No. 23-170

In the Supreme Court of the United States

COALITION FOR TJ,
Petitioner,
v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is whether public schools can avoid the Equal Protection Clause's prohibition on racial discrimination in student admissions through purportedly race-neutral schemes.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because it concerns government treating people as members of racial groups rather than as individuals, as is required by the Fourteenth Amendment.

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Thomas Jefferson High School for Science and Technology—known to students, parents, and alumni as TJ—showcases the continuing viability of the American Dream. TJ is the top-ranked public high school in the nation and a magnet school for gifted STEM students in Northern Virginia. With a student body that is 79% minority (including a large number of students from immigrant backgrounds), TJ is a testament to America as a land of opportunity for everyone.[2]

According to government statistics, in 2020 73% of TJ's admitted students were classified as Asian American. Yet this label fails to capture the rich diversity of TJ's Asian American students, who come from families representing at least thirty different countries, each with unique cultures, languages, and traditions.[3]

In the spring of 2020, the Fairfax County School Board decided that TJ's student body did not reflect the "right kind" of diversity. To that end, the Board drastically overhauled TJ's admissions scheme. Throughout the process, the Board stated explicitly on many occasions that its goal was to change the racial composition of the school. Pet. at 7–9. And the Board succeeded in its goal, reducing the percentage of Asian students admitted to TJ from 73% to 54%. Pet. at 10.

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[2] Erin Wilcox, *Parents sue to stop discriminatory admissions at top-ranked high school*, THE HILL (Mar. 10, 2021), https://tinyurl.com/36v6rpf6.

[3] *Id.*

The racial motivation of the Board cannot seriously be doubted. However, the final admissions plan the Board adopted did not explicitly rely on race, but resorted to "race-neutral" proxies to accomplish the Board's racial goal.

In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, this Court unambiguously held that the Constitution's Equal Protection Clause does not permit public schools to engage in racial balancing. 143 S. Ct. 2141 (2023)[hereinafter *SFFA*]. Furthermore, the Court reaffirmed that when it comes to racial preferences, "[W]hat cannot be done directly cannot be done indirectly." *Id.* at 2176.

Unfortunately, university administrators and government officials throughout the country—including multiple state governors and the President of the United States—are openly signaling their intent to subvert this Court's decision and to continue racial balancing, albeit covertly. The Court should grant certiorari to prevent further violations of the Fourteenth Amendment's promise of equality before the law.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE GOVERNMENT FROM ENGAGING IN COVERT DISCRIMINATION.

Multiple university administrators, K–12 schools, governors, and even the President have signaled their intent to drive racial preferences underground so they cannot be detected. In *Cooper v. Aaron*, this Court held that "the constitutional rights of children not to be discriminated against in school admission on grounds

of race . . . can neither be nullified openly and directly . . . nor nullified indirectly . . through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" 358 U.S. 1, 17 (1958) (quoting *Smith v. Texas*, 311 U.S. 128, 132 (1940)). *SFFA* affirmed the same principle: "[W]hat cannot be done directly cannot be done indirectly . . . the prohibition against racial discrimination is 'levelled against the thing, not the name.'" *SFFA*, 143 S. Ct. at 2176 (quoting *Cummings v. Missouri*, 71 U.S. 277, 325 (1867)). This Court should grant review to make clear that proxies for race that result in unequal treatment are just as impermissible as overt preferences.

A. Prominent public university officials have urged universities to hide their racial preferences.

The Association of American Law Schools (AALS) boasts on its website that it is a "nonprofit association of 176 member and 18 fee-paid law schools. Its members enroll most of the nation's law students[.]"[4] On July 10, 2023, less than two weeks after the Court's ruling in *SFFA*, the AALS held a "Conference on Affirmative Action." The purpose of this conference was, in the words of conference host Dean Erwin Chemerinsky, "to help each other as we go forward to achieve diversity without affirmative action."[5]

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[4] *About Us*, THE ASS'N OF AM. L. SCHS., https://tinyurl.com/2p98a4xv (last visited Sept. 14, 2023).

[5] Assn. Am. L. Schs., *AALS Conference on Affirmative Action, Welcome & Panel 1*, YOUTUBE (Aug. 2, 2023), https://tinyurl.com/5ffx586w (at 8:34) [hereinafter Assn. Am. L. Schs., *Panel I*].

Erwin Chemerinsky is the dean of the University of California, Berkeley School of Law. In November 2022, Chemerinsky told a reporter:

> What colleges and universities will need to do after affirmative action is eliminated is find ways to achieve diversity *that can't be documented as violating the Constitution*. So they can't have any *explicit* use of race. They have to make sure that their admissions statistics don't reveal any use of race. *But they can use proxies for race*.[6]

During the AALS conference, Chemerinsky continued to advocate for the use of proxies to achieve racial goals, drawing on his own experiences in California, where racial preferences in higher education have been nominally prohibited since 1996.[7] Said Chemerinsky:

> So when I was at UC Irvine, we created a program for college students from disadvantaged backgrounds. A student in order to qualify for this—it was a program—you had to have a family income of twice the poverty level or less. It overwhelmingly was enrolled by students of color. But I think that that would be permissible. We created a program for high

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[6] Jay Caspian Kang, *The Sad Death of Affirmative Action*, THE NEW YORKER (Nov. 4, 2022) (emphasis added), https://tinyurl.com/yc7mrnyc.

[7] In reality, California's universities have engaged in "unrelenting resistance to the 1996 voter initiative, in every way possible short of patent violation." *See* Heather Mac Donald, *California passed an anti-affirmative action law, and colleges ignored it*, N.Y. POST (Sep. 1, 2018, 12:15 PM), https://tinyurl.com/53bv7jey.

> school students targeting particular high schools. Those high schools happened to be 99% students of color. But the program was itself facially race neutral.[8]

Chemerinsky was not the only AALS speaker to support such policies. Vice President and General Counsel for the University of Michigan Timothy Lynch asked "How do we approach *race-conscious but also race-neutral* means to achieve greater, or at least protect, diversity gains?"[9]

Chemerinsky and Lynch both pointed specifically to Thomas Jefferson High School as a potential model for universities to follow in the wake of *SFFA*. Said Chemerinsky:

> One of the things that several of you just referred to is, what about proxies that might yield diversity? Tim, you were talking about the Thomas Jefferson case out of the Fourth Circuit that may be going to the Supreme Court. Some of the questions that we got that were submitted earlier this morning: the school has a motive of having a more racially diverse school body, but uses race-neutral means like Texas' six percent plan. Given the race-conscious motive, would such a plan pass constitutional muster? Another person wrote, if a school uses a race-neutral criterion as a proxy for race, and the school knows its use is to make the school more racially diverse, must the

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[8] Assn. Am. L. Schs., *Panel 1*, *supra*, at 1:24:38.

[9] Assn. Am. L. Schs., *AALS Conference on Affirmative Action: Panel 3*, YOUTUBE (Aug. 2, 2023) (emphasis added), https://tinyurl.com/ycxcyr59 (at 2:39).

> school genuinely value diversity with respect to that criteria, e.g. zip code, and if not, isn't that likely to be labeled as pretextual?[10]

In his response, Vice President Lynch was frank about the actions of the Fairfax County School Board:

> In 2020 they made a decision to take race-neutral means, but as a way to be race-conscious about increasing diversity. So in some ways akin to the Texas model they decided to move away from feeder schools, by creating percentages for various middle schools in Northern Virginia. And as a result they did increase diversity among African American, Hispanic students. For Asian American students, the numbers did decrease in some ways. But so the question was—there was an effort here to increase diversity. It did have an impact on reducing the number of Asian Americans, but the means were neutral.[11]

Lynch approved of this scheme and encouraged other schools to adopt similar methods: "[I]n terms of what law schools should be doing, they should be thinking about the first statement [Chief Justice] Roberts made, which is, trying to take opportunities to increase diversity through race-neutral means."[12]

When it comes to questions of race and discrimination, the Court has long noted that the government is not always forthcoming about its true intentions. But interestingly, the school officials were

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[10] *Id*. at 6:52.

[11] *Id*. at 8:40.

[12] *Id*. at 10:12.

candid that they would continue to pursue racial balancing, the very thing forbidden by *SFFA*.

At the AALS affirmative action conference, Vice President Lynch alluded to "racially conscious but also race-neutral" approaches, acknowledging the Chief Justice's warning against "having a backdoor approach."[13] In a highly revealing digression, Lynch warned conference listeners to watch what they say, lest the unconstitutional aims be made subject to constitutional scrutiny:

> Whatever you do, you should be aware right now of the record you're creating. The record your faculty is creating. The more you have—do law school faculty members, who generally have a great understanding of the law, sometimes speak in ways that does not reflect the current state of the law? Well as a general counsel at a university, I could only speculate that that is possible. [Laughter] You all are really the best understanders of the law in the world. But what record are you creating? What are your faculty saying in emails? What are they saying in public? Because the Thomas Jefferson case, as you see in the dissent—they look for text messages, they look for anything that could be used as evidence of discriminatory intent.[14]

Lynch emphasized the importance of having a "race-neutral" cover story for race-conscious policies: ["T]he key question in terms of creating the record is,

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[13] *Id*. at 10:30.

[14] *Id*. at 10:36.

what can you *say* right now is the race-neutral explanation for doing it? And *how do you avoid having your faculty muddy the record*?"[15] Chemerinsky agreed:

> That's why I pretty much agree with Tim and others who said, *how this is presented* becomes so important. If it's *presented* with strong race-neutral justifications, I think it's much more likely to be allowed. And I think it's very important not to talk about it in terms of it being an attempt to circumvent the decision. [16]

While Chemerinsky emphasized the importance of keeping the record clear of any statements indicating a desire on the part of university officials to engage in racial discrimination, this is easier said than done. In June 2023, shortly before the AALS conference, video surfaced of Chemerinsky admitting that UC Berkeley Law School practices "unstated affirmative action," at least in faculty hiring.[17] Chemerinsky frankly explained the practice and how it is kept off the record:

> What I mean by unstated affirmative action is, what if the college or university doesn't tell anybody, doesn't make any public statements, but still wants to do it. I'll give you an example from our law school—but if ever I'm deposed I'm going to deny I said this to you. When we do faculty hiring, we're quite conscious that diversity is important to us. And we say

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[15] *Id*. at 12:41 (emphasis added).

[16] *Id*. at 23:43 (emphasis added).

[17] Alexander Hall, *Dean caught saying Berkeley Law uses 'unstated affirmative action:' 'I'm going to deny I said this'* FOX NEWS (June 30, 2023, 9:37 PM) https://tinyurl.com/43krhnfr.

> diversity is important, it's fine to say that. But, I'm very careful when we have a faculty appointments committee meeting. Any time somebody says, you know, we should really prefer this candidate over this candidate, because this person would add to diversity—don't say that! You can think it, you can vote it, but our discussions are not privileged, so don't ever articulate that that's what you're doing![18]

Dean Chemerinsky and Vice President Lynch are influential figures at two of the nation's top public law schools. This Court should grant cert to send the message that it meant what it said in *SFFA*, and that government actors may not thwart the Equal Protection Clause by discriminating covertly.

B. University presidents across the nation have issued statements indicating their desire to subvert *SFFA*.

Harvard University, perhaps America's most famous institution of higher learning and one of the parties whose admissions policies were struck down in *SFFA*, issued a statement on the same day as the Court's decision.[19] The statement, signed by Harvard President Lawrence Bacow and many other Harvard officials, clearly indicated Harvard's displeasure with the outcome in *SFFA* and demonstrated that rather than giving up federal funding and freeing itself of its obligations under Title VI, Harvard plans to continue

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[18] *Id.*

[19] Statement, Lawrence Bacow, President, Harvard University, Supreme Court Decision (June 29, 2023), https://tinyurl.com/2j5dvm47.

racially discriminatory admissions policies, but covertly.

In what has become a common theme of several universities' public statements about *SFFA*, Harvard officials singled out what they apparently viewed as a potential loophole within the decision which would permit Harvard to continue offering racial preferences:

> The Court also ruled that colleges and universities may consider in admissions decisions "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." We will certainly comply with the Court's decision.[20]

Harvard's promise to "comply" was meant to be tongue in cheek. But the president failed to acknowledge the Court's unambiguous and clear statement that "universities may not simply establish through application essays or other means the regime we hold unlawful today." *SFFA*, 143 S. Ct. at 2176.

In the wake of *SFFA*, Sarah Lawrence College issued a new essay prompt asking how the decision might impact the applicant's life. As law professor Anthony Kreis has noted, questions like this will "disproportionately elicit responses from people about their backgrounds as nonwhites, and I think that's really quite obviously the point."[21] But "[a]t the same time, it's vague and open enough that the college can

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[20] *Id.*

[21] Liam Knox, *Prompting Discussion or Tempting Litigation,* INSIDE HIGHER ED (July 20, 2023), https://tinyurl.com/yuvw8vs8.

quite easily point to it and say, 'Well, anybody can offer their viewpoints on this, no matter their background.'"[22]

Yale University's statement on *SFFA* similarly indicated the school's intent to stay the course. In his statement, Yale President Peter Salovey not only expressed his "strong disagreement with the Court's decisions," he stated that "The Court's decisions may signal a new interpretation, but Yale's core values will not change."[23] Salovey made clear what he meant by "core values": "We will continue to foster diversity in its many dimensions and will use all lawful means to achieve it."[24]

The State University of New York (SUNY) issued an openly combative statement, beginning with the accusation: "Today, the US Supreme Court attempted to pull our nation backwards in the journey towards equity and civil rights[.]"[25] The statement struck a defiant tone:

> The commitment to diversity, equity, and inclusion will continue to be a factor in every goal we pursue, every program we create, every

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[22] *Id*.

[23] Statement, Peter Salovey, President, Yale University, Supreme Court Decisions Regarding Admissions in Higher Education (June 23, 2023), https://tinyurl.com/3u67jkph.

[24] *Id*.

[25] Press Release, John B. King, Jr., Chancellor, State University of New York, Chancellor King and SUNY Board of Trustees on SCOTUS Decision on Race Conscious Admissions Cases (June 29, 2023), https://tinyurl.com/45zy4xuh.

> policy we promulgate, and every decision we make.[26]

Columbia University issued a more cautious statement, saying:

> We are reviewing the Supreme Court's decision and will refrain from commenting further until we fully understand its implications. As we prepare to comply with the law, our commitment to our values is unwavering. Diversity is a positive force across every dimension of Columbia, and *we can and must find a durable and meaningful path to preserve it*.[27]

So long as schools continue to define "diversity" in terms of "racial diversity," they will look for ways to get the racial balance they want.

None of this is surprising. The government has long been recalcitrant when it comes to equality. After California passed Prop 209 banning racial preferences in public education and employment, the state implemented various proxies for race, including socio-economic preferences.[28] Notably, these schools chose socio-economic factors over a straight economic

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[26] *Id*.

[27] Announcement, Columbia University in the City of New York, Columbia Issues Statement on Affirmative Action Cases (July 5, 2023) (emphasis added), https://tinyurl.com/yrpuzfn5.

[28] *See* Mac Donald, *supra* note 7.

preference since economic preference, alone, would have led to a balance that officials did not like.[29]

Universities and even Thomas Jefferson are not alone in their desire to make use of proxies. K–12 schools in New York, Boston, and Maryland have also employed proxies in attempts to get their preferred racial balance.[30] It is vital that the Court provide clear guidance to the effect that indirect racial discrimination will not be tolerated as a method of circumventing or subverting *SFFA*.

C. Government officials—from state governors to President Biden—are encouraging universities to evade the law.

Government officials in high office have also signaled their intention to defy or subvert *SFFA*. California Governor Gavin Newsom unequivocally condemned *SFFA*, saying: 'Right-wing activists—including those donning robes—are trying to take us back to the era of book bans and segregated campuses."[31] Newsom even appeared to suggest that the state of California will not follow *SFFA*, saying: "[N]o court case will ever shatter the California dream

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[29] *Id*.

[30] John Yoo & Erin Wilcox, *If Supreme Court ends affirmative action in higher education, here's what the left could try next*, FOX NEWS (Oct. 28, 2022, 5:00 AM), https://tinyurl.com/3fk9837t.

[31] Statement, Gavin Newsom, Governor, State of California, Governor Newsom Condemns Supreme Court's Majority Opinion on Affirmative Action (June 29, 2023), https://tinyurl.com/4ztsppep

. . . our commitment to diversity, equity, and equal opportunity has never been stronger."[32]

Governor Jay Inslee of the State of Washington all but declared his intention to ignore the Supreme Court. Said Inslee:

> These Republican-appointed judges have again shown their disdain for well-established principles of American law. They've demonstrated they are blind to the fact that our long history of racism contributes to the opportunity barriers ethnic minorities still face today. Our state will continue advancing the cause of equity in higher education and government. As with past rulings from this court that have made our society less equitable for women, people of color, and other marginalized communities, Washington state will respond however necessary to continue advancing Dr. Martin Luther King Jr.'s vision of the arc of the moral universe that bends toward justice.[33]

On the east coast, Governor of New Jersey Phil Murphy also condemned *SFFA* and the Supreme Court: "Sadly, this decision is yet another way in which the U.S. Supreme Court is taking our country backwards . . . The Supreme Court's decision does not reflect the values of New Jersey."[34] Governor Murphy

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[32] *Id.*

[33] Statement, Jay Inslee, Governor, State of Washington, Inslee statement on SCOTUS ruling gutting affirmative action (June 29, 2023), https://tinyurl.com/mryfc975.

[34] Statement, Phil Murphy, Governor, State of New Jersey, Statement from Governor Murphy on the U.S. Supreme Court

went on to say that "My administration remains committed to advancing equity in every area of our society, and will be working with our partners in higher education to determine ways to promote equitable admissions within the constraints of this ruling."[35] In other words, likeminded politicians and university officials are collaborating.

Governor Maura Healey of Massachusetts issued a similarly combative statement: "Today's Supreme Court decision overturns decades of settled law. In the Commonwealth, our values and our commitment to progress and to continued representation in education are unshakable."[36] The statement was signed by many officials of Massachusetts institutions of higher education.

In New York, Governor Kathy Hochul called *SFFA* "a dark day for democracy and equality."[37] Governor Hochul was surprisingly candid about her attitude: "[W]e go forth to ensure New York remains a place where we celebrate diversity, inclusion, and we're going to continue to subscribe to those principles

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Decision on Affirmative Action (June 29, 2023), https://tinyurl.com/4cuxdvpd.

[35] *Id.*

[36] Press Release, Maura Healey, Governor, Commonwealth of Massachusetts, Healey-Driscoll Administration Releases Joint Statement in Response to Supreme Court Decision on Race-Based Admissions (June 29, 2023), https://tinyurl.com/yfzxuzb3.

[37] Nick Reisman, *New York reacts to top court's affirmative action ruling*, SPECTRUM LOC. NEWS (June 29, 2023), https://tinyurl.com/ynyh9ekc.

regardless of the decisions made by the Supreme Court of the United States."[38]

President Biden, in his role as chief executive of the United States, has also unequivocally condemned *SFFA*. In a press conference, the President said: "The Court has effectively ended affirmative action in college admissions. And I strongly—strongly disagree with the Court's decision."[39]

President Biden was not content merely to express his disagreement with the Court's holding. Rather, his words expressed a clear intention to fight the decision: "We cannot let this decision be the last word. I want to emphasize: We cannot let this decision be the last word."[40] "We can't go backwards."[41] "[]I know the Court's decision is a severe disappointment to so many people, including me, but we cannot let the decision be a permanent setback for the country.[42]" "We have to find a way forward."[43]

Like many others, President Biden pointed to a part of Chief Justice Roberts's opinion which Biden appeared to believe could authorize continued race-conscious admissions policies:

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[38] *Id*. (emphasis added).

[39] President Joe Biden, Remarks by President Biden on the Supreme Court's Decision on Affirmative Action (June 29, 2023), transcript available at https://tinyurl.com/4tacm437.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*.

> The Court says, quote "[N]othing in this opinion should be construed as prohibiting universities from considering an application's [applicant's] discussion of how race [has] affected his or her life," but it's—it's through—but "be it through discrimination [or] inspiration or otherwise."[44]

The President went on to call for schools to find ways to undermine *SFFA* by using proxies for race:

> [Universities] should not abandon their commitment to ensure student bodies of diverse backgrounds and experience that reflect all of America. What I propose for consideration is a new standard, where colleges take into account the adversity a student has overcome when selecting among qualified applicants.[45]

In addition to "adversity," President Biden suggested "examining where the student grew up and went to high school."[46] This is much like the purportedly race-neutral scheme that was implemented at Thomas Jefferson.

The President even stated his intent to help universities come up with those proxies: "Today, I'm directing the Department of Education to analyze what practices help build [] more inclusive and diverse student bodies[.]"[47] In a fact sheet released the same day, the White House announced that the Department of Education will "provide resources to colleges and universities addressing lawful admissions practices,

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

and will also be "[r]eleasing a report on strategies for increasing diversity[.]"[48]

So long as public officials view the world only in terms of racial outcomes, they will seek ways to prefer or penalize individuals for the race they were born into. That will perpetuate all of the mischief *SFFA* warned against: stereotyping, balancing, and arbitrary classifications into perpetuity. Covert discrimination is no less unconstitutional than outright discrimination. This Court should grant cert to stop it.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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[48] Press Release, FACT SHEET: President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities (June 29, 2023), https://tinyurl.com/45eezjy5.