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PROXY DISCRIMINATION IN PUBLIC CONTRACTING

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Abstract

This Article considers the legality of racial preferences in government contracting in light of the Supreme Court's decision in Students for Fair Admissions v. Harvard. *Newfound heightened scrutiny of contracting programs may cause governments to turn to proxy discrimination to avoid such scrutiny, but such proxy discrimination would be unlawful under well-established Supreme Court precedent. Indeed, proxy discrimination would be just as unlawful in contracting as it is in other areas. A better path forward to support entrepreneurs of all racial and ethnic backgrounds would embrace genuinely race-neutral programs.*

CONTENTS

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INTRODUCTION

Though the Equal Protection Clause generally forbids governments to discriminate on the basis of race, the Supreme Court has carved out a narrow exception for race-conscious programs in public contracting to remedy an underlying statutory or constitutional violation.[1] In practice, state and local governments have often construed that exception extremely broadly, leading to individual rights violations.[2] Yet the Supreme Court's 2023 opinion in *Students for Fair Admissions v. Harvard* ushered in a new era by emphasizing just how high the bar is for a government decisionmaker to show a compelling interest sufficient to justify discriminatory racial preferences.

In a post–*Students for Fair Admissions* era, state and local governments might hesitate to claim that contracting preferences fall within established exceptions to the Equal Protection Clause's prohibition on race discrimination. To achieve their racial balance goals in contracting, some governments might instead resort to proxies for race. But a long line of cases, culminating in the Supreme Court's landmark 1978 opinion in *Village of Arlington Heights v. Metropolitan Housing Developing Corp.*, demonstrate that using proxies for race to achieve a racial result is just as unlawful as using race itself.

Proxy discrimination would be just as unlawful in contracting as in other areas where it has been tried, notably education. Part II of this article examines how preferences in contracting have traditionally operated. Part III discusses how *Students for Fair Admissions* might lead to heightened scrutiny of contracting programs and why governments might be tempted to turn to proxy discrimination to avoid such scrutiny. Part IV explains why such proxy discrimination is unlawful under well-established Supreme Court precedent. Finally, we conclude by discussing a better path forward: employing genuinely race-neutral programs to support entrepreneurs of all racial and ethnic backgrounds.

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[1] Richmond v. J. A. Croson & Co., 488 U.S. 469, 500 (1989).

[2] *See, e.g.*, Landscape Consultants of Texas v. Houston, No. 4:23-cv-03516 (S.D. Tex. Sept. 23, 2023); Californians for Equal Rights Foundation v. San Diego, No. 3:24-cv-00484 (S.D. Cal. March 12, 2024); Hierholzer v. Guzman, 24-1187 (4th Cir. April 23, 2024).

I. TRADITIONAL RACIAL PREFERENCE PROGRAMS

Nearly 10 percent of the U.S. economy is filtered through government contracts at the federal, state, and local level.[3] Following the Civil Rights Act of 1964, governments at all levels began implementing race-conscious programs in attempts to remedy past *de jure* racial discrimination in public contracting. Sixty years later, these Minority and Women Business Enterprise (MWBE) programs are still going strong.

Houston, Texas, has administered a race-conscious MWBE program since 1984.[4] While Houston's program has evolved over the decades, it retains a structure and operation common to many traditional MWBE programs. The two components of a race-conscious MWBE program are a definition of who is included in the race or sex-based preference;[5] and a goal for MWBE participation.

Houston defines a "minority person" as a citizen or legal resident alien of the United States who is: Black American, which includes persons having origins in any of the black racial groups of Africa; Hispanic American, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race; Asian-Pacific American, which includes persons having origins from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, the Federated States of Micronesia, or Hong Kong, or the region generally known as the Far East; Native American, which includes persons having origins in any of the original peoples of North America, American Indian, Eskimo, Aleut, Native Hawaiian; or Subcontinent Asian American, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.[6] And Houston defines a "woman" as "a person who is a citizen or legal resident alien of the United States and who is of the

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[3] Judge Glock, *Welcome to the World of Minority Contracting*, CITY J., Spring 2023, at 28.

[4] Kossman Contracting Co. v. Houston, No. H-14-1203, 2016 WL 11473826, at *1 (S.D. Tex. Feb. 17, 2016).

[5] Some MWBE programs also include race-neutral preferences for small businesses or businesses owned by disabled individuals.

[6] HOUSTON, TEX., CODE OF ORDINANCES § 15-82. These racial and ethnic descriptions mirror those used in the federal Small Business Administration's Section 8(a) Business Development Program. *See* 13 C.F.R. § 124.102(b).

female gender."[7] Membership in any of these racial, ethnic, or sex-based groups is typically self-certified, and often no distinction is made between recent immigrants and individuals whose families have lived in the United States for generations.

For those who clear these race and sex-based hurdles, the next step to qualifying as a minority or women-owned business enterprise usually requires proving majority ownership. Generally, minority or women business owners must own, control, and manage a sole proprietorship or at least 51 percent of the stock or assets of their corporation, partnership, or other professional entity.[8] Most MWBE programs are intended for small businesses. MWBE applicants must meet business-size requirements; businesses that grow beyond the size threshold can lose their certification.[9]

The other key component of a traditional MWBE program is the "utilization" goal, usually expressed as the percentage of each public contract's value that must go to a certified minority or woman-owned business enterprise, either directly as a prime contractor or indirectly as a subcontractor. Frequently, governments rely on so-called "disparity studies" to set the utilization goal. Disparity studies, produced by specialty third-party consulting firms, purport to review and analyze the utilization and availability of minority and woman-owned businesses in a particular market area to determine if a disparity exists in a public entity's public contracting awards.[10]

Producing disparity studies has become a multimillion-dollar industry unto itself.[11] That industry owes its existence to a single sentence written by Justice O'Connor in *Richmond v. J.A. Croson Co*., in which the U.S. Supreme Court first held that race-conscious public contracting programs are subject to strict scrutiny.[12] In her plurality opinion, Justice O'Connor noted that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[13] Though the Court ultimately struck down Richmond's

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[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, *id.* at §§ 15-87–89 (establishing small business size restrictions and effect of exceeding small business size restrictions); MUN. CODE OF CHICAGO, ILL., at § 2-92-470 (imposing penalties on businesses exceeding small business size restrictions); N.Y. EXEC. LAW § 310(20) (McKinney 2025) (defining small business).

[10] MGT of America Consulting, LLC, *State of New York Empire State Development Disparity Study* 17 (2024).

[11] *See* Glock, *supra* note 3.

[12] *See Croson*, 488 U.S. at 469.

[13] *Id.* at 509.

30 percent MWBE set-aside, the industry *Croson* spawned is alive and well.[14]

Since quotas for MWBE participation are unconstitutional,[15] a state, city, or county's annual utilization goal for all of its public contracts is often expressed as "aspirational."[16] Public entities then impose individual goals on each public contract—called "contract-specific goals"—to ensure that the overarching aspiration is achieved. When submitting bids for public contracts, bidders are often required to explain in writing how they will meet the contract-specific MWBE goal. If a bidder is an MWBE, the company is typically permitted to self-perform some or all of the MWBE goal. If not, the bidder must identify the MWBE subcontractors it will use to achieve the goal.

A bidder who fails to meet a contract-specific MWBE goal can sometimes be excused by showing that it tried sufficiently hard to find MWBE subcontractors. In Houston, for example, a contractor must take sixteen separate actions to prove that it made such a "good faith effort," including advertising subcontracting opportunities in "news media focused towards minority and women persons far in advance of the solicitation date" and helping MWBE subcontractors obtain bonds, lines of credit, and insurance.[17] Failure to make good faith efforts can result in sanctions, including being banned from public contracting for up to five years.[18]

II. PROXIES AFTER *STUDENTS FOR FAIR ADMISSIONS*

Houston's public contracting program and Harvard's college admissions policy may appear to have little in common, but they are linked—as are all government programs that use racial

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[14] *See* George R. La Noue, *Racial Preferences in Economic Benefits: From Widely Accepted to Legally Indefensible*, 25 FED. SO'Y REV. 72, 77-80 (2024) (questioning the scientific rigor of contracting disparity studies and their legal basis for a compelling government interest in operating a race-conscious public contracting program).

[15] *See Croson*, 488 U.S. at 507.

[16] *See, e.g.*, *Empire State Development 2024 Disparity Study*, *supra* note 10, at 9 ("New York State currently maintains a 30% MWBE aspirational goal, which serves as a benchmark for contracting endeavors across all industry categories."); Miller Consulting, Inc., *City of Raleigh Disparity Study* ES-2 (2023) [https://perma.cc/AL52-9EX9] ("The City of Raleigh currently has an aspirational goal of 15% of the total contract values to be performed by certified M/WBE businesses in contracts awarded by the City of Raleigh for construction and building projects of $300,000 or more."); Harris County, Tex., *Harris County Minority- and Woman-Owned Business Enterprise Program Policy* 2 [https://perma.cc/JTB8-NUGT] (defining "annual aspirational goal" as "the County's overall, annual total target for the participation of MBEs and WBEs in County contracts").

[17] City of Houston, *Office of Business Opportunity Good Faith Efforts Policy* (2022).

[18] HOUSTON, TEX., CODE OF ORDINANCES § 15-86(a).

classifications—by the need to withstand the highest level of judicial scrutiny.

Most recently, in *Students for Fair Admissions*, the Supreme Court reaffirmed that strict scrutiny applied to the use of race in education. Previously, student body diversity had been considered a compelling interest sufficient to justify racial preferences in admissions if narrowly tailored to achieve this compelling interest. *Students for Fair Admissions* began its analysis by noting the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race,"[19] a principle the Court has recognized "repeatedly."[20] Further, the Court emphasized that "[e]liminating racial discrimination means eliminating all of it." This principle applies to discrimination against any racial group: the Equal Protection Clause is "universal in its application,"[21] for it "cannot mean one thing when applied to one individual and something else when applied to a person of another color."[22] If "both are not accorded the same protection, then it is not equal."[23]

While the Court acknowledged limited exceptions to that general principle, any such exception must survive the demanding two-step inquiry of strict scrutiny.[24] The use of race must further a compelling governmental interest and must be narrowly tailored to achieve that interest.[25] In *Students for Fair Admissions,* Harvard and North Carolina offered a range of interests they believed compelling, but the Court rejected them all. Harvard offered: "training future leaders in the public and private sectors"; preparing graduates to "adapt to an increasingly pluralistic society"; "better educating its students through diversity"; and "producing new knowledge stemming from diverse outlooks."

North Carolina's list was similar, including "(1) promoting the robust exchange of ideas; (2) broadening and refining

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[19] Students for Fair Admissions v. Harvard, 600 U.S. 181, 207 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (cleaned up)).

[20] *See* Loving v. Virginia, 388 U.S. 1, 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

[21] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[22] *Cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

[23] *Students for Fair Admissions*, 600 U.S. at 290.

[24] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

[25] Fisher v. University of Tex. at Austin, 570 U.S. 297, 311 (2013).

understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[26] The Court considered these goals "commendable" but "not sufficiently coherent for purposes of strict scrutiny" because a court can never really know when they have been reached so that the "perilous remedy of racial preferences may cease."[27] The Court noted that it applied a similar analysis in *Croson* regarding the constitutionality of a preferential government contracting program. There, the Court rejected claims that "past societal discrimination" could "serve as the basis for rigid racial preferences," as to allow such claims would be "to open the door to competing claims for 'remedial relief' for every disadvantaged group."[28]

Obvious differences exist between the use of race in public education and public contracting. Cases permitting some use of race in education grounded their reasoning in universities' First Amendment right to educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."[29] Governments lack any parallel First Amendment right to select the contractors of their choice. But the scrutiny applied in *Students for Fair Admissions* suggests that very few race-preferential contracting programs could withstand it. Under *Croson*, the leading case, a state or local government may use race preferences to rectify the effects of "identified discrimination."[30] The "identified" part of that formulation is important: a "generalized assertion that there has been past discrimination in an entire industry" is insufficient to uphold a race-conscious contracting program.[31] Otherwise, "achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[32] Preferences in contracting are generally prohibited, and the exception is limited to a particular set of circumstances.

Where is the line between "identified discrimination" and a "generalized assertion of past discrimination?" In *Croson*, the Supreme Court held that when there is "a significant statistical disparity between the numbers of qualified minority contractors

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[26] Students for Fair Admissions v. Univ. of North Carolina, 567 F.Supp.3d 580, 656 (2023).

[27] *Students for Fair Admissions*, 600 U.S. at 214.

[28] *Croson*, 488 U.S. at 505.

[29] *Bakke, 438 U.S.* at 312.

[30] *Id.* at 469.

[31] *Id.* at 499.

[32] *Id.*

willing and able to perform a particular service and the numbers of such contractors actually engaged," an "inference of discriminatory exclusion might arise."[33] But *should* such an inference follow? Plenty of causes besides discriminatory exclusion can explain racial disparities. Racial and ethnic groups are not evenly represented in the professions. Sometimes these disparities reflect past or present discrimination; often they do not. That Cambodian Americans are overrepresented in the doughnut industry owes largely to the success of a single entrepreneur's bakery decades ago.[34] Vietnamese Americans disproportionately work as manicurists in no small part because a famous actress with impeccable nails visited a South Vietnamese refugee camp in the 1970s.[35] Cultural habits, social networks, and kinship ways vary across different groups, and may produce different outcomes. As Justice O'Connor understood in a different context, it would be "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[36] It is similarly unrealistic to expect governments to do the same with regard to statistical imbalances in the ranks of their contractors.

Statistical disparities also do not constitute evidence of "specific, identified instances of past discrimination that violated the Constitution or a statute."[37] Aside from avoiding prison riots, a specific identified instance of past discrimination is the only compelling interest left standing to permit race-based government action after *Students for Fair Admissions*. Proving such an interest—and proving that race-based government action is narrowly tailored to achieve that interest—is no easy task. Nor should it be. Courts interpreting the requirement following *Students for Fair Admissions* have required government actors to identify a specific instance of past discrimination without relying on general allegations of bias in the industry; provide direct evidence of intentional discrimination as opposed to mere disparities; and show past governmental participation in the discrimination it seeks to remedy.[38] The disparity studies undergirding most public contracting programs—which

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[33] *Id.* at 509.

[34] Elaine Lewinnek, Thuy Vo Dang & Gustavo Arellano, *Christy's Donut Shop: Where the Cambodian American Reign of Doughnut Shops Began*, PBS SOCAL (Apr. 13, 2022).

[35] Regan Morris, *How Tippi Hedren Made Vietnamese Refugees Into Nail Salon Magnates*, BBC NEWS (May 2015).

[36] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988).

[37] *Students for Fair Admissions*, 600 U.S. at 207.

[38] *See, e.g.*, Holman v. Vilsack, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021) (citing Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing precedent)).

identify statistical disparities, not specific, identified instances of past discrimination—do not satisfy these demanding requirements.

The rigor of the strict scrutiny standard set forth in *Students for Fair Admissions* strongly suggests that this Court is likely to strike down any attempted end-runs. Yes, under *Croson*, a city or state that can demonstrate recent discrimination in contracting could still claim a compelling interest in remedying that discrimination. But such discrimination has been clearly illegal since 1964, and race-conscious programs intended to remedy it have also been ubiquitous for over 50 years. Probably few or no real-world race-preferential contracting programs qualify as remedial under the standard set forth in *Students for Fair Admissions*.

Notably, *Students for Fair Admissions* also held that race-preferential educational programs are illegal unless they satisfy the "twin commands" of the Equal Protection Clause in addition to the traditional strict scrutiny test. The twin commands are that "race may never be used as a 'negative" and that it "may not operate as a stereotype."[39] Each holding is contained in a separate section of the opinion.[40] As Wisconsin Institute for Law and Liberty attorneys Skylar Croy and Daniel Lennington conclude in a new piece on the twin commands test, "[t]he best reading of SFFA, based on its text and structure, is that the U.S. Supreme Court made three separate—alternative—holdings governing how equal protection claims should be analyzed."[41]

The twin commands test may have a particularly strong impact on contracting litigation, insofar as it allows "plaintiffs an opportunity to streamline otherwise expensive and time-consuming litigation because the twin commands raise legal questions for which factual development—i.e. discovery—is mostly (maybe even entirely) unnecessary."[42] Under *Croson*, it is expensive to rebut disparity studies, and often requires years of litigation. The twin commands test allows plaintiffs to bypass those hurdles if they can demonstrate a contracting preference uses race as a negative or a stereotype. Because contracting is generally zero-sum—if one bidder

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[39] *Students for Fair Admissions*, 600 U.S. 181 (2023).

[40] *Id.* at 214-18.

[41] Skylar Croy & Daniel Lennington, *The Twin Commands: Streamlining Equality Litigation Based on Students for Fair Admissions*, 25 FED. SO'Y. REV. 349, 358 (2024). *See also* Larry J. Pittman, *The Supreme Court's Erroneous Equal Protection Clause Analysis: Societal Discrimination, the Harvard College Decision as the New* Plessy v. Ferguson*-Lite, and the Thirteenth Amendment*, 57 CREIGHTON L. REV. 189, 234 (2024) (agreeing with Croy and Lennington that *Students for Fair Admissions* sets forth a twin commands test, but criticizing the imposition of "another requirement on the use of race in a college's admissions process that prior Court precedent did not impose").

[42] *Id.* at 351.

gets a contract, that means another doesn't—under most race-preferential programs, race will serve as a negative. Such programs may arguably also use race as a stereotype, by assuming that members of certain races are less likely to own businesses that will be competitive for contracts. In short, *Students for Fair Admissions'* twin commands test leaves race preferential contracting programs more legally vulnerable than they were before.

III. THE UNLAWFULNESS OF PROXY DISCRIMINATION

If state and local governments are no longer able (or only very rarely able) to use overt race preferences, some might turn to proxy discrimination. Proxy discrimination refers to a decisionmaker's use of a non-racial characteristic associated with race (the proxy) to achieve a racial result. Such policies are on their face race-neutral, but the supposedly neutral factors employed are chosen to achieve a particular racial outcome. Although the Constitution gives governments wide range of discretion in choosing what kind of race-neutral contracting policies to apply, if a policy was in fact adopted to discriminate, it is unconstitutional.

That practice has a sordid history. In the wake of the first challenges to Jim Crow, Southern state governments often resorted to proxy discrimination to achieve their goals. Examples include literacy tests,[43] grandfather clauses,[44] and (unconstitutional now under the Twenty-Sixth Amendment) the poll tax.[45] Throughout all its decisions on the topic, the Supreme Court has been clear that strict scrutiny applies regardless of whether a law is facially discriminatory or facially race-neutral but "motivated by a racial purpose or object."[46]

In *Village of Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court set forth a list of factors used to determine if a decisionmaker is engaged in proxy discrimination.[47] In that case, a developer accused local authorities of using residential zoning as a tool for proxy discrimination. *Arlington Heights* requires courts to examine the "totality of the relevant facts" and conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[48] The ultimate purpose of this holistic inquiry is to

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[43] Schnell v. Davis, 336 U.S. 933 (1949).

[44] Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268, 269 (1939).

[45] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

[46] Miller v. Johnson, 515 U.S. 900, 913 (1995).

[47] 429 U.S. 252 (1977).

[48] *Id.* at 266.

identify whether a race-neutral policy can be "traced to a discriminatory purpose." The Court explained that many things may be relevant to the inquiry, including the "impact of the official action—whether it bears more heavily on one race than another"[49]; the "historical background of the decision"[50]; the "specific sequence of events leading up to the challenged decision"[51]; and "contemporary statements by members of the decision-making body."[52]

The Supreme Court anticipated some use of proxy discrimination in *Students for Fair Admissions* and emphasized that such circumvention of its ban on race discrimination is unlawful. "Universities may not simply establish through application essays or other means the regime we hold unlawful today," Chief Justice Roberts warned in his majority opinion. "'What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'"[53]

A. Proxy Discrimination in Education

While the pre–*Students for Fair Admissions* Court allowed the limited use of race in university admissions, it never extended that ruling to K-12 admissions. So K-12 schools that wanted to change the racial demographics of their student bodies often resorted to indirect methods to engineer their desired racial numbers.

For example, in the wake of racial unrest in the summer of 2020, the Fairfax County, Virginia, school board wanted to change the racial demographics of its flagship magnet school, Thomas Jefferson High School for Science and Technology (TJ). Rather than adopt explicit racial preferences, the Board devised a revamped admissions system that abolished the traditional admissions exam and instead allocated most seats at TJ to students in the top 1.5 percent of their Fairfax County middle schools. Because Asian American students, who had generally done well under the previous test-based admission system, disproportionately attend certain Fairfax County middle schools, the new plan diminished the numbers of Asian Americans admitted to TJ. A group of parents and alumni, the Coalition for TJ, challenged the new policy as a violation of the Equal Protection Clause. The Coalition won in district court, where Judge

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[49] *Id.*

[50] *Id.* at 267.

[51] *Id.*

[52] *Id.* at 268.

[53] *Students for Fair Admissions*, 600 U.S. at 230.

Claude Hilton remarked in ruling against a motion to dismiss: "Everybody knows that the policy is not race-neutral, and that it's designed to affect the racial composition of the school. You can say all sorts of beautiful things while you're doing others."

The school board appealed and won in the Fourth Circuit. There, the court held that *Arlington Heights* was the correct legal standard to apply to the Coalition for TJ's claims. But the Fourth Circuit held that the Coalition could not prevail at the first factor because Asian Americans were still overrepresented in TJ's entering class.[54] More broadly, the Fourth Circuit held that "evidence relied on by the Coalition in furtherance of its discriminatory intent contention is far too sparse to permit an inference of nefarious design."

We strongly disagree with the Fourth Circuit's analysis, but its core holding that *Arlington Heights* is the right framework for analyzing proxy discrimination claims marks an important concession. And what the Fourth Circuit didn't hold is also important. Some advocates urged that *Arlington Heights* shouldn't apply, or should apply only in weakened form, because the Board's purpose was benign or because it acted to remedy past discrimination. But the Fourth Circuit held that *Arlington Heights* was the correct test, just that the Coalition didn't meet its burden under it. *Coalition for TJ* leaves open the possibility that claims of proxy discrimination that meet the *Arlington Heights* standard can persist.

In a related instance, the Boston School Committee also used proxy discrimination to engineer the student demographics it wanted at three different magnet schools. The oldest and most famous of these, Boston Latin School, is the alma mater of a veritable Who's Who of individuals prominent in American history, politics, and letters, including Samuel Adams, Benjamin Franklin and Ralph Waldo Emerson.[55] Until recently, most students were admitted to these schools based on a combination of GPA and exam scores.[56] But in fall 2020, the Boston School Committee replaced the exam with a system that gave out most seats to students with the highest GPAs in each zip code.[57] The district court and the First Circuit recognized that this was done "precisely to alter racial demographics,"[58] and three School Committee members who voted to implement it eventually had to resign due to racially insensitive text messages and

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[54] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 879.

[55] BOSTON LATIN SCH., *Notable Alumni*, [https://perma.cc/ED3C-PNS7] (last visited Oct. 27, 2025).

[56] *See* Boston Parent Coal. for Academic Excellence v. Boston Sch. Cmte., 89 F.4th 46, 51 (1st Cir. 2023).

[57] *See id*. at 52–53.

[58] *Id*. at 63.

behavior toward white and Asian-American students.[59] Because white and Asian American students live disproportionately in zip codes that lost seats under the plan, it worked as intended. The First Circuit also held that *Arlington Heights* was the correct test for analyzing plaintiffs' claims but concluded that "a discriminatory purpose did not motivate the Plan's adoption."[60] Though the Supreme Court denied certiorari in this case, three Justices indicated in dissents from denial of certiorari that they understood *Arlington Heights* to be the correct standard of review.[61]

New York City similarly used proxies for race to achieve the racial results it wanted when former Mayor Bill de Blasio sought to abolish the admissions exam for the city's eight test-in Specialized High Schools. Though the test had been validated as measuring what it was intended to measure, de Blasio proceeded on the theory that the exam disparately impacted black and Hispanic applicants.[62] His schools chancellor, Richard Carranza, had spoken derisively about the Asian American students at those schools, saying, "I just don't buy into the narrative that any one ethnic group owns admission to these schools."[63] When de Blasio and Carranza failed to push their test-abolition plan through the state legislature, they unilaterally altered admission criteria for a portion of the class to accomplish that same purpose. An equal protection challenge to that scheme, in which the challengers are represented by Pacific Legal Foundation, is ongoing.

Now that *Students for Fair Admissions* has identified new limits on the use of race in admissions in higher education, colleges and universities have signaled an increased willingness to use proxies for race to discriminate. Before *Students for Fair Admissions*, some states adopted constitutional amendments that placed limits on the use of race in education beyond those found in the federal Constitution. For example, in 1997, California voters approved by referendum the California Civil Rights Initiative (Prop. 209), which amended the state constitution to prohibit racial preferences in public education, contracting and employment. In California, universities initially "went through a depression figuring out what to do," as one

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[59] *See id*. at 53–54.

[60] *Id*. at 48.

[61] Boston Parent Coal. v. Boston Sch. Cmte., 604 U.S. ___, ___ (2024) (Alito, J., dissenting from denial of certiorari); *Id.* at ___ (Gorsuch, J., dissenting from denial of certiorari).

[62] *See* NEW YORK CITY DOE, *Specialized High Schools Proposal* 6–7, 12; *see also* Bill de Blasio, *Our specialized schools have a diversity problem. Let's fix it.*, CHALKBEAT (2018), [https://perma.cc/4ZRS-DAH9].

[63] *See* Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. TIMES, June 5, 2018, [https://perma.cc/N3CZ-QZUV].

Berkeley dean put it, before deciding to resort to proxies for race that could still get them the racial results they wanted.[64] Berkeley Law Dean Erwin Chemerinsky has been perhaps surprisingly forthright about discriminating by proxy:

> 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.[65]

At an American Association of Law Schools conference held just days after *Students for Fair Admissions*, Dean Chemerinsky further discussed how institutions could use proxies to get around the Court's decision:

> 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 school students targeting particular high schools. Those high schools happened to be 99% students of color. But the program was itself facially race neutral.[66]

At the same conference, Tim Lynch, general counsel of the University of Michigan, similarly discussed how law schools might lawfully use "race-conscious but also race-neutral means to achieve greater, or at least protect, diversity gains."[67] He recommended that in "terms of what law schools should be doing, they should be thinking about the first statement [Chief Justice] Roberts made,

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[64] Heather Mac Donald, *California passed an anti-affirmative action law, and colleges ignored* it, N.Y. POST (Sep. 1, 2018), [https://perma.cc/N9TW-L52R]. The same piece recounts the following anecdote: "UCLA law professor Richard Sander was on a committee to discuss what could be done after 209. "The tone among many of the faculty and administrators present was not 'How do we comply with the law in good faith?' but 'What is the likelihood of getting caught if we do not comply?' . . . Some faculty observed that admissions decisions in many graduate departments rested on so many subjective criteria that it would be easy to make the continued consideration of race invisible to outsiders."

[65] Jay Caspian Kang, *The Sad Death of Affirmative Action*, THE NEW YORKER (Nov. 4, 2022), [https://perma.cc/K5XD-22Y8].

[66] ASS'N OF AM. LAW SCHS., *AALS Conference on Affirmative Action: Panel 3*, at 2:40, YouTube (Aug. 2, 2023), https://youtu.be/1Shl_vJ0xl4.

[67] *Id*. at 2:39.

which is, trying to take opportunities to increase diversity through race-neutral means."[68]

Other colleges appear to be using essay prompts to circumvent *Students for Fair Admissions.* Sarah Lawrence College issued a new essay question 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."[69] In a statement issued just after the decision was announced, Harvard University noted that the Court ruled that universities may consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise" and that it would "certainly comply" with this part of the decision.[70] The cheeky suggestion is that Harvard intends to use essays about experiences with race as a proxy for underrepresented minority status.

In short, selective K-12 schools have frequently attempted various forms of proxy discrimination, and post–*Students for Fair Admissions*, many colleges and universities look poised to do the same. Though the relevant Supreme Court precedents hold that such discrimination is just as illegal as using race itself would be, both K-12 schools and universities have tried energetically to circumvent this prohibition. Because litigation in many of these cases is still pending, it remains to be seen whether the courts will effectively check such proxy discrimination without intervention from the Supreme Court. Whatever happens in these cases, though, they suggest that should the Supreme Court crack down on explicit race discrimination in contracting, proxy discrimination will be a likely strategy of evasion.

B. Proxy Discrimination in Contracting

Some of the proxies used in education could have clear analogs in contracting. For example, at the University of Chicago, the Neubauer Family Adelante Scholarship is not technically restricted to Hispanic and Latino students but is instead open to "outstanding students who share the Neubauers' commitment to Hispanic/Latino communities."[71] Similarly, ScHOLA²RS House at the University of

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

[69] Liam Knox, *Prompting Discussion or Tempting Litigation*, INSIDE HIGHER ED, (July 20, 2023), [https://perma.cc/2U7E-KDLW].

[70] Lawrence Bacow, *Statement of Lawrence Bacow, President, Harvard University, on Supreme Court Decision* (June 29, 2023), [https://perma.cc/9Q7F-U8MN].

[71] *Neubauer Family Adelante Summer Scholars*, [https://tinyurl.com/4sp3t9m2].

Connecticut—a "Living/Learning Community," roughly a dormitory that offers specialized academic and social programming to the students living there—is similarly open to students "interested in engaging in topics related to the experience of black males in higher education."[72] This language was adopted in response to criticisms that the original program, which prioritized applications from students who self-identified as "African American/Black or mixed race," was racially exclusive and discriminatory.[73] It is easy to imagine a state government using similar language and giving preference to contractors who demonstrate a commitment to the Black, Hispanic, or Native American communities or "interested in topics" related to these communities. When these preferences are used as proxies for race, they should be struck down under *Arlington Heights*.

Essay or personal-statement requirements like Harvard's or Sarah Lawrence's could also be used as proxies for race in contracting and should be struck down as unconstitutional. Governments could require prospective contractors to submit essays or personal statements on topics related to race, diversity, or inclusion that encourage contractors to reveal their racial background.

Some federal contracting programs have already gone down this road. In *Ultima Service Corp v. Department of Agriculture*, a federal judge enjoined operations of a Small Business Administration program that assumed that membership in certain racial categories automatically qualified contractors as eligible for certain contracts open to "socially disadvantaged" businesses.[74] The SBA promptly tried to evade the decision by asking each of its racial minority contractors to write an essay explaining how they were disadvantaged by coming from a racial minority group. In an email,

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[72] ScHOLA²RS House Learning Communities Program, *Scholastic House Of Leaders in support of African American Researchers & Scholars* (last visited Oct. 27, 2025), [https://perma.cc/KAK7-5ZBL].

[73] As two members of the Civil Rights Commission wrote in a letter to University of Connecticut president Susan Herbst, "Up until a few weeks ago, the University of Connecticut web site explicitly stated that the applications of 'students who identify as African American/Black or mixed race will be prioritized." This language, which clearly announces an intent to discriminate, appears to have been quietly removed after ScHOLARS House attracted some attention from the press. We are concerned, however, that the new language may be simply a fig leaf. The name of the Learning Community is, after all, 'Scholastic House of Leaders Who Are African-American Researchers and Scholars', not 'Scholastic House of Individuals Interested in Engaging Topics Related to the Experience of Black Males in Higher Education' or the like. Further, Dr. [Erik] Hines . . . further describes ScHOLA2RS House as a space 'for African-American men' and notably not as a space for 'persons interested in issues affecting African-American men.'" Gail Heriot and Peter Kirsanow, *Letter* (March 21, 2016) (on file with author).

[74] 683 F. Supp. 745 (E.D. Tenn. 2023).

the SBA informed at least some of its 8(a) contractors that the essay could be no more than two paragraphs long and should recite one or two instances of discrimination. The message also suggested, falsely, that the court's decision simply required that filing such an essay with the SBA sufficed for the contractor to continue in the SBA program.[75] This essay requirement looks very much like an unlawful proxy for race. Other government decisionmakers may adopt such an essay requirement prospectively, rather than in response to a loss in court; any such requirements are also likely unlawful.

Other proxies may be less closely identified with race and, while equal protection violations if adopted for racial reasons, may be less clear violations. In education, as in *Coalition for TJ* and *Boston Parent Coalition*, geography has commonly been used as a proxy for race. Such neighborhood and zip code preferences could also be used as proxies for race in contracting. If they are used this way, these programs should be struck down as unconstitutional. One potential limitation is that a business can be registered anywhere, making it easier for contractors from disfavored racial backgrounds to circumvent the rule.

Socioeconomic status or income could also be used as a proxy. Some existing federal statutes do something similar already by offering preferences for "socially disadvantaged" or "economically disadvantaged" persons.[76] Attorney Michael Rosman identifies three general categories into which these statutes fall.[77] In some cases, the drafters barely hide their intention to use these terms as proxies for race; "socially disadvantaged" is explicitly defined as applying to members of certain racial groups. Such "invoking of the term

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[75] Todd Gaziano, *Trust the Feds to Stop Discriminating?*, LIBERTY UNYIELDING (Nov. 20, 2023).

[76] Michael E. Rosman, *The Language of Race and Sex Preferences in Contracting* (2025) (on file with authors). According to Rosman, sometimes "socially disadvantaged" and "economically disadvantaged" are interpreted in tandem to encompass a single concept of socioeconomic disadvantage. Sometimes, as with the Department of Transportation's Disadvantaged Business Program or at the Minority Business Development Program, members of certain racial groups are presumed to be socially and/or economically disadvantaged. Other programs do treat social and economic disadvantage as different concepts and will only find persons with assets or income under a certain threshold to be economically disadvantaged. At the Department of Transportation, for example, economic disadvantage may be rebutted (regardless of race) if a business owner has a personal net worth in excess of $2,047,000, excluding that person's equity in a primary residence, the disadvantaged business enterprise, and any retirement accounts. The Small Business Administration does something similar but uses different cutoffs, examining net worth, net income, and the fair market value of the business owner's assets. It presumes that individuals are not economically disadvantaged if they have a net worth over $850,000, an adjusted gross income over three years in excess of $400,000, or fair market value of all assets in excess of $6.5 million. The same tests are used regardless of the line of business.

[77] *Id.*

'disadvantage' notwithstanding," these statutes "are simple racial (or sex) preferences."[78] Any such programs should be particularly easy candidates for equal protection challenge; applying *Arlington Heights* is likely unnecessary because the racial preference is barely camouflaged. There exist other federal statutes in which "socially disadvantaged" isn't defined in the statute in racial terms, but might nonetheless have been motivated by racial purpose. Any such statutes are good candidates for challenge under the *Arlington Heights* test.

Socioeconomic preferences in contracting that aren't thinly disguised race preferences might nonetheless be less likely to flourish than their counterparts in education. It makes sense to give a hand up to teenagers who have grown up in poverty and have had fewer advantages than others, regardless of their race. As former president Barack Obama put it, "I think we should take into account white kids have been disadvantaged and have grown up in poverty and shown themselves to have what it takes to succeed."[79] The race-neutral case for giving a hand up to owners of disadvantaged businesses is less clear. Their owners are adults, some of whom have had decades to overcome the disadvantages of childhood. Some businesses struggle or are "disadvantaged" because they are less effective than other firms in the same field at creating value for customers. Does it really make sense for government to put a thumb on the scale for such contractors?

In both education and contracting, there is also the problem of how to define who is socioeconomically disadvantaged and deserves to benefit. Advocates of socioeconomic preferences in education generally recognize that socioeconomic status is multifaceted and that having high socioeconomic status is about more than income or wealth.[80] Some selective colleges and universities deal with this ambiguity by giving admissions officers broad discretion to give or withhold socioeconomic status preference. To riff on Potter Stewart's phrase, they might not know how to define socioeconomic disadvantage precisely, but admissions officers know it when they

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[78] *Id.*

[79] Eugene Robinson, *Obama Cools on Affirmative Action*, TRUTHDIG (May 15, 2007).

[80] In a law review article critiquing socioeconomic preferences as an alternative to racial affirmative action, Maimon Schwarzschild quotes George Orwell: "The essential point about the English class system is that it is not entirely explicable in terms of money. . . . A naval officer and his grocer very likely have the same income, but they are not equivalent persons and they would only be on the same side of very large issues." The "not equivalent persons" wording rankles twenty-first century American ears, but few would dispute the general point that socioeconomic status also involves subtle markers of taste different from annual income or assets. Maimon Schwarzschild, *A Class Act: Social Class Affirmative Action and Higher Education*, 50 SAN DIEGO L. REV. 441, 459-60 (2013).

see it. Governments awarding contracting preferences could attempt to use a similar model. But government officials might abuse this broad discretion to put a thumb on the scale for applicants from favored racial backgrounds while claiming they are simply doing socioeconomic status preferences. Similar abuses of discretion have been found in university admissions.

The existing federal statutes giving preferences to economically disadvantaged businesses have generally avoided the subjective approach and had concrete cutoffs for economic disadvantage. The Small Business Administration looks at net worth, net income, and the fair market value of the owner's assets. It presumes that individuals are not economically disadvantaged if they have a net worth in excess of $850,000, an adjusted gross income over three years in excess of $400,000, or fair market value of all assets in $6.5 million.[81] The Department of Transportation takes a similar approach; economic disadvantage may be rebutted if the owner has a personal net worth over $2,047,000, excluding that person's equity in a primary residence, equity in the disadvantaged business, and any retirement accounts.[82] These limits are notably high; one survey puts the 75th percentile for net worth for all Americans at $658,340 and the 90th percentile at $1,920,758.[83] Many businesses owned by white Americans would likely qualify, as the median net worth for Americans of this racial background is $285,000.

It is perhaps not surprising that existing programs define economic disadvantage so broadly. Even very well-off Americans are famously averse to seeing themselves as upper class.[84] "Director's Law," named for University of Chicago economist Aaron Director, holds that public expenditures are generally made primarily for the benefit of the middle class rather than the poor, because the middle class is most effective at securing control of the bureaucracy to improve its own position.[85] But whatever the reasons why economic disadvantage has come to be defined so broadly, the breadth of existing definitions means that it will generally be a poor proxy for race. Government decisionmakers who wish to discriminate will likely wind up seeking other, better proxies.

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[81] 13 C.F.R. § 124.104(c).

[82] 49 C.F.R. § 26.68(a).

[83] DQYDJ, *United States Net Worth Brackets and Percentiles*, [https://perma.cc/R78J-72X4].

[84] *See, e.g.*, Anat Shenker-Osorio, *Why Americans All Believe They Are 'Middle Class,'* THE ATLANTIC (Aug. 1, 2013).

[85] *See generally* George Stigler, *Director's Law of Public Income Distribution*, 13 J. L. ECON. 1 (1970).

IV. A BETTER PATH FORWARD

In a post–*Students for Fair Admissions* world, government entities with race-conscious public contracting programs have a choice: follow academia's lead and use proxies in an attempt to hide programs that no longer pass constitutional muster, or adopt truly race-neutral programs that help *all* small businesses thrive. The latter is unquestionably the smart – and constitutional – choice.

State and local governments have plenty of examples for race-neutral programs that encourage small business growth and participation in public contracting. In California, which has outlawed race and sex-based preferences in public contracting since 1996,[86] cities and counties operate small business offices which provide certifications, counseling, networking, and funding for entrepreneurs and companies interested in public contracting opportunities. Los Angeles County's Office of Small Business has helped 2,150 small businesses earn 134,772 country contracts through projects like its APEX Accelerator Program, which provides workshops on the government contracting process, training on how to market a company's goods and services to government buyers, and individualized counseling on writing proposals and conducting market research – all available regardless of the race or sex of a small business's owner.[87] San Diego's Small Local Business Enterprise and Emergent Local Business Enterprise Programs help newer and small businesses gain a foothold in the city's public contracting by offering bid discounts, a mentorship program, and assistance with obtaining bonding and insurance.[88]

But even municipalities without the size and budget of Los Angeles County or San Diego can encourage small and local businesses to participate in public contracting without resorting to unlawful race and sex-based preferences. The race or sex of a company's majority owner says very little about whether that company can do the best job for the best price. Taxpayers and entrepreneurs of all backgrounds deserve better.

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[86] CAL. CONST. art. I, § 31(a).

[87] L.A. County Department of Economic Opportunity, Supporting LA County's Businesses, [https://perma.cc/KD56-DSBW].

[88] City of San Diego, *Small Local Business Enterprise (SLBE) Program* (July 2022), [https://perma.cc/774H-U62D].