

No. 23-170

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IN THE  
**Supreme Court of the United States**

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COALITION FOR TJ,

*PETITIONER,*

v.

FAIRFAX COUNTY SCHOOL BOARD,

*RESPONDENT.*

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*On Petition for Writ of Certiorari to the  
U.S. Court of Appeals for the Fourth Circuit*

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**BRIEF OF THE LIBERTY JUSTICE CENTER  
AND MOMOKO TAKAHASHI AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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**INTEREST OF THE AMICI CURIAE<sup>1</sup>**

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center believes that every American has a right to equal treatment under the law, regardless of race, whether in education or other sectors of society. *See, e.g., Joyner v. Vilsack*, 1:21-cv-01089 (W.D. Tenn.) (challenging race-discriminatory USDA program on behalf of a farmer who would be eligible for hundreds of thousands of dollars in farm loans if not for his race); *Clark v. State Public Charter School Authority*, 2:20-cv-02324-APG-VCF (D. Nev.) (challenging public education program that identifies plaintiff as belonging to groups characterized as “oppressive” and “wrong”); *Menders v. Loudoun Cty. School Bd.*, 1:21-cv-00669-AJT-TCB (E.D. Va.) (similar; applying *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1997)).

Momoko Takahashi is a Ph.D. graduate from Northwestern University in Evanston, Illinois.

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<sup>1</sup> Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for all parties were advised of Amicus’s intent to file this brief at least ten days prior to its filing.

Throughout her academic career, she has faced discrimination in school admissions due to her ethnicity.

## **SUMMARY OF ARGUMENT & INTRODUCTION**

Government discrimination against people based on race, when race is so ill-defined to begin with, is illogical—and, in America, it's illegal. But courts have been inconsistent in conducting the rigorous inquiry into discriminatory intent required by *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Furthermore, although it cannot be used to justify racial discrimination, achieving the educational benefits of diversity remains a key interest for educational institutions – and yet, here the School Board is diminishing that interest by diminishing the size of its Asian-American class.

## **ARGUMENT**

### **I. The Court should clarify the *Arlington Heights* test.**

”Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). But courts have not been consistent in the scope of such inquiry. Some courts use a very liberal standard, accepting circumstantial evidence and piercing the veil of neutral explanations to find racial prejudice. *See Democratic Nat’l Comm. v. Hobbs*, 948 F.3d

989, 1041 (9th Cir. 2020), *rev'd Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (racial discrimination in voter integrity laws); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (same); *New York v. United States DOC*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018) (immigration); *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276 (E.D.N.Y. 2018) (same). But other times, courts decide to engage in judicial restraint and adopt a level of deference that *Arlington Heights* does not contemplate. *See, e.g., N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302-03 (4th Cir. 2020) (plaintiffs must prove that legislature had “discriminatory intent,” and legislature “*must*” be afforded “a presumption of good faith”); *Bishop of Charleston v. Adams*, No. 2:21-cv-1093-BHH, 2022 U.S. Dist. LEXIS 24090, at \*29-30 (D.S.C. Feb. 10, 2022) (plaintiff must prove both “intentional discrimination” and “actual discriminatory effect”).

This Court should grant certiorari to clarify the *Arlington Heights* framework as applied to racial discrimination in school admission policies.

## II. “Benign” discrimination should not be excused.

As Petitioner says, the aim of racial discrimination in Fairfax County school admissions is “racial balancing – which is racial discrimination all the same.” Pet. 23. The school’s objective is to make its student body “reflect the racial makeup of the school district.” Pet. 2. In order to do this, it has to discriminate against its historically Asian-American student body. Pet. 2-3.



In striking down affirmative action last term, Justices on both sides of the issue agreed that attempting to attain “the educational benefits of diversity” was a noble goal. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2188 (2023) (“to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits”) (Thomas, J., concurring); *Id.* at 2234 (racial discrimination has been authorized “in service of the educational benefits that flow from a diverse student body”) (Sotomayor, J., dissenting); *Id.* at 2248 n.33 (observing that the petitioner and its expert “agreed that valuable educational benefits flow from diversity”) (Sotomayor, J., dissenting); *Id.* at 2256 (favoring increasing minority enrollment in order to attain “the educational benefits that [the universities] seek to achieve”) (Sotomayor, J., dissenting) (cleaned up). In sum, even though it may no longer justify raced-based discrimination in the application process, attaining the educational benefits of diversity remains an important policy.

Here, however, Fairfax County seeks to racially discriminate to *deny* its student body the educational benefits of diversity.

Asians and Asian Americans nationwide are more likely to be foreign-born than their counterparts: 57 % of Asian Americans, including 71% of Asian-American adults, were born in another country, compared to only 14 percent of all Americans and 17 percent of all American adults. Abby Budiman & Neil G. Ruiz, *Key Facts About Asian-Americans, a Diverse and Growing*

*Population*, PEW RESEARCH (Apr. 29, 2021).<sup>2</sup> *Amicus* Momoko Takahashi is one such individual: born in Japan, she moved to the U.K. before immigrating to America as a nine-year-old. Yet despite having lived in two more countries and speaking one more language (Japanese, the furthest-removed language from English)<sup>3</sup> than most of her peers, and despite her record as a champion high school debater, she was rejected from every non-state university she applied to as an undergraduate applicant in favor of less accomplished applicants.

Approximately one-third of Asian Americans, particularly those raised in households where English is not spoken, lack proficiency in writing, reading, and speaking skills. Guofang Li, *Other People's Success: Impact of the 'Model Minority' Myth on Underachieving Asian Students in North America*, KEDI JOURNAL OF EDUCATIONAL POLICY, Vol 2., Issue 1, 69, 70 (2005). *Amicus* Momoko Takahashi is one among many Asians and Asian Americans who have struggled with English as a second language, but did not receive the necessary help in school due to being stereotyped as a super-smart Asian. Ms. Takahashi excelled in mathematics, which apparently offset her shortcomings in other subjects in her teachers' eyes. Her mathematics proficiency, however, was not due to her race, but rather

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<sup>2</sup> <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/>.

<sup>3</sup> Barry R. Chiswick & Paul W. Miller, *Linguistic Distance: A Quantitative Measure of the Distance Between English and Other Languages*, IZA Discussion Paper No. 1246 (Aug. 2004), <https://ftp.iza.org/dp1246.pdf>; see also *Foreign Language Training*, Foreign Service Institute, U.S. Department of State, <https://www.state.gov/foreign-language-training/> (last visited April 26, 2022) (Japanese is one of five “super-hard languages” that require 2200 class hours to master).

due to the sacrifices made by her family, who believed that school excellence was a collective effort. This is a common experience for many Asian Americans; it is not unusual for a student's parents to sell their house to finance their child's education, leading one Asian American to comment that "if I failed to earn scholarships[,] it would be the financial equivalent of burning down my parents' home." Jingjing Xiao, *For an Asian-American Family, the Cost of Education*, N.Y. TIMES (Mar. 26, 2019)<sup>4</sup>; see also *Children of Asian Immigrants Reveal Sacrifices Their Parents Made*, YouTube (June 16, 2015)<sup>5</sup>.

Asian Americans can also bring a unique perspective on discrimination. They were, after all, the victims of the first U.S. law to prevent immigration and naturalization on the basis of race, the Chinese Exclusion Act of 1882. *Asian Americans Then and Now*, ASIA SOCIETY.<sup>6</sup> They have also been victims of the Japanese internment during World War II and the recent spate of anti-Asian violence in the wake of COVID-19.

By handicapping Asian or Asian-American applicants, educational institutions are reducing students with Chinese, Japanese, Korean, Vietnamese, Thai, Cambodian, or Indian heritage (among others) into a single box labeled "Asian." Each of these distinct ethnic groups has its own language, culture, sociological makeup, and perspective, but they are all locked into the same box in race-based admissions programs.

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<sup>4</sup> <https://www.nytimes.com/2019/03/26/well/family/for-an-asian-american-family-the-cost-of-education.html>

<sup>5</sup> <https://www.youtube.com/watch?v=k1lDX0lzhd4>

<sup>6</sup> <https://asiasociety.org/education/asian-americans-then-and-now> (last visited Dec. 11, 2021).

Most of those categories are self-explanatory, but an example of a sociological difference among East Asian cultures illustrates the point. Chinese and Koreans are more likely to adopt new technologies than Japanese, who are more focused on potential negative effects of new technology. Martin Schiere, et al., *Understanding the Social Cultural Differences Between China, Japan and South Korea for Better Communication*, GLOCALITIES.<sup>7</sup> And Japanese and South Koreans are more likely to be “open-minded idealists who value personal development and culture” than their Chinese counterparts, who are more likely to “value family and community.” *Id.*

Southeast Asians arguably have it even worse. The very term “Asian American” tends to center on East Asians (such as Chinese, Koreans, or Japanese) at the expense of South Asians (Bangladeshis, Indians, Sri Lankans) and Southeast Asians (Cambodians, Filipinos, Thai, Vietnamese). See, e.g., Li Zhou, *The Inadequacy of the Term “Asian American,”* VOX (May 5, 2021, 10:10 AM).<sup>8</sup> And Southeast Asians in America often live experiences entirely different from those of their East Asian or non-Asian counterparts. For example, while only 12.1 percent of all U.S. Asians live in poverty, below the U.S. average of 15.1%, that number is 19.1 percent for Cambodians. *U.S. Cambodian Population Living in Poverty*, PEW RESEARCH CENTER

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<sup>7</sup> <https://glocalities.com/news/understanding-the-social-cultural-differences-between-china-japan-and-south-korea-for-better-communication> (last visited Dec. 11, 2021).

<sup>8</sup> <https://www.vox.com/identities/22380197/asian-american-pacific-islander-aapi-heritage-anti-asian-hate-attacks>.

(Sept. 8, 2017).<sup>9</sup> Even more curiously, while a smaller percentage of U.S.-born Asians live in poverty than their foreign-born counterparts, that statistic is reversed for Cambodians. *Id.* And while Indian Americans have a median income of \$100,000, Burmese Americans have a median income of only \$36,000. Dedrick Asante-Muhammad & Sally Sim, *Racial Wealth Snapshot: Asian Americans and the Racial Wealth Divide*, NATIONAL COMMUNITY REINVESTMENT COALITION (May 14, 2020).<sup>10</sup> Bangladeshi and Hmong poverty rates outstrip those of African-Americans. Huizhong Wu, *The Model Minority Myth: Why Asian-American Poverty Goes Unseen*, MASHABLE (December 14, 2015).<sup>11</sup> And while over 94 percent of Taiwanese and Japanese Americans have a high school diploma, that statistic is under 66 percent for Laotian and Hmong Americans. Benjamin Chang, *Asian Americans and Education*, OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (Feb. 2017).<sup>12</sup> 17 percent of Pacific Islanders, 14% of Cambodian Americans, and 13 percent of Laotian and Hmong Americans have four-year college degrees (compared to 22 percent for African-Americans or 15 percent for Hispanics). Sahra Vang Nguyen, *The Truth about 'The Asian Advantage' and 'Model Minority Myth'*, HUFFINGTON POST (Oct 14, 2015).<sup>13</sup>

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<sup>9</sup> <https://www.pewresearch.org/social-trends/chart/u-s-cambodian-population-living-in-poverty/>.

<sup>10</sup> <https://ncrc.org/racial-wealth-snapshot-asian-americans-and-the-racial-wealth-divide/>.

<sup>11</sup> <http://mashable.com/2015/12/14/asian-american-poverty/#.UK4LnHskgqr>

<sup>12</sup> <https://files.eric.ed.gov/fulltext/ED577104.pdf>.

<sup>13</sup> [http://huffingtonpost.com/sahrah-vang-nguyen/the-truth-about-the-asian\\_b\\_8282830.html](http://huffingtonpost.com/sahrah-vang-nguyen/the-truth-about-the-asian_b_8282830.html)

And Southeast Asians also differ among themselves. Vietnamese culture differs from Cambodian and Lao culture, for example, in that the former has strong Chinese influences while the latter two are more influenced by India. *Asian Americans Then and Now, ante*. And the majority of Southeast Asian countries are “home to dozens of different ethnic groups” and have within themselves a clear geographically-based religious divide. Michael G. Peletz, *Diversity and Unity*, ASIA SOCIETY (last visited Dec. 13, 2021).<sup>14</sup> A student from one such country’s highland areas, following a more mythological tradition, would obviously have perspectives from those of a student from the lowlands, who would be more likely to adhere to a more formal religion such as Islam, Buddhism, or Christianity. *Id.*

Fairfax County admissions systems’ rudimentary response to this rich cultural diversity is to take geography as an indicator of diversity, call the people from the largest continent in the world (and their American descendants) collectively “Asian,” and disadvantage them in their admissions process. Because they don’t look like the average student in the school district. That is not right. Moreover, it does not even reflect “diversity.”

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). This Court should stop allowing quota systems in school

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<sup>14</sup> <https://asiasociety.org/education/diversity-and-unity>.

admissions policies under the guise of diversity like Fairfax County's.

**CONCLUSION**

This Court should grant the petition for certiorari.

Respectfully submitted,

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