No. 21A590

In the
Supreme Court of the United States

COALITION FOR TJ,

Applicant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Respondent.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE THE STAY PENDING APPEAL ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

The Fourth Circuit should not have granted the extraordinary remedy of a stay pending appeal. As to irreparable harm, the Board has all but abandoned any reliance on the time and expense of implementing a new admissions plan. And the supposedly irreparable harm it does proffer—injury to its reputation and ability to compete for top students—is far too speculative. Its flawed merits argument also demonstrates both why this Court will likely grant review *and* why the panel majority was demonstrably wrong. Under the Board's theory, a school district may adopt criteria designed to disfavor a particular racial group to achieve racial balance so long as members of that group still earn a share of seats commensurate with its proportion of the applicant pool. In any other context, it would be clear that the government cannot discriminate against a racial group simply because its members have been successful in obtaining a benefit. It should be the same here. And without vacatur, Asian-American applicants to TJ will suffer the irreparable harm of being subject to a discriminatory process for one of the nation's best public high schools.

ARGUMENT

I. This Court Is Likely to Grant Review

This Court is likely to review this case because it presents a question of substantial importance that is unsettled in the lower courts. The Board characterizes it as a "fact-bound threshold dispute over whether the Coalition met its burden of proving that the Plan has a disparate impact on Asian Americans." Resp. at 14. But the Board agreed in the district court that the relevant facts were undisputed and, at

bottom, argues the district court applied the wrong *legal standard*. Instead of analyzing the "impact of the official action," *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977), by comparing the aggregate performance of Asian-American students under the previous criteria and the new criteria, the Board thinks the district court should have simplistically compared the Asian-American proportion of *applicants* versus *admitted students*. Resp. at 14. In other words, the parties dispute the proper standard for measuring disparate impact in an intentional discrimination claim. That is a question of law, one that this Court should review following the Court of Appeals' decision. *See* States' Brief at 11–12.

The Board also incorrectly argues that the district court's legal conclusion was an outlier. But the circuits are divided on how to apply *Arlington Heights* to cases where the government targets a racial group to accomplish a particular goal, such as racial balancing. It is no coincidence that the district courts in both this case and *Association for Education Fairness v. Montgomery County Board of Education*, No. 8:20-02540-PX, 2021 WL 4197458, at *15–19 (D. Md. Sept. 15, 2021), relied on the Fourth Circuit's application of *Arlington Heights* in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), to find discriminatory intent where decisionmakers "set out to increase and (by necessity) decrease the representation of certain racial groups" at selective K-12 schools "to align with districtwide enrollment data." *Ass'n for Educ. Fairness*, 2021 WL 4197458, at *17.[1]

[1] It is irrelevant that *Association for Education Fairness* was decided at the pleading stage. The district court in that case adopted the same theory of law as did the district court here. If it had agreed with the Board's interpretation of *Arlington Heights*, it would have granted the motion to dismiss.

McCrory's treatment of a facially race-neutral law even in the absence of racial animus stands in marked contrast to cases like *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of City of Boston*, 996 F.3d 37, 45–50 (1st Cir. 2021), where even concrete evidence of animus was deemed insufficient. Secondary school admissions cases are a subset of this conflict that present a question of particular importance given this Court's history of race-conscious admissions cases.

II. The Stay Causes Irreparable Harm to the Coalition and Others

Far more than two children will be harmed if vacatur is not granted. *See* Resp. at 39. The number of Coalition members with children eligible for admission to TJ was not litigated below. Yet the Board attempts to convert member declarations submitted to show associational standing into the number of Coalition members with children who intend to apply to TJ. ECF No. 17 at 24 in Case No. 22-1280 (4th Cir.). The Coalition met its burden to show associational standing by submitting declarations of two members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); App. 33a. But many more Coalition members have children that are affected by the admissions changes: there are more than two hundred Coalition members, many of whom joined precisely *because* they have children who intend to seek admission to TJ. App. 24a, 33a. The Board's invalid inference vastly underestimates the scope of irreparable harm to the children of Coalition members, as well as hundreds of other Asian-American applicants to TJ.

Moreover, the stay will harm not only this year's applicants, but next year's. Even on an expedited schedule, the Fourth Circuit is unlikely to finally adjudicate

the policy's validity before the next admissions cycle begins. Resp. at 40. Oral argument in the Fourth Circuit is scheduled for the second week of September 2022, just one month before TJ begins accepting applications.[2] And indeed, when the Coalition sought a preliminary injunction in the district court in September 2021, the Board argued that the process was already too far along to be preliminarily enjoined. App. 253a, 260a. Should the Fourth Circuit rule against the Board on the merits in late 2022, the Class of 2027 will likely face the same argument.

But even if it only affects this year's applicants, the deprivation of a constitutional right "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Judge Heytens improperly minimized that harm and instead emphasized purported injury to the Board if it cannot enforce a policy already ruled unconstitutional. *See* App. 12a.[3]

III. The Court of Appeals Demonstrably Erred in Granting the Stay

A. The Board Will Not Be Irreparably Harmed Absent a Stay

Unable to demonstrate actual irreparable harm, the Board continues to tout administrative inconveniences and avoidable, self-imposed difficulties. Resp. at 35–38. The Board knew well before September 2021 that two of the standardized tests it previously used were unavailable, yet apparently never sought replacements. ECF No. 64-2 in Case No. 1:21-cv-00296-CMH-JFA (E.D. Va.) (September declaration of

[2] Last year, the application window opened on October 25 and closed on November 19. FCPS, TJHSST Freshman Application Process, https://tinyurl.com/mrxfm27n.

[3] The supposedly "analogous" election cases cited by the Board are inapplicable, Resp. at 39. The applications in *Veasey v. Perry* were denied without explanation, 574 U.S. 951 (2014), and there are no technological concerns in the current case as in *Williams v. Rhodes*, 393 U.S. 23, 35 (1968).

Jeremy Shughart). The Board also ignored the district court's warning, six months before a final decision, to be prepared for an adverse decision. App. 247a, 260a.[4] The Board now professes concern for "thousands of students who are relying on an orderly admissions process," Resp. at 36, yet it failed to prepare a contingency plan to ensure a smooth application process regardless of the litigation outcome. Indeed, it calls such preparation "enormously wasteful," although a few simple steps could have prepared it for the district court's decision. Resp. at 37. The Board's actions throughout the litigation show that maintaining a discriminatory admissions policy, not concern for TJ applicants themselves, is the driving motivation behind the stay application.

The April 30 deadline is also self-imposed and not a source of irreparable harm. This same deadline was in place last year, yet evaluators did not even start reviewing applications until May 3, and decisions were not announced until June 23. And Judge Heytens erred in finding that delaying admissions would "irreparably harm TJ's ability to compete for students." App. 13a. First, TJ apparently had no trouble competing for students last year, even with the delayed admissions schedule, touting the Class of 2025 as "high performers" who are "well prepared for the school's academic rigor" and with an average GPA higher than the previous five years.[5] Second, most if not all area private schools which attract TJ-caliber students have

[4] The Board attacks a strawman in arguing that "[p]ublic entities could not operate if, every time they were sued, they had to preemptively design new policies to hedge against the possibility of injunction." Resp. at 37. The issue is not that the Board was sued, but that the judge told the Board on the record at a hearing that it should be ready to respond to a judgment that its admissions policy was unconstitutional. App. 247a. Despite being put "on notice," the Board unwisely chose to double down on a controversial policy. The entirely foreseeable fallout from that decision is not irreparable harm.
[5] FCPS, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM*, June 23, 2021, https://tinyurl.com/3cd5dn7b.

acceptance and tuition deadlines in early March, meaning that TJ's April 30 deadline already comes too late for applicants considering private school.[6] The panel majority erred in finding irreparable harm from the Board's self-imposed and needlessly inflexible admissions deadline. *See* App. 15a–16a (Rushing, J., dissenting).

The Board now claims that complying with the district court's injunction would substantially harm its reputation in the community, hoping this meets the test of irreparability. This is speculative at best. The Board suggests no measure of its current reputation or how damage to that reputation might be assessed. *See, e.g.*, *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (irreparable harm must be "neither remote nor speculative, but actual and imminent") (citation omitted). In light of the Board's "shoddy and rushed" process that was "more concerned with simply doing something to alter the racial balance at TJ than with public engagement," App. 32a, 46a, the Board's reputation might best be rehabilitated by complying with the district court's injunction rather than continuing to fight for the ability to use criteria the district court found discriminatory.

The Board also wrongly asserts that the Coalition's request for vacatur a mere eight days after the Fourth Circuit issued a stay is "inexplicable delay." Resp. at 35, 39. But in *Beame*, the only case the Board cites to support this outlandish claim, the applicants waited *ninety* days after the court of appeals decision before filing a petition for certiorari and did not seek a stay for twenty *additional* days. *Beame v.*

[6] *See, e.g.*, Nysmith School for the Gifted (Mar. 10, 2022); St. Paul VI Catholic High School (Mar. 12, 2022); Bishop O'Connell High School (Mar. 6, 2022); Flint Hll School (March 4, 2022).

Friends of the Earth, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers). In contrast, the Coalition's application was filed just over a week after the challenged decision—a period comparable to the time that the Board took to seek a stay in the district court, ECF No. 134 in Case No. 1:21-cv-00296-CMH-JFA (E.D. Va.), and then to seek a stay in the Court of Appeals, ECF No. 8 in Case No. 22-1280 (4th Cir.).

B. The Board's Merits Argument Would Eviscerate *Arlington Heights* and Permit Racial Balancing Through Proxies

Under the Board's reasoning, a school district could implement a facially race-neutral proxy with the express intent of producing racial balance so long as the "overrepresented" group received offers comparable to their proportion of the applicant pool. This Court's precedents do not sanction such discrimination. They demand strict scrutiny of government actions "not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). The analysis favored by the Board and the panel majority threatens to create a substantial exception to this principle and circumvent the clear holding that racial balancing is "patently unconstitutional." *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

1. The Board's position enables racial balancing and requires far too much in the context of an intentional discrimination claim

The Board's assertion that disparate impact requires that Asian Americans received fewer offers than their proportion of the applicant pool, *see* Resp. at 19–21, is wrong for the reasons stated in the Coalition's initial brief (pp. 18–19) and the States' amicus brief (pp. 11–12). The Board's other merits arguments are also flawed.

First, the Board asserts that the district court's reasoning would mean "that any policy change that affects a public institution's racial demographics has a suspect racially disproportionate impact." Resp. at 18. That is often self-evidently true—a policy change that substantially "affects" racial demographics has a disparate impact on the racial group that loses representation. But this does not "turn the previous status quo into a permanent quota." *Id.* A plaintiff must still prove that the changed policy was "at least in part 'because of,' not merely 'in spite of,'" the racial impact. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In most cases, merely pointing to a racially disparate impact does little to establish intent.

Second, the Board seeks to import Title VII disparate impact case law to show that the racial composition of the *applicant pool* is the proper baseline. But Title VII allows liability *solely* based on a practice that was "not intended to discriminate" but "in fact ha[s] a disproportionately adverse effect" on a racial group. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). By contrast, in a discriminatory intent case, "proof of disproportionate impact is but one factor to consider 'in the totality of the circumstances'; it is not 'the sole touchstone' of the claim." App. 18a–19a (quoting *McCrory*, 831 F.3d at 231). The Fourth Circuit recognizes that demonstrating disparate impact in an intentional discrimination case is less onerous than in a Title VII case based entirely on impact. *McCrory*, 831 F.3d at 231 (courts must not require "too much in the context of an intentional discrimination claim"); *id.* at n.8. The Title VII cases are thus of little use.

Third, the Board argues that "[y]ear-to-year fluctuations in the demographics

of the admitted class could be explained by any number of unrelated factors." Resp. at 20.[7] But FCPS itself attributed the decline in Asian-American admissions to the policy change.[8] And the Board's claim that "the Coalition has not presented a shred of evidence . . . that the decrease was *caused* by the Plan," Resp. at 22, borders on the farcical. The Coalition demonstrated below how the 1.5% set-aside and Experience Factor bonuses disproportionately harm Asian-American students. App. 153a–158a.

Fourth, while the Board acknowledges that certain middle schools experienced a substantial drop in admissions due to the 1.5% set-aside, disproportionately affecting Asian-American students, it argues that the number of Asian-Americans admitted from non-feeder schools *increased*. Resp. at 22. Of course, some students who benefited from the 1.5% allocation were Asian-American, but overall, they were *disproportionately students of other races*. *Compare* App. 143a–144a (Coalition brief in support of summary judgment, factual assertions 18 and 19), *with* App. 64a (Board's response to factual assertions 18 and 19). Meanwhile, the students shut out because they had to compete against numerous other eligible applicants from their middle school were disproportionately Asian American. *See id.* That tradeoff would be worth it to a decisionmaker seeking to promote racial balance at Asian-Americans' expense.[9]

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[7] The Board points to mild fluctuation in the racial composition of the applicant pool as one alternative explanation. Resp. at 22–23. But that small change can hardly account for the dramatic reduction in Asian-American admissions.

[8] FCPS, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM* (June 23, 2021), *available at* https://tinyurl.com/3cd5dn7b.

[9] The Board claims that "[w]hile Asian-American students . . . primarily competed against each other at [two middle] schools, each racial group has a similarly above-average representation in at least two other participating schools." Resp. at 24. But its claim is based on enrollment demographics, rather

Fifth, the Board says the Experience Factor bonus points could not have contributed to a disparate impact because only a few unallocated seats went to students at underrepresented middle schools. Resp. at 24. But that is not the point. Because it was so difficult for Asian-American students at feeder schools to obtain an *allocated* seat, many were thrown into the unallocated pool. To be sure, some Asian-American students from these schools received offers, but they were forced to compete in an unequal system where students from other schools received a 45-point bonus. The precise impact of this bonus—and of the other Experience Factors—will vary in each individual case. A prospective student's injury does not depend on whether he or she is admitted, however, but on whether he or she is deprived of the opportunity "to compete on a level playing field for a racial purpose." App. 33a (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)). The evidence from the Class of 2025 shows that the Experience Factor bonuses disproportionately burdened Asian-American applicants. App. 110a–113a.[10]

Finally, the Board says the Coalition failed to explain "*how and why* the challenged Plan factors disproportionately harmed Asian Americans." Resp. at 26. But the Coalition has extensively detailed how the 1.5% set-aside disproportionately forced Asian-American students to compete against each other for allocated seats and to compete at a point-disadvantage for unallocated seats. The impact of these factors

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than the demographics of *TJ applicants*. For example, although Longfellow Middle School is less than 30% Asian American, App. 105a, most (63.6%) of its applicants to TJ for the Class of 2024 were Asian American, *see* App. 238a (noting 96 of the 151 applicants were Asian American).

[10] The Board bizarrely claims that the Coalition forfeited the Experience Point argument, but that is wrong. *See* App. 155a–158a; ECF No. 125 at 25 n.14 in Case No. 1:21-cv-00296-CMH-JFA (E.D. Va.).

was considerable—56 fewer offers to Asian-American students despite an increase in capacity by 64 seats. App. 26a. By any proper measure, that is enough to demonstrate disparate impact in the context of an intentional discrimination claim.

2. The Board acted to change the racial composition of TJ

There is no real doubt as to why the Board chose to overhaul TJ's established admissions criteria. As Judge Rushing noted, "Board member discussions were permeated with racial balancing." App. 18a. The Board acted in direct response to outcry over the murder of George Floyd and the racial composition of the TJ Class of 2024. App. 39a–40a. From the very first presentation to the Board of a revised plan in September 2020, racial considerations were front and center. This is not a case where decisionmakers acted for an unrelated reason and racial demographics just happened to shift. Rather, "[t]hroughout this process, Board members and high-level FCPS officials expressed their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school." App. 34a.

The Board does not dispute this, but proffers several arguments to diminish its significance. None are persuasive. The Board notes that no Board member expressed any overt hatred towards Asian-American students or stated on the record that Asian-American enrollment should decrease. Resp. at 28. But no decisionmaker in *McCrory*—again, a case that bound the panel considering the stay motion—said that Black voting strength should decrease. *McCrory*, 831 F.3d at 229 & n.7. Rather, the decisionmakers wanted Republicans to win elections, so they targeted Black voters who disproportionately voted for Democrats. *Id.* at 233. Likewise here, Board

members wanted to racially balance TJ—they said so constantly, and even voted for a resolution "to have TJ's demographics represent the NOVA region." App. 48a. Because Asian Americans were the only racial group overrepresented at TJ compared to regional demographics, the Board targeted Asian-American applicants and forced them to shoulder a disproportionate burden. No racial animus is necessary for the Board to have acted with discriminatory intent. *McCrory*, 831 F.3d at 233.

The Board then attacks the term "racial balancing," arguing that a policy must contain particular racial targets to be considered racial balancing. Resp. at 29. But the Board *did* have a target—it wanted TJ to match the demographics of FCPS and Northern Virginia. And while Board members paid lip service to socioeconomic and geographic diversity, discussions of race predominated, beginning with the very first slides presented to the Board in September, which compared the racial composition of TJ to FCPS. That's why the district court found that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception." App. 47a. While the challenged plan did not fully bring TJ into line with the racial demographics of FCPS, every racial group's proportion of admissions moved in that direction. The Board provides no support for its apparent argument that racial balancing is less pernicious if it is not accomplished in one fell swoop.

The Board then takes issue with the relevance of the racial data it obtained before making its final decision to overhaul TJ admissions. As it did below, the Board harps on the fact that no modeling was available to show the precise effect of the adopted plan. But the Board had data that enabled it to predict the racial effect of its

actions, including racial data on past TJ admissions by middle school, showing which middle schools—and which applicants—would be harmed by imposing a 1.5% set-aside. App. 115a. This data also told the Board members which middle schools were underrepresented, along with the racial composition of the applicants from those schools. And the Board received a voluminous white paper detailing various models run by FCPS staff, further demonstrating that the Board was obsessed with the racial effect of its actions.[11] And there is no dispute that the Board *sought* modeling on the precise effect of the Experience Factors, wanting to know if 200 points would "change who got in." App. 232a–233a. At the very least, the Board knew at least as much about the effect of their action as did the legislators in *McCrory*. *Cf.* 831 F.3d at 230.

Perhaps the meat of the Board's Response is its misrepresentation of the Coalition's theory of the case. The Board says that "the Coalition argues[] that any steps taken to improve educational access for underserved groups are by definition invidious discrimination against Asian Americans, merely because Asian Americans represented the existing majority." Resp. at 31–32. The Coalition argues no such thing. There are many steps the Board could take to "improve educational access for underserved groups" that would not discriminate against anyone. One example is the Board's resolution directing Superintendent Brabrand "to establish a plan for student talent development and put into action means for student potential identification and outreach" that was "intended to address the systemic issues that impact diversity at

[11] The white paper was in the record below and is available online. *See* FCPS, *Thomas Jefferson High School for Science & Technology: Improving Admissions Processes* (Nov. 2020), https://tinyurl.com/2p89er57.

TJ." ECF No. 118-27 at 7 in Case No. 1:21-cv-00296-CMH-JFA (E.D. Va.). A long-term plan to improve the K-8 pipeline—as outlined in that resolution—would ultimately result in more Black and Hispanic students at TJ, but would not discriminate against anyone. The same is true of some other Board actions, such as eliminating the application fee or expanding the admitted class size. The Board's problem is not that it wanted to help underserved students, but that it chose to treat students unequally as a shortcut to obtain its desired racial result.

Two final points merit mention. First, the Board cites *Crawford v. Board of Education*, 458 U.S. 527, 537–39 (1982), and *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*, 572 U.S. 291 (2014), for the proposition that states can repeal legislation designed to benefit racial minorities even though the repeal has a disparate impact on those groups. Resp. at 32–33. But those cases involved the special doctrine that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford*, 458 U.S. at 539. Even so, *Crawford* recognized that such a repeal would still be unconstitutional "if the purpose of repealing legislation is to disadvantage a racial minority." *Id.* at n.21. No intentional discrimination argument was raised in either case. And there has been no suggestion that the prior TJ admissions process was anything but race-neutral.

Second, the Board argues that discussion of Texas' "Top Ten Percent" plan in *Fisher* suggests that the Court would view the Board's action as a permissible, race-

neutral method of increasing diversity. Resp. at 34. The first obvious problem with that argument is that this Court has not extended the diversity rationale into the K-12 arena. *See Parents Involved*, 551 U.S. at 724–25. The second problem is that the constitutionality of the Top Ten Percent plan was not before the Court in *Fisher*. In any event, the Board's TJ overhaul is readily distinguishable—the seats allocated to each middle school are extremely limited (no FCPS middle school has more than a dozen guaranteed seats, *see* App. at 240a), there are few unallocated seats, and Asian-American applicants from feeder schools are at a marked disadvantage for the limited number of unallocated seats. Texas' interest in drawing students from throughout the State to its flagship university also easily outstrips any interest the Board might have in geographic diversity—especially considering that the Board's policy disadvantages students who leave their zoned schools elsewhere in Fairfax County to attend Advanced Academic Program Level IV Centers. *See* States' Brief at 2.

* * *

The Board's theory would create an exception to *Arlington Heights* and *Feeney* for policies that target a particular racial group in the name of diversity or balancing. That runs counter to this Court's repeated admonitions that it is "irrelevant that a system of racial preferences in admissions may seem benign," *Fisher*, 570 U.S. at 307, and that government actions demand strict scrutiny "not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object," *Miller*, 515 U.S. at 913. In practice, it would allow school districts to evade strict scrutiny by using racial proxies to

determine the racial makeup of selective schools. The district court correctly rejected it. This Court should, too.

CONCLUSION

The Emergency Application should be granted and the stay vacated.

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Respectfully submitted,

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