IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1303

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff-Appellant

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA OLIVER-DAVILA; MICHAEL O'NEIL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS,

Defendants-Appellees

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants-Intervenors-Appellees

No. 22-1144

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff-Appellant

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA OLIVER-DAVILA; MICHAEL O'NEILL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS, Superintendent of the Boston Public Schools,

Defendants-Appellees

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants-Intervenors-Appellees

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in questions concerning when school districts may take race into account in making decisions. The United States has responsibilities for enforcing the Equal Protection Clause in the context of public education, 42 U.S.C. 2000c-6, 2000h-2, and is also charged with enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Among other things, Title VI generally prohibits recipients of federal financial assistance (including school districts) from intentionally discriminating on the basis of race, and courts apply the same standards for evaluating intentional discrimination under Title VI and the Equal Protection Clause. *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003). In addition, the Department of Education ensures Title VI compliance in the education context, and it issues regulations, guidance, and letters regarding the permissible use of race in that setting. *E.g.*, 34 C.F.R. Pt. 100. The United States files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. If a school board adopts a facially race-neutral policy to ensure that students of all races may equally take advantage of a valuable resource, does that intent qualify as a suspect purpose under the Equal Protection Clause?

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[1] The United States takes no position on any issue other than the legal issues described above. In particular, this brief does not address the case-specific mootness questions raised in these appeals. In addition, the United States

2. If strict scrutiny were to apply here, should this Court address what the strict-scrutiny inquiry would entail in this novel context when the district court has not yet answered that question?

SUMMARY OF ARGUMENT

When a school board adopts—or retains—a facially race-neutral policy to ensure that students of all races may equally take advantage of a valuable resource, that intent is not a discriminatory purpose triggering strict scrutiny.

A wealth of precedent supports this conclusion: The Supreme Court has long held that public entities seeking to promote equal opportunity or increase racial diversity must first consider race-neutral means for accomplishing those goals before relying on explicit racial classifications, and at no point has it suggested that those race-neutral means are constitutionally suspect and must therefore satisfy strict scrutiny. Indeed, the Supreme Court's opinions in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), emphasized the distinction between race-neutral and race-based means for increasing racial diversity in the K-12 context, with Justice Kennedy's pivotal

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expresses no views on the significance of the troubling statements made by some members of the Boston School Committee, nor does it address more broadly how the law applies to the facts here. Instead, the federal government files this brief to set forth its views on the important legal questions raised by the parties' merits arguments in the event the Court reaches them.

concurrence declaring that the former are unlikely to "demand strict scrutiny to be found permissible." *Id.* at 789. In *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), the Supreme Court likewise affirmed that public entities may "choose to foster diversity and combat racial isolation with race-neutral tools," rejecting a contention that such race-conscious decisionmaking raises equal-protection concerns. *Id.* at 545.

This Court and every other court of appeals to have decided the issue have agreed that providing equal opportunities and increasing racial diversity are not suspect ends that themselves trigger strict scrutiny. In *Anderson* v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004), for example, this Court squarely held that the "mere invocation of racial diversity as a goal is insufficient to subject [a race-neutral policy] to strict scrutiny." *Id.* at 87. The consensus reached by the courts of appeals is well founded. A governmental entity acts with a suspect purpose only if it adopts a policy "'because of,' not merely 'in spite of,' its adverse effects" on a specific racial group. *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979). When an entity acts to promote equal opportunity, however, it does not seek to benefit or burden any particular racial group; instead, it endeavors to ensure that individuals of *all* races may equally take advantage of valuable opportunities.

If this Court nevertheless determines that the facially race-neutral policy here is subject to strict scrutiny, it should remand for the district court to evaluate

whether the policy survives review under that standard. The district court has not addressed that complex and novel question, and it specified that it would allow defendants to present additional evidence should the court deem it necessary.

ARGUMENT

I

ENSURING THAT STUDENTS OF ALL RACES ENJOY EQUAL EDUCATIONAL OPPORTUNITIES IS NOT A SUSPECT PURPOSE

The legal framework that applies here is well established: The "central purpose" of the Equal Protection Clause is "the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). In enforcing that guarantee, the Supreme Court has held that "all racial classifications imposed by government" are subject to "strict scrutiny." *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted). In addition, even facially race-neutral governmental policies can be subject to strict scrutiny if they were adopted with an "invidious [racially] discriminatory purpose." *E.g.*, *Anderson* v. *City of Boston*, 375 F.3d 71, 82-83 (1st Cir. 2004) (citation omitted).[2]

[2] Strict scrutiny does not apply to all race-neutral policies motivated in part by a racially discriminatory purpose. A defendant is not liable for adopting such a policy if it shows it would have adopted it in the absence of racial discrimination. *Hunter* v. *Underwood*, 471 U.S. 222, 228, 230-231 (1985). This brief does not address the related question whether a plaintiff challenging a race-neutral policy must establish a racially disparate impact—in addition to a racially discriminatory

To satisfy strict scrutiny, a challenged policy must be "narrowly tailored" to further "compelling governmental interests." *Grutter*, 539 U.S. at 326.

As explained below, a school board does not act with an invidious discriminatory purpose when it adopts a facially race-neutral policy to provide equal educational opportunities—that is, when it acts to ensure that students of all races may equally take advantage of educational resources, regardless of whether its actions are voluntary or are required by the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, or another law. Such an intent—and the closely related intent of increasing racial diversity—thus does not trigger strict scrutiny, as the district court correctly recognized. Add. 29-34, 37-39, 45, withdrawn, App. 2612; Add. 78-84, 105-106.[3]

A. Precedent Establishes That An Intent To Equalize Opportunities For Persons Of All Races Is Not Suspect

As multiple lines of Supreme Court precedent make clear, and as this Court and other courts of appeals have squarely held, a public entity does not act with an

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purpose—to trigger strict scrutiny, nor does it address the scope of any such impact that must be shown.

[3] "Add. __" refers to page numbers in the addendum to plaintiff-appellant's opening brief. "App. __" refers to page numbers in plaintiff-appellant's appendix. "Br. __" refers to page numbers in plaintiff-appellant's opening brief. "Doc. __, at __" refers to docket-entry numbers in the district court docket and page numbers appended by the CM/ECF system, respectively.

invidious discriminatory intent when it employs race-neutral means to promote equal opportunities.

1. The Supreme Court Has Repeatedly Sanctioned Race-Neutral Means For Promoting Equal Opportunities In Unqualified Terms

In multiple contexts, the Supreme Court has explained that public entities may use race-neutral means to provide equal opportunities for persons of all races or to further the related purposes of increasing racial diversity or promoting racial integration. The Supreme Court's consistent endorsement of the use of race-neutral means to further these goals—unqualified by any statement that strict scrutiny would apply—makes clear that such goals are not constitutionally suspect.

a. To begin, the Supreme Court's cases evaluating whether explicit racial classifications satisfy strict scrutiny have routinely directed governmental actors that seek to promote equal opportunities or increase racial diversity to evaluate whether they can instead accomplish their goals through race-neutral means. Indeed, racial classifications fail strict scrutiny *unless* the entity has first considered in good faith workable race-neutral alternatives. In discussing this requirement, the Supreme Court has never indicated that race-neutral means for achieving these goals, too, must satisfy strict scrutiny. See, *e.g.*, *Grutter*, 539 U.S. at 339-340.[4]

[4] This brief discusses decisions addressing interests in (1) advancing equal opportunity; (2) promoting racial integration; (3) avoiding racially isolated schools;

For example, in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court faulted a city for relying on racial classifications without first considering "race-neutral means to increase minority business participation in city contracting." *Id.* at 507; *id.* at 509-510 (plurality opinion). Concurring in the judgment, Justice Scalia agreed that if a governmental entity "adopt[ed] a preference" for contracting with small or new businesses, that preference would be "permissible" and "not based on race," even if it were adopted to "undo the effects of past [racial] discrimination" and had "a racially disproportionate impact." *Id.* at 526.

Similarly, in *Fisher* v. *University of Texas*, 579 U.S. 365 (2016) (*Fisher II*), the Supreme Court evaluated several race-neutral practices for increasing the racial diversity of an undergraduate student body without suggesting that they triggered strict scrutiny. Specifically, the Court rejected the contention that the defendant university could have avoided using racial classifications in its admissions program

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(4) increasing racial diversity; and (5) obtaining the educational benefits that flow from a student body that is diverse along multiple dimensions (including race), the interest the Supreme Court deemed compelling in the higher-education context in *Grutter*, 539 U.S. at 324-325, 328, 337-338. Although those interests are not necessarily identical, they are similar in a key respect: the interests themselves do not inherently favor or disfavor any specific racial group, even if their application to particular factual scenarios may sometimes foreseeably result in more, or fewer, opportunities for individuals of a particular race than would otherwise be the case. See pp. 14-16, *infra*.

by (1) weighting socioeconomic factors more heavily or (2) expanding its "Top Ten Percent Plan," which guaranteed admission to a certain number of students in each public high school in the State. *Id.* at 385-388.

Although *Fisher II* questioned whether expanding the percentage plan would make the university's admissions policy more race neutral than the challenged plan, it never indicated that either of the proposed alternatives would be subject to strict scrutiny. Instead, the Court held that the university need not adopt the alternatives because they were unworkable. 579 U.S. at 385-388; accord, *e.g.*, *Grutter*, 539 U.S. at 339-340 (reaching similar conclusion about another higher-education admissions plan); *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 980 F.3d 157, 193-195 (1st Cir. 2020) (same), cert. granted, 142 S. Ct. 895 (2022). The *Fisher II* dissenters disagreed with that workability holding, but they, too, concluded that such race-neutral measures are permissible, explaining in unqualified terms that the university "could have adopted [nonracial] approaches to further its goals," including "uncapping the Top Ten Percent [Plan] or placing greater weight on socioeconomic factors." 579 U.S. at 426-427 (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting); *id.* at 394, 409-410, 437; accord *Grutter*, 539 U.S. at 361-362 (Thomas, J., joined in relevant part by Scalia, J., concurring in part and dissenting in part) (similar).

Given this precedent, "it would be quite the judicial bait-and-switch" to hold that the race-neutral means that the Supreme Court has required entities to consider adopting "are also subject to strict scrutiny." *Coalition for TJ* v. *Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *4 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring in order granting school board stay pending appeal in pending challenge to race-neutral admissions policy for selective public school).

b. The key opinions in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 735 (2007), reinforce the conclusion that race-neutral means of promoting equal opportunity and increasing racial diversity do not trigger strict scrutiny. Indeed, Justice Kennedy expressly endorsed that understanding in his concurrence.

At issue in *Parents Involved* were systems that two school districts adopted for assigning students to schools to promote racial integration and avoid racial isolation. 551 U.S. at 711-712, 715-717; *id.* at 725-726 (plurality opinion). Both systems relied on express racial classifications, and one system also employed race-neutral measures—grouping schools into clusters for purposes of making certain assignments—"to facilitate integration." *Id.* at 716-717 (majority opinion) (citation omitted); *id.* at 711-712.

Although the majority held that the express racial classifications failed strict scrutiny, *Parents Involved*, 551 U.S. at 733-735, it did not question the race-neutral

component of the plan employing such a measure. Moreover, in evaluating whether the racial classifications survived strict scrutiny, the majority applied the precedent just described, faulting the school districts for not "consider[ing] methods other than explicit racial classifications to achieve their stated goals." *Id.* at 735. In doing so, the Court treated using race-neutral means to facilitate racial integration as categorically permissible.

Justice Kennedy, who provided the fifth vote to invalidate the racial classifications at issue in *Parents Involved*, emphasized that race-neutral measures to promote equal opportunity or increase racial diversity are not subject to strict scrutiny. His pivotal opinion concluded that "[i]f school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way," without treating students differently "on the basis of a systematic, individual typing by race." 551 U.S. at 788-789 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy explained that school boards "may pursue the goal of bringing together students of diverse backgrounds and races" through "other means," such as "strategic site selection of new schools" and "drawing attendance zones with general recognition of the demographics of neighborhoods." *Id.* at 789. Significantly, Justice Kennedy said that "[t]hese mechanisms are race conscious

but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Ibid.*

Chief Justice Roberts' opinion for the plurality, too, recognized that "different considerations" are in play when a court evaluates actions seeking to "achiev[e] greater racial diversity" that are race neutral rather than based on "explicit racial classifications." *Parents Involved*, 551 U.S. at 745 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ.) (not opining on the validity of such race-neutral actions). Significantly, the plurality harmonized its decision with other decisions recognizing the permissibility of facilitating racial integration by explaining that those decisions did not sanction the means at issue in *Parents Involved*—racial classifications—and that some did not apply strict scrutiny. For example, the plurality recognized that dictum in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), said that school officials may act voluntarily to promote racial integration, *id.* at 16, but the plurality emphasized that *Swann* "addresse[d] only a possible state objective; it sa[id] nothing of the permissible *means*." *Parents Involved*, 551 U.S. at 737-738.[5]

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[5] See also *Parents Involved*, 551 U.S. at 738 (plurality opinion) (distinguishing *Tometz* v. *Board of Education*, 39 Ill. 2d 593, 597-598, 237 N.E.2d 498, 501 (1968), which upheld a statute requiring "race-consciousness in drawing school attendance boundaries"); *id.* at 739 n.16 (distinguishing *School Committee of Boston* v. *Board of Education*, 352 Mass. 693, 698-700, 227 N.E.2d 729, 733-

That analysis suggests that *race-neutral* efforts to further goals such as increasing racial diversity and facilitating racial integration are permissible—and thus that those goals are not constitutionally suspect. Indeed, Chief Justice Roberts embraced that understanding in a subsequent oral argument, stating that "[he] thought both the plurality and the concurrence in *Parents Involved* accepted the fact that race conscious action such as school siting or drawing district lines * * * is okay, but discriminating in particular assignments is not." Tr. of Oral Arg. at 54, *Ricci* v. *DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328).

c. Finally, *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), categorically sanctioned race-neutral measures for providing equal opportunities in the context of addressing a constitutional-avoidance argument. *Inclusive Communities* held that the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, allows plaintiffs to pursue disparate-impact claims—claims challenging race-neutral practices that have a disproportionately adverse effect on a racial group and lack a legitimate justification. *Inclusive*

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734 (1967), appeal dismissed for want of a substantial federal question, 389 U.S. 572 (1968), which upheld a statute that required school districts to avoid racial imbalance but did not "specify how to achieve this goal"); *id.* at 738-739 (distinguishing *Citizens for Better Education* v. *Goose Creek Consolidated Independent School District*, 719 S.W.2d 350, 352-353 (Tex. App. 1986) (*Citizens I*), writ refused n.r.e., appeal dismissed for want of a substantial federal question, 484 U.S. 804 (1987), discussed at pp. 15-16, *infra*).

Cmtys., 576 U.S. at 524, 530-546. In reaching that conclusion, the Court rejected the defendants' argument that it should interpret the statute differently to avoid a constitutional question: whether recognizing disparate-impact claims would violate equal-protection principles by sometimes compelling race-conscious decisionmaking, Pet. Br. at 42-45, *Inclusive Cmtys.*, *supra* (No. 13-1371). See *Inclusive Cmtys.*, 576 U.S. at 540, 544-545.

As relevant here, *Inclusive Communities* emphasized that "race may be considered in certain circumstances and in a proper fashion," citing Justice Kennedy's endorsement in *Parents Involved* of efforts to pursue racial diversity through race-neutral means. *Inclusive Cmtys.*, 576 U.S. at 545. "Just as this Court has not 'question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions,'" the Court explained, it "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns." *Ibid.* (brackets in original) (quoting *Ricci*, 557 U.S. at 585). As a result, housing authorities may "foster diversity and combat racial isolation with race-neutral tools." *Ibid.* By using such unqualified terms in the context of addressing

a constitutional-avoidance argument, the Court made clear that promoting racial diversity and integration are not suspect and do not trigger strict scrutiny.[6]

2. Supreme Court Precedent Specifying When A Purpose Is Suspect Confirms That Promoting Equal Opportunities Is Not Suspect

This understanding—that providing equal opportunities, increasing racial diversity, and promoting racial integration are not suspect purposes—makes perfect sense under the Supreme Court's precedent delineating the circumstances in which a motivation qualifies as suspect. In *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979), the Supreme Court held that to establish that a race-neutral policy was adopted with a discriminatory purpose, a plaintiff must show that the decisionmaker "selected or reaffirmed [the policy] at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

It follows that when a governmental entity adopts a race-neutral policy to ensure that persons of all races may equally take advantage of a valuable resource, that purpose is not suspect. In those circumstances, the entity's goal is not to

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[6] Addressing an analogous provision of Title VII of the Civil Rights Act of 1964 that generally bars employers from intentionally discriminating based on race, 42 U.S.C. 2000e-2(a)(1), *Ricci* explained that Title VII permits an employer to "consider[], before administering a[n] [employment] test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." 557 U.S. at 585 (distinguishing that scenario from one in which an employer discards the results of an examination after administering it); cf. *Antonelli* v. *New Jersey*, 419 F.3d 267, 270, 274-276 (3d Cir. 2005) (similarly rejecting equal-protection challenge to design of employment test).

benefit or burden any particular racial group, but rather to promote equal opportunities for individuals of all races. Cf. *Rothe Dev., Inc.* v. *United States Dep't of Def.*, 836 F.3d 57, 64 (D.C. Cir. 2016) (holding a statute providing benefits to victims of racial prejudice does not classify based on race); *United States* v. *Hatch*, 722 F.3d 1193, 1209 (10th Cir. 2013) (holding a statute criminalizing racially motivated violence is consistent with equal-protection principles).

Supporting this understanding, *Crawford* v. *Board of Education*, 458 U.S. 527 (1982), concluded that an intent to facilitate racial integration is not suspect when evaluating a claim that a race-neutral law was motivated by a segregative intent. *Id.* at 529-532 & n.1, 543-545 (holding there was "no reason to challenge" a lower-court determination of no discriminatory intent even though the lower court found that voters ratifying the law may have believed prior law was "aggravating" the "desegregation problem" by leading to racially isolated city schools). As *Crawford* explained elsewhere in the opinion, "a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Id.* at 538; see also *Citizens for Better Educ.* v. *Goose Creek Consol. Indep. Sch. Dist.*, 484 U.S. 804, 804 (1987) (*Citizens II*) (deeming meritless an appeal challenging, on equal-protection grounds, a school district's race-neutral decision to change the

geographical attendance zones for its high schools to avoid "*de facto* [racial] segregation," *Citizens I*, *supra* note 5, 719 S.W.2d at 351-353).[7]

To be sure, when an entity pursues an equal-opportunity interest in a particular scenario, it may be foreseeable that specific racial groups will benefit and others will be burdened relative to the status quo. Moreover, the entity may at times describe its intent broadly—as promoting equal opportunities—or more narrowly—as increasing the representation of the particular racial groups underserved in the relevant context, such as Black Americans in one context, or Asian Americans in another. But neither of these circumstances would establish that the entity has acted "'because of,' not merely 'in spite of,' [any] adverse effects upon an identifiable [racial] group"; as just explained, an interest in assuring that all students, regardless of race, have an equal opportunity to take advantage of a valuable resource is not the same as an interest in benefiting or burdening students of a particular race. *Feeney*, 442 U.S. at 279; see also, *e.g.*, *Doe* v. *Lower Merion Sch. Dist.*, 665 F.3d 524, 547-548 (3d Cir. 2011).

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[7] *Citizens II* dismissed the appeal of *Citizens I* for want of a substantial federal question. *Citizens II*, 484 U.S. at 804. *Citizens II* is thus binding precedent representing the Supreme Court's view that the plaintiffs' equal-protection challenge was meritless. See, *e.g.*, *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

3. This Court And Other Courts Of Appeals Have Recognized That Seeking To Promote Equal Opportunities Is Not Suspect

All courts of appeals to have addressed the question—including this Court—have agreed that the goals of promoting equal opportunities, increasing racial diversity, and facilitating racial integration are not constitutionally suspect.

For example, in *Raso* v. *Lago*, 135 F.3d 11 (1st Cir. 1998), this Court evaluated a suit brought by former residents of a predominantly white neighborhood who claimed entitlement to a preference for certain new housing units. *Id.* at 12-13. The plaintiffs asserted an equal-protection claim against the Department of Housing and Urban Development (HUD), contending that HUD engaged in racial discrimination when it insisted that former residents receive a preference for only some units so that the remaining units would be available on an equal basis to individuals of all races. *Id.* at 13-15. *Raso* explained that the plaintiffs were "mistaken in treating 'racial motive' as a synonym for a constitutional violation," noting that "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect[s] a concern with race." *Id.* at 16. Because HUD insisted on the race-neutral condition "to secure *equal* treatment of applicants regardless of race," this Court held that HUD's motivations were not suspect. *Id.* at 15-17. That conclusion followed even though when HUD pursued its equal-opportunity interest on the facts there, HUD sought "to increase minority opportunities." *Id.* at 16.

Similarly, in *Anderson*, this Court concluded that a school district's race-neutral plan for assigning students to schools was not motivated by a suspect purpose even though the district adopted the plan in part to "preserve[] racial diversity" in its schools. 375 F.3d at 82, 87-88. Relying on much of the then-extant precedent discussed above, *Anderson* held that the "mere invocation of racial diversity as a goal is insufficient to subject the [plan] to strict scrutiny." *Id.* at 87 ("The Supreme Court has explained that the *motive* of increasing minority participation and access is not suspect."). Because the school district's "commitment to diversity is not *per se* constitutionally suspect," *Anderson* further concluded that the district could permissibly "continue to monitor relevant school demographics" and "consider modifying the current assignment system to meet all of [its] stated goals, including diversity," through similarly "[]constitutional means." *Id.* at 93.

In *Comfort* v. *Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (en banc), this Court used similar logic to reject a facial equal-protection challenge to a state law authorizing funding for school districts to voluntarily combat *de facto* racial segregation. *Id.* at 9, 11-12. As relevant here, *Comfort* explained that school districts could use race-neutral methods to achieve that goal, which "would not trigger any equal protection scrutiny." *Id.* at 12 (citation omitted). As this Court concluded in denying an injunction pending appeal in this case, it follows from this

precedent that "a public school system's inclusion of [racial] diversity as one of the guides" in selecting a race-neutral admissions policy for a selective school "does not by itself trigger strict scrutiny." *Boston Parent Coal. for Acad. Excellence Corp.* v. *School Comm. of Bos.*, 996 F.3d 37, 41, 46, 48-49 (1st Cir. 2021). A race-neutral admissions policy that seeks to "increase * * * the percentage representation of an underrepresented group" is likewise not subject to strict scrutiny. *Id.* at 48-49 (emphasizing that there is "no likely controlling reason why one cannot prefer to use facially neutral and otherwise valid admissions criteria that cause underrepresented races to be less underrepresented").

Other courts of appeals have reached similar conclusions. For example, in *Doe*, the Third Circuit evaluated a school board's race-neutral school-assignment plan and held that the board's "goal[]" of "[a]voiding" a "racially disproportionate impact" did not trigger strict scrutiny. 665 F.3d at 547-548, 553-554, 556. The D.C. Circuit likewise held that a race-neutral federal statute was not subject to strict scrutiny even though Congress enacted it in part to "advance equality of business opportunity" and to "counteract" "racial discrimination." *Rothe*, 836 F.3d at 71-72; see also, *e.g.*, *Spurlock* v. *Fox*, 716 F.3d 383, 394-396, 399-400 (6th Cir. 2013) (holding, in a case alleging racial resegregation, that a school board's race-neutral rezoning plan was not subject to strict scrutiny even though the board sought "to adopt measures that would have the least possible effect on increasing

racial isolation and exacerbating the racial achievement gap"); *Stevenson* v. *Blytheville Sch. Dist. #5*, 800 F.3d 955, 961, 969-972 (8th Cir. 2015); *Allen* v. *Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352-1354 (11th Cir. 1999), vacated at joint request of parties, 216 F.3d 1263 (11th Cir. 2000).

B. The Purposes Of The Equal Protection Clause And The Longstanding Views Of The United States Reinforce The Conclusion That Pursuing Equal Opportunities Is Not Suspect

A ruling that an intent to equalize opportunities for individuals of all races is constitutionally permissible would align with key purposes of the Equal Protection Clause, which was adopted to break down racial barriers. As *Inclusive Communities* recognized, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation," and the government has a central role to play "in moving the Nation toward a more integrated society." 576 U.S. at 546-547. It cannot be that the Equal Protection Clause requires school authorities to "accept the status quo" when they learn that one of their policies is impeding the ability of students of all races to take advantage of a valuable public good, such as an education at the selective schools at issue here. *Parents Involved*, 551 U.S. at 787-788 (Kennedy, J., concurring in part and concurring in the judgment).

Conversely, the Equal Protection Clause does not prohibit a school district that *has* implemented equitable policies from refusing to adopt *less* equitable policies. Imagine, for example, that the schools at issue here had always followed

the admissions policy plaintiff challenges, and plaintiff had requested that the school board adopt the predecessor testing-based policy. If the board refused because the proposal would interfere with its goal of making the education at issue here equally available to students of all races, the board would not be acting with a suspect purpose: it would be nonsensical—and unworkable—to require school boards to defend myriad decisions declining to adopt inequitable policies under the demanding strict-scrutiny standard. And, significantly, there is no basis for concluding that a school board's intent is proper in such circumstances, and yet becomes suspect when the baseline state of affairs is different.

Consistent with that logic, the United States and the Department of Education—which have important enforcement responsibilities in this area, see p. 1, *supra*—have consistently taken the position for more than 20 years that race-neutral means for promoting equal opportunity, racial integration, or racial diversity in the K-12 context are lawful, sometimes making explicit that such measures are not subject to strict scrutiny. See, *e.g.*, U.S. Dep't of Justice & U.S. Dep't of Educ., *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* 5-6 (Dec. 2, 2011), https://perma.cc/UG83-CMMD (2011 Guidance), withdrawn, U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Withdrawal of Guidance 1 (July

3, 2018), https://perma.cc/KQ6B-JMNY (2018 Letter);[8] U.S. Dep't of Educ., Dear Colleague Letter on *Parents Involved* (Aug. 28, 2008), https://perma.cc/49UL-X94U, replaced by 2011 Guidance; U.S. Br. at 17, 24-27, *Parents Involved*, *supra* (No. 05-908) (2006); Tr. of Oral Arg. at 18, 21-23, *Parents Involved*, *supra* (No. 05-908) (2006); U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (Feb. 1, 2004), https://perma.cc/LK93-3AC9. For all of the reasons identified above, that longstanding position is correct.

C. Plaintiff's Counterarguments Are Unpersuasive

In various parts of its brief, plaintiff misunderstands the legal standard that governs when a court evaluates whether a race-neutral policy was adopted with a suspect intent. At times, plaintiff claims that it need only show that the school board adopted the challenged policy with a "racial purpose" or "because of [its] effect on racial demographics," and plaintiff likewise suggests that it would suffice to show an "intent to *increase* the representation of certain racial groups," which would "'by necessity' impl[y] [an] intent to *decrease* the representation of the remaining groups." Br. 3-4, 22, 25, 39, 48, 52 (citations omitted). But the

[8] The 2018 Letter summarily withdrew the 2011 Guidance and six other documents on the ground that they "suggest[ed] to public schools" that they "take action or refrain from taking action beyond plain legal requirements." 2018 Letter 2. The letter did not disagree with any conclusion in the 2011 Guidance as to the actions public schools are constitutionally permitted to take. *Ibid.*

Supreme Court has held that the critical inquiry is whether the board adopted the policy "'because of,' not merely 'in spite of,' its adverse effects" on a particular racial group. *Feeney*, 442 U.S. at 279. And the extensive precedent discussed above—which plaintiff largely ignores or misconstrues—establishes that a governmental entity does not act with a suspect intent when it seeks to ensure that individuals of all races may equally take advantage of valuable public resources.[9]

To the extent plaintiff further contends (Br. 22, 46-54) that a race-neutral policy seeking to promote equal opportunities amounts to unlawful "racial balancing," that argument misapprehends Supreme Court precedent. "Racial balancing," as the Court has used that term, means a preference for "some specified percentage of a particular group merely because of its race or ethnic origin." *Fisher* v. *University of Tex.*, 570 U.S. 297, 311 (2013) (citation omitted). The Court has held that under the demanding strict-scrutiny standard, "outright

[9] Although plaintiff repeatedly cites (Br. 4, 25, 39) *Miller* v. *Johnson*, 515 U.S. 900 (1995), for the proposition that any "racial purpose" is constitutionally suspect, *id.* at 913, *Miller* concerned an "analytically distinct" claim that a State had "used race as a basis for separating voters into districts," *id.* at 911 (citation omitted). Such a racial-gerrymandering claim is governed by different standards. *Id.* at 916 (requiring a showing that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"). When *Miller* used the shorthand phrase "racial purpose" in describing the case law at issue here, it therefore did not *sub silentio* alter the underlying standard. See *Raso*, 135 F.3d at 16-17 & n.7 (explaining that *Miller* did not hold that "*any* action in which race plays a role is constitutionally suspect").

racial balancing" is not a compelling interest justifying the extreme measure of using racial classifications. *Ibid.* (citation omitted). But that holding is inapplicable when a school board employs race-neutral means to provide equal opportunities: in such circumstances, a board neither seeks to attain any "specified percentage[s]" of racial groups "merely because of * * * race," nor does it employ constitutionally problematic racial classifications, *ibid.* (citation omitted). Cf., *e.g.*, *Grutter*, 539 U.S. at 330, 339-340 (explaining that racial classifications cannot be used to achieve racial balancing *and* sanctioning race-neutral means for promoting diversity); *Boston Parent Coal.*, 996 F.3d at 47 (concluding the use of neutral criteria to address "opportunity gaps" for Black and Latinx students is not unlawful racial balancing).

Instead, as explained above, when a governmental entity is deciding how to distribute a valuable resource to members of the public, it may take race-neutral steps to ensure that individuals of all races may equally take advantage of that resource—here, an education at three selective public schools. In doing so, there is nothing problematic about endeavoring to ensure that the cohort of admitted students more closely reflects the racial makeup of students in the relevant community, as that is one way to measure whether the resource is being distributed on an equal basis. Indeed, if a school board were committed to that equal-opportunity goal above all others, it could distribute seats on the basis of a lottery.

Such an action could not possibly be constitutionally problematic, underscoring the conclusion that pursuing an equal-opportunity interest is not suspect.

Plaintiff ultimately concedes—correctly—that under *Anderson*, *supra*, "reciting [racial] diversity as a goal" for adopting a race-neutral policy is "insufficient to trigger strict scrutiny." Br. 51. According to plaintiff, however, that holds true only if the policy "treat[s] everyone equally," by which plaintiff appears to mean that "each student, Black or white," receives the "same preferences." Br. 50-51. But the "means chosen" in the admissions policy plaintiff challenges here (Br. 51) pass muster under that standard because the policy granted all students the same preferences regardless of race. Add. 15-18, 64-67 (noting the policy relied only on race-neutral factors such as GPAs and residential zip codes). Although the policy reserved certain seats at each school for students in specified zip codes (Add. 17-18, 66-67), the student-assignment plan challenged in *Anderson* similarly reserved half of the seats at each school for students deemed to live within the school's "walk zone," 375 F.3d at 76-77—a "preference" plaintiff concedes was permissible (Br. 50-51). Consistent with that concession, plaintiff acknowledged in district court that the school board here could have sought to "increase[] the presence of Black and Latino students" by awarding some seats on a citywide basis and allocating others to "tiers" of census tracts grouped together based on certain socioeconomic factors. Doc. 97, at 15.

Plaintiff thus fails to offer any basis for concluding that some race-neutral plans adopted to promote the concededly proper purpose of increasing racial diversity are subject to strict scrutiny. Nor could it: the precedent described above sanctions the use of *all* race-neutral approaches for providing equal opportunities and promoting racial diversity, including those granting individuals preferences based on a wide variety of race-neutral factors.

II

IF THIS COURT DETERMINES STRICT SCRUTINY APPLIES, IT SHOULD REMAND FOR THE DISTRICT COURT TO EVALUATE WHETHER THE POLICY PASSES MUSTER UNDER THAT STANDARD

In the event that this Court determines that the admissions policy challenged here is subject to strict scrutiny, it should decline plaintiff's invitation (Br. 54-59) to address whether the policy survives review under that standard—a question the district court had no occasion to evaluate (Add. 38-39, 95-99). Instead, this Court should remand to the district court for it to consider that fact-sensitive question in the first instance. Not only is remand in such circumstances this Court's standard practice, *United States* v. *Acosta-Colon*, 157 F.3d 9, 21 (1st Cir. 1998), but also the district court specified that it would allow defendants to present additional evidence on this issue if it found it necessary (Add. 4, 52; Doc. 100, at 26-28, 32, 34-35).

Resolution of the strict-scrutiny question would require this Court to evaluate the compelling interests defendants would assert to justify the challenged policy. Cf. *Parents Involved*, 551 U.S. at 720-725 (rejecting two interests as inapplicable in the K-12 context at issue there but not "attempting * * * to set forth all the interests a school district might assert"). The Court would also need to decide the contours of the narrow-tailoring inquiry in this unusual context—a difficult task that no federal appellate court has had occasion to perform. As the Supreme Court has explained, "strict scrutiny must take relevant differences into account," and courts must "calibrate[]" the narrow-tailoring inquiry to the relevant context. *Grutter*, 539 U.S. at 327, 333-334 (citation and internal quotation marks omitted).

Here, for example, plaintiff argues that a race-neutral policy cannot be narrowly tailored unless it is a "last resort" for accomplishing a governmental entity's compelling objectives. Br. 58 (citation omitted). But it makes little sense to apply the doctrine plaintiff invokes—that racial classifications are narrowly tailored only if public entities adequately consider adopting "workable race-neutral alternatives," *Grutter*, 539 U.S. at 339—when a plaintiff challenges an action that itself is *already* race neutral. If this Court holds that strict scrutiny applies in this novel setting, it should remand to the district court for it to evaluate these complex issues in the first instance.

CONCLUSION

For the foregoing reasons, this Court should hold that an intent to equalize opportunities for students of all races is not suspect, and it should decline to address what the strict-scrutiny inquiry might entail in this novel context.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Office Word 2019.

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