

Supreme Court To Hear First School Admissions Challenge Since *Students for Fair Admissions*—What Higher Education Institutions Need to Know

Client Alerts

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On October 19, 2026, the US Supreme Court granted certiorari in *Association for Education Fairness v. Montgomery County Board of Education*, No. 26-12, an Equal Protection challenge to the lottery system a Maryland school district uses to admit students to its selective magnet middle schools. It marks the first time the Supreme Court has agreed to hear a case concerning race in admissions since its landmark 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*.¹ The grant follows the Court's refusals to hear similar challenges involving Thomas Jefferson High School in Virginia in February 2024 and Boston's exam schools in December 2024.

The decision could yield important guidance about how challengers can demonstrate unlawful discrimination in the context of facially neutral admissions policies, at a time when the federal government is pursuing novel theories of what Title VI and the Equal Protection Clause prohibit. We trace the background of the case, describe the stakes and potential outcomes, and unpack what it means for educational institutions navigating this uncertain terrain.

Background

The Association for Education Fairness (AFEF), a group of Asian American parents, challenged the lottery Montgomery County Public Schools adopted during the pandemic to select students for its magnet middle schools from among those who meet grade, reading, and test-score thresholds. The district court dismissed the challenge on two independent grounds. It found no plausible disparate impact, because Asian American students' share of admittees exceeded their share of applicants, and found no plausible discriminatory intent.² The Fourth Circuit affirmed, in a short decision addressing only the disparate impact issue, applying its earlier decision in *Coalition for TJ v. Fairfax County School Board*.³

The Fourth Circuit's decision turned on the impact element of an Equal Protection claim under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which generally requires a showing of both discriminatory purpose and discriminatory impact. The impact element asks whether a facially neutral policy "bears more heavily on one race than another."⁴ In *Coalition for TJ*, the Fourth Circuit measured impact by how a group fares under the new policy alone, relative to its share of applicants, and the First Circuit has taken a similar approach using the group's share of the

eligible population. Both courts have found no disparate impact where the challengers' groups remained overrepresented among admitted students, even though their numbers had dropped under the new policy relative to the old one.⁵

In February 2026, the Third Circuit rejected that framework. It held that aggregate disparate impact is one way to prove the impact element but not the only way, and that statistically significant changes in before-and-after admissions data are relevant evidence.⁶ The Third Circuit also joined the Second Circuit, which held in 2024 that, once a plaintiff shows a policy was adopted with discriminatory intent, harm to even one individual because of race can establish impact, whether or not the racial group as a whole fared worse.⁷

What the Court Could Decide

The Supreme Court limited its review to one question: "Whether a plaintiff challenging a facially neutral admissions policy as racially discriminatory must establish that the targeted racial group suffered an aggregate disparate impact relative to its share of the applicant pool."

The Court will decide whether a plaintiff challenging a facially neutral admissions policy as intentionally discriminatory must show that the targeted group's share of admitted students fell below its share of the applicant pool. If the answer is yes, the First and Fourth Circuits' approach will become the national rule. If the answer is no, the Court could address what other evidence is sufficient, such as before-and-after data or harm to individual applicants, as the Third and Second Circuits allow. A broader ruling is also possible. Justice Alito has criticized lower courts for treating disparate impact as a necessary element at all, and the Third Circuit noted that some circuits do not require it.⁸ If the Court takes that view, disparate impact would remain evidence of intent but would no longer be a separate element plaintiffs must prove.

In explaining what the impact element requires, the Court, or individual Justices, could also signal what suffices to prove intent, an issue on which lower courts are divided. The First and Fourth Circuits have held that a goal of greater racial diversity, pursued through neutral criteria, does not establish invidious intent.⁹ The Third Circuit has held that a district's "equity" commitments and its stated goal of moving toward racial proportionality could support a finding of discriminatory purpose.¹⁰ The issue has taken on added significance as the federal government has disavowed disparate-impact liability under Title VI while treating a growing range of facially neutral practices as evidence of intentional discrimination.¹¹ The Department of Justice (DOJ), for example, warned in its July 2025 guidance that "[i]ntent to influence demographic representation risks violating federal law."¹² Applying that view, DOJ concluded in October 2026 that a medical school's socioeconomic-disadvantage score was a "race proxy" because it was "intentionally race-correlated and intended to alter the racial composition of the admitted class."¹³ More broadly, DOJ's admissions findings letters

consistently present racial disparities in admissions outcomes under the heading “Statistical Evidence of Intentional Discrimination,” rather than as evidence of disparate impact.¹⁴

Implications for Colleges and Universities

AFF arose from a K–12 district, but its rule affects institutions of higher education, both public and private. *Arlington Heights* governs claims under the Equal Protection Clause, to which public universities are subject. And in *SFFA*, the Court reiterated that “discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI,” which applies to private institutions as well.¹⁵

Students for Fair Admissions, the plaintiff in *SFFA*, has already previewed how *AFF* could affect higher education. In a cert-stage amicus brief supporting *AFF*’s petition, it argues that colleges and universities have adopted so-called “proxies” for race, such as neighborhood-level socioeconomic data and essay prompts about lived experience, and that these practices amount to intentional discrimination that the First and Fourth Circuits’ approach insulates from review. The brief relies on DOJ findings letters resulting from its admissions investigations of colleges and universities.

A ruling for *AFF* would therefore change the litigation risk that facially neutral admissions criteria carry for public and private institutions alike, in at least three ways.

- **A threshold barrier may fall.** In the First and Fourth Circuits, a challenger whose racial group remains well represented relative to the applicant pool can lose on impact alone, whether at the pleading stage, as here, or later, as in the *Fairfax County* and *Boston* cases. A ruling for *AFF* would remove that barrier, but challengers would still have to prove discriminatory intent. The likelier effect is that more challenges could reach discovery into evidence of intent, which can include internal correspondence and other communications. Institutions may wish to review, with counsel and under privilege, how the rationales for their facially neutral criteria are documented.
- **Admissions data will draw closer scrutiny.** Aggregate impact is relatively simple to measure. If it is no longer required, challengers will have more ways to slice admissions data to show impact, such as before-and-after comparisons or harm to individual applicants. The practices *SFFA* calls racial proxies would also carry greater legal risk.
- **Federal enforcement is on a separate track.** DOJ’s findings letters and funding actions rest on its view that adopting facially neutral practices in order to change a class’s racial composition is itself unlawful, and DOJ treats statistical disparities as evidence of that intent. Whatever the Court decides, DOJ’s enforcement will likely continue on that theory.

Looking Ahead

Oral argument is expected in early 2027, with a decision expected by the end of the Term. Whether the United States participates, and what arguments it presses, will be worth watching.

Jenner & Block's higher education practice group advises colleges and universities on the issues outlined above. Our lawyers counsel institutions on compliance strategy, represent clients in litigation and government investigations, and monitor regulatory developments affecting higher education nationwide. To discuss how these developments may affect your institution, please contact practice group Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Terri Mascherin (tmascherin@jenner.com).

Footnotes

[1] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

[2] *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358 (D. Md. 2022).

[3] *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 23-1068, 2026 WL 281028 (4th Cir. Feb. 3, 2026) (per curiam); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023).

[4] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)); see *Sargent v. Sch. Dist. of Phila.*, 165 F.4th 727, 739–40 & n.6 (3d Cir. 2026) (noting that some, but not all, circuits read *Arlington Heights* to require both purpose and impact as separate elements).

[5] See *Coal. for TJ*, 68 F.4th at 879–82; *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 57–59 (1st Cir. 2023). Dissenting from the denial of review in the Fairfax County case, Justice Alito, joined by Justice Thomas, wrote that the Fourth Circuit's approach "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). Justice Alito dissented again in the Boston case, and Justice Gorsuch wrote separately that he shared many of those concerns. *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 145 S. Ct. 15, 15–18 (2024) (Alito, J., dissenting from denial of certiorari); *id.* at 15 (Gorsuch, J., statement respecting denial of certiorari).

[6] *Sargent*, 165 F.4th at 749–50.

[7] *Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 173–74 (2d Cir. 2024).

[8] *Bos. Parent Coal.*, 145 S. Ct. at 17 (Alito, J., dissenting from denial of certiorari); *Sargent*, 165 F.4th at 739–40 & n.6.

[9] *Coal. for TJ*, 68 F.4th at 885–86; *Bos. Parent Coal.*, 89 F.4th at 61–62.

[10] *Sargent*, 165 F.4th at 742–43.

[11] See Exec. Order No. 14281, 90 Fed. Reg. 17,537 (Apr. 23, 2025); Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14,281, 90 Fed. Reg. 57,141 (Dec. 10, 2025).

[12] Memorandum for All Federal Agencies from the Att'y Gen., *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*, at 8 (July 29, 2025), <https://www.justice.gov/ag/media/1409486/dl>.

[13] Letter from Civ. Rts. Div., U.S. Dep't of Just., to Amy Nash Golian, Ohio State Univ., at 6 (Oct. 21, 2026), <https://www.justice.gov/crt/media/1467356/dl>.

[14] *See, e.g., id.* at 6–7; Letter from Civ. Rts. Div., U.S. Dep't of Just., to Peter Spivack, Hogan Lovells US LLP, Counsel to Yale School of Medicine, at 4 (May 14, 2026), <https://www.justice.gov/crt/media/1440601/dl>.

[15] *SFFA*, 600 U.S. at 198 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)).

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