Fourth Circuit struck down district’s race-based transfer policy, declaring that “Montgomery County employs a race-conscious nonremedial transfer policy which amounts to racial balancing.” *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Pub. Schs.*, 197 F.3d 123, 128 (4th Cir. 1999). In 2016, the Montgomery County Public Schools began to implement a new, allegedly “facially neutral” admissions process for its highly selective magnet schools to move admissions outcomes closer to its preferred racial demographic numbers.

But the district’s board’s public discussions reinforce that it had a discriminatory intent. Board members questioned whether a “blind and neutral” process would produce the “equitable” results the

district desired, and one board member asked whether “some form of affirmative action, either socio-economic or racial” could be implemented. See Pet. App. 64a. District officials openly discussed their desire to alter admissions criteria to achieve “equitable” admissions—apparently in preference to the then existing merit-based admissions. Compl. ¶ 37. Since then, the Board has repeatedly revamped its admissions criteria with the intent to reach its preferred racial makeup of the student body. See Compl. ¶¶ 35–81.

The numbers evidence more than a coincidental change in demographics in school admissions. At the Takoma Park school, the weighted Asian American proportion of admitted students fell from 45.6% before the field test of the new admissions process to 31.5% after; at Eastern, it fell from 31.4% to 21.8%; at Upcounty STEM/Clemente, it fell from 66% to 50.6%; and at Upcounty Humanities/MLK, it fell from 58.2% to 30.3%. Pet. App. 71a–72a. While disparate impact alone should not be actionable, these stark declines are evidence of discriminatory intent impacting specific individuals. The Fourth Circuit seemingly acknowledged this as evidence of discriminatory intent, but it nevertheless found that those precipitous declines did not satisfy *TJ*’s disparate impact requirements. Pet. App. 3a–4a. This case presents the Court with a clean vehicle to resolve a deepening circuit split and drive the law forward.

CONCLUSION

The Fourth Circuit requires an injured plaintiff to show that a significant—and undefined—number of other members of his or her race have also been affected. But, the Fourteenth Amendment protects “persons,” not groups: “No State shall . . . deny any person within its jurisdiction the equal protection of the laws,” U.S. Const. amend. XIV, § 1. Students “must be treated based on [their] experiences as an individual—not on the basis of race.” *SFFA*, 600 U.S. at 231. In *SFFA*, the Court rejected the idea that a school district may adopt specific measures to engage in proxy discrimination in favor of certain racial groups—to the disadvantage of members of other racial groups: “[W]hat 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.” *Id.* at 230 (internal quotation marks omitted).

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand.

Respectfully submitted,

David C. Tryon
Counsel of Record

Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

Grady Block
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado
80227
(303) 292-2021
GBlock@mslegal.org

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