No. _____

In the
Supreme Court of the United States

COALITION FOR TJ,

Applicant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Respondent.

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

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PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Applicant is Coalition for TJ. The Coalition was the plaintiff in the district court and the appellee in the court of appeals.

Respondent is the Fairfax County School Board. The Board was the defendant in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

The related proceedings are:

Coalition for TJ v. Fairfax County School Board, No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022) (order granting summary judgment).

Coalition for TJ v. Fairfax County School Board, No. 1:21-cv-00296 (E.D. Va. Mar. 11, 2022) (order denying stay pending appeal).

Coalition for TJ v. Fairfax County School Board, No. 22-1280 (4th Cir. Mar. 31, 2022) (order granting stay pending appeal).

RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, applicant hereby submits the following corporate disclosure statement.

1. Applicant has no parent corporation.
2. No publicly held corporation owns any portion of applicant, and applicant is not a subsidiary or an affiliate of any publicly-owned corporation.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Rules

Other Authorities

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

Pursuant to Rule 22 of this Court and the All Writs Act, 28 U.S.C. § 1651, Applicant Coalition for TJ respectfully applies for an emergency order vacating the stay pending appeal issued March 31, 2022, by the United States Court of Appeals for the Fourth Circuit. App. 1a–2a.

INTRODUCTION

The Fairfax County School Board's process for overhauling admissions at Thomas Jefferson High School for Science & Technology "was infected with talk of racial balancing from its inception." App. 47a. So said the district court in the process of invalidating the Board's new racially motivated admissions process for one of the nation's best public high schools. Considering an undisputed factual record, the court found that the new criteria had already had a substantial adverse impact on Asian-American students and that the Board intended to make it more difficult for Asian-American students to gain admission in order to achieve its desired racial balance. The court permanently enjoined the Board from using the challenged admissions process.

Pleading administrative inconvenience upon having to revise its discriminatory admissions policy on a shortened timetable, the Board sought a stay pending appeal in the Fourth Circuit. Despite the district court's finding that the admissions process had disadvantaged, and would continue to disadvantage, Asian-American applicants to TJ—including members of Applicant Coalition for TJ currently in seventh and eighth grade—a divided Fourth Circuit panel granted the

Board's request. Not only did the panel majority wade into an area of legal uncertainty on the merits, but it disregarded clear precedent that mere expenditures of time, effort, and money, however inconvenient, do not amount to irreparable harm. It also gave short shrift to both the public interest in not enforcing unconstitutional policies and the interests of Asian-American students who will be forced to endure another year of harm.

In these circumstances, the panel majority's grant of a stay permitting the Board to continue to implement an admissions policy that has been declared unconstitutional was demonstrably wrong. Unless the stay is vacated, hundreds of Asian-American applicants to TJ, including children of Coalition members, will be forced to compete for seats at TJ in a system intended to discriminate against them because of their race. Because admissions decisions are imminent, the Coalition respectfully asks the Chief Justice, in his capacity as Circuit Justice for the Fourth Circuit, to vacate the stay pending appeal and reinstate the district court's injunction.

OPINIONS BELOW

The opinion of the district court granting summary judgment to the Coalition is available at 2022 WL 579809 and is reproduced at App. 23a. The opinion of the district court denying the Board's motion to stay the judgment pending appeal is unpublished and is reproduced at App. 21a. The opinion of the Fourth Circuit staying the district court's judgment pending appeal is available at 2022 WL 986994 and is reproduced at App. 1a.

JURISDICTION

The district court issued its final judgment on February 25, 2022, after granting the Coalition's motion for summary judgment and denying the Board's. App. 22a; App. 23a–53a. The district court subsequently denied the Board's motion for a stay pending appeal on March 11, 2022. The Board filed notice of appeal on March 14, 2022. The Fourth Circuit granted the Board's motion to stay the district court's judgment pending appeal on March 31, 2022. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651.

CONSTITUTIONAL PROVISION INVOLVED

Section 1, clause 2 of the Fourteenth Amendment to the United States Constitution states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

Thomas Jefferson High School for Science & Technology (known in the community as "TJ") is an Academic-Year Governor's School in Alexandria, Virginia, which serves students gifted in science, technology, engineering, and mathematics. App. 23a. Students from Fairfax County and several surrounding counties and cities are eligible to attend TJ, but the school is administered by the Fairfax County School Board. App. 24a–25a. Prior to October 2020, TJ admitted students based on a competitive, merit-based process that included GPA requirements, teacher

recommendations, essay questions, and a multi-component standardized test. App. 25a.

In Fall 2020—against a backdrop of the murder of George Floyd; a new Virginia diversity, equity, and inclusion reporting requirement; and a low number of Black students admitted to that year's TJ freshman class—the Board began to overhaul the TJ admissions process. App. 38a–39a. First, the Board in October eliminated the standardized testing requirement in a procedurally atypical vote, just one month before hundreds of applicants were scheduled to take the test. App. 43a–44a. Then the Board approved what is described as a new "holistic" admissions policy in December. App. 31a; App. 45a. Most notably, the new policy guaranteed seats at TJ for 1.5% of the eighth-grade class of each public middle school within TJ's reach. App. 26a. The guarantee left only about 100 "unallocated" seats for students to compete for irrespective of middle school, including private school and home school applicants. App. 37a–38a; *see also* App. 208a–209a (deposition testimony of TJ admissions director Jeremy Shughart). Because a disproportionate number of Asian-American applicants and accepted students at TJ come from a handful of Fairfax County Public Schools (FCPS) middle schools, each of which often sent far more than 1.5% of their eighth graders to TJ,[1] the guarantee effectively limited Asian-American enrollment. App. 37a–38a; *see also* App. 238a (summary of Asian-American applicants and admits to TJ by FCPS middle school for five years before the

[1] The 1.5% guarantee particularly impacts the handful of FCPS middle schools with advanced academic centers that attract concentrations of students more likely to apply to TJ. *See* App. 46a.

challenged plan was implemented). This was the new policy's intended result. App. 34a.

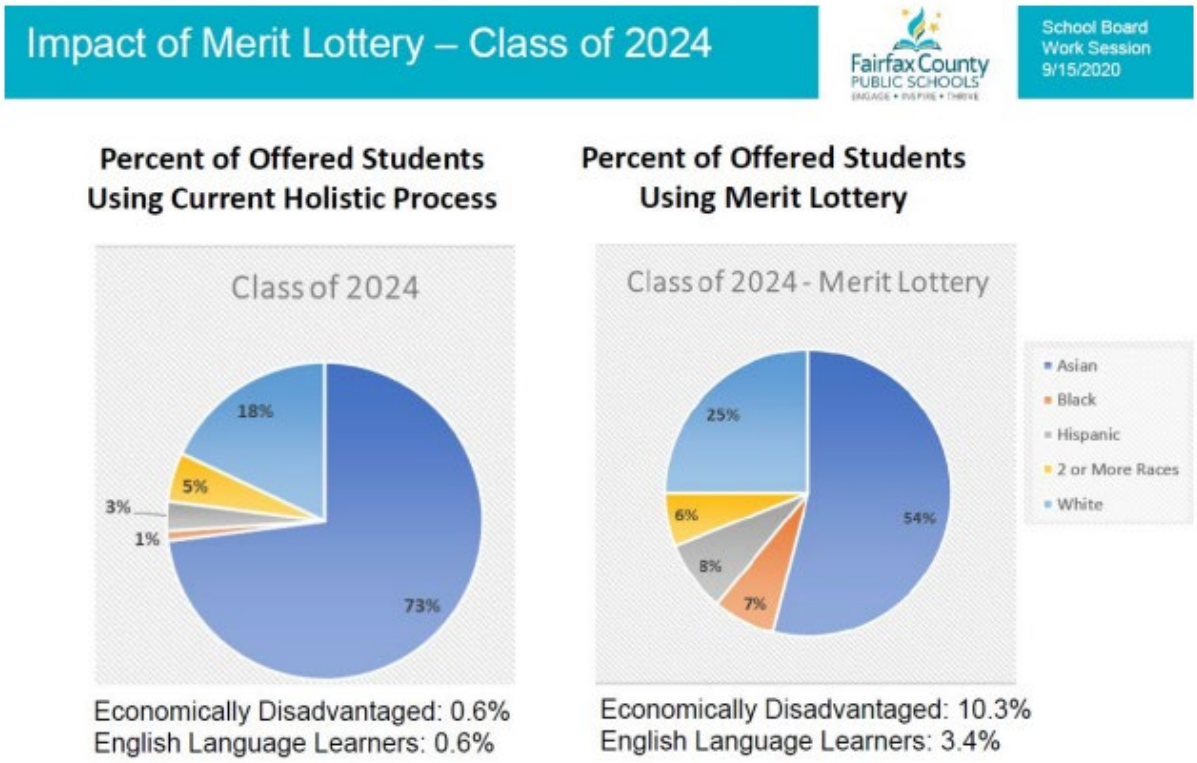
As part of the holistic review, the policy also included bonus points for certain "Experience Factors," including an applicant's attendance at a middle school deemed historically "underrepresented" at TJ. *See* App. 37a–38a. The underrepresented school bonus—worth 45 bonus points in a system with 900 base points, *see* App. 198a–199a (testimony of admissions director Shughart)—disproportionately went to non-Asian-American students last year. App. 113a (showing that just 27.2% of applicants who received the underrepresented school bonus were Asian-American, although almost half of the overall applicants were Asian American). So did the 90-point bonus for free and reduced-price lunch eligibility. App. 110a. Together with the 1.5%-per-middle-school guarantee, this change made it disproportionately more difficult for Asian-American students to access TJ. *See* App. 37a–38a.

As the district court concluded from the undisputed evidence the parties submitted, the Board's process to overhaul TJ admissions was "infected with talk of racial balancing from its inception." App. 47a. The very first proposal the Board considered declared that TJ "should reflect the diversity of FCPS, the community and Northern Virginia." App. 29a. Slides presented at a September work session—which first compared historical TJ admissions data by race with the racial makeup of the school district and then focused on the racial impact of the proposed changes—made clear that when the Board and FCPS said "diversity," they primarily meant racial diversity. *See* App. 47a. The Board ultimately adopted a resolution declaring its goal

to have "TJ's demographics represent the NOVA [Northern Virginia] region." App. 48a.

Contemporaneous text messages between Board members also reflected a racial motive: in private conversations, Board members Abrar Omeish and Stella Pekarsky recognized that Asian Americans are "discriminated against in this process," "there has been an anti [A]sian feel underlying some of this," and that the superintendent has "made it obvious" with "racist" and "demeaning" references to "pay to play," referring to test prep for the former TJ admissions exam. App. 178a & 180a. Pekarsky acknowledged the racial concerns at play when she texted that one of the superintendent's proposals would "whiten our schools and kick [out] Asians" and asked, "[h]ow is that achieving the goals of diversity?" App. 178a.

The proposal Pekarsky spoke of—a so-called "merit lottery" which capped the number of offers each region in TJ's catchment area could receive—predicted a 19 percentage-point drop in offers to Asian-American students compared to the previous admissions policy. *See* App. 47a. Under the modeling presented, every other racial group would gain seats:



Source: FCPS

Ultimately, the Board did not adopt the merit lottery—with some Board members opposing it because they feared it might not go far enough to achieve racial balancing. App. 47a–48a. As Board member Elaine Tholen put it, the lottery "seems to leave too much to chance," leading her to ask, "will chance give us the diversity we are after?" App. 48a. Instead of a lottery system, the Board chose a facially race-neutral process that it intended to achieve the same result. Indeed, Board members indicated in their internal communications that a holistic process with geographic considerations would be the key to accomplishing the Board's racial ends. *See* App. 48a–49a. And FCPS staff worked to tweak the bonus-point system in service of the same racial balancing goal. *See* App. 127a–133a (discussion between admissions

director Jeremy Shughart and FCPS staff member Lidi Hruda regarding scoring rubric); App. 215a–236a (internal discussions on tweaking admissions); *see also* App. 169a–170a (Coalition brief in support of summary judgment summarizing these discussions).

The ultimate result was exactly as Pekarsky had predicted for the merit lottery. The new plan did "whiten" TJ and "kick out" Asian-American students. In the Class of 2025, the first class admitted under the new admissions policy, offers to Asian-American students dropped 19 percentage points—from 73% to 54% in a single year. App. 26a–27a. In raw numbers, Asian-Americans received 56 fewer offers than the previous year, despite the addition of 64 seats to the incoming class. App. 26a. Every other racial group, including white students, increased their share of offers. In the previous five years, Asian-American students had never made up less than 65% of an admitted class. App. 36a.

The scope of the decline was no surprise, given the Board's implementation of the 1.5% plan and Experience Factor bonuses. Indeed, the 1.5% plan on its own substantially limited Asian-American enrollment, as the six FCPS schools that sent the most Asian-American students to TJ the year before the changes saw that number almost cut in half—from 204 to 108—after implementation. *Compare* App. 144a (factual assertions in Paragraph 19 of Coalition's opening summary judgment brief), *with* App. 64a–65a (Paragraph 19 of the Board's summary judgment response); *see also* Local Rule 56(B) (E.D. Va.) ("In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of

material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."). The limited number of unallocated seats combined with the Experience Factor bonuses placed these students on an unequal playing field and made it disproportionately difficult for them to compete for seats at TJ.

B. Procedural History

The Coalition sued the Board on March 10, 2021, seeking injunctive and declaratory relief. The district court denied the Board's motion to dismiss and two motions for preliminary injunction sought by the Coalition. In denying the second motion for preliminary injunction, approximately six months before ruling on summary judgment, Judge Hilton stated: "But the [B]oard's on notice. They understand that we're trying the case, and we don't know what the outcome is going to be yet, so they've got to be prepared for [an adverse decision], don't they." App. 247a. Later in that same hearing, Judge Hilton again noted, "[W]e can try this case in January and get a decision. It seems to me that's plenty of time to get corrected whatever needs to be corrected, if that's warranted from the findings after the trial of the case." App. 260a.

The case did not go to trial. It was instead resolved on cross-motions for summary judgment after a January 18, 2022, hearing where the parties acknowledged that no material facts remained in dispute. The district court granted the Coalition's motion for summary judgment and denied the Board's motion, finding that the Board acted with discriminatory intent when it overhauled TJ's admissions

criteria seeking racial balance. App. 49a–50a. Although the Board never argued that its plan could satisfy strict scrutiny, the district court went on to confirm that it could not. App. 50a–52a. The court therefore enjoined the Board from using the challenged policy going forward. Before it filed its notice of appeal, the Board sought a stay pending appeal in the district court. The court denied that motion on March 11. App. 21a.

The Board waited more than two weeks after the district court issued the injunction to file its notice of appeal. It then filed in the Fourth Circuit a motion for a stay pending appeal. On March 31, a divided panel granted the Board's motion over Judge Rushing's dissent. App. 1a–20a. Because the Fourth Circuit's stay immediately subjects Asian-American students with pending TJ applications to a discriminatory admissions policy, the Coalition has sought this emergency relief.

REASONS FOR GRANTING THE APPLICATION

A Circuit Justice may

> vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the [lower court] is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); *see also Raysor v. DeSantis*, 140 S. Ct. 2600, 2602 (2020) (mem.) (Sotomayor, J., dissenting). This case satisfies all three requirements.

I. THIS COURT SHOULD AND LIKELY WILL GRANT REVIEW

This case presents "an important question of federal law that has not been, but should be, settled by this Court," and on which the lower courts are divided. *See* Sup. Ct. R. 10(c). Specifically, the question is whether a school board violates the equal protection rights of disadvantaged students when it implements selective admissions criteria with the goal of producing racial balance. This Court has not yet resolved that precise question, although it has long recognized that facially race-neutral government action nevertheless violates the Equal Protection Clause if undertaken for an impermissible racial purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977). A new divide has emerged as public-school districts across the country have recently overhauled admissions criteria for selective K-12 schools, seeking to alter the racial composition of the admitted students. School districts—including the Board in this case—candidly admit their goal of admitting more Black and Hispanic students, but deny any intent to discriminate against the Asian-American students who typically bear the brunt of the changes. Multiple courts have held that such facially race-neutral policies that treat applicants differently to achieve racial balance discriminate against Asian-American applicants—and thus must satisfy strict scrutiny. *See* App. 49a–50a (district court opinion below); *Ass'n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, Civ. No. 8:20-02540-PX, 2021 WL 4197458, at *15–19 (D. Md. Sept. 15, 2021) (plaintiff organization plausibly alleged that a county Board of Education overhauled magnet middle school program admission criteria to limit Asian-American enrollment and achieve racial balance).

Other courts have found that similar revisions did not demand strict scrutiny. *See Boston Parent Coal. for Academic Excellence Corp. v. Sch. Cmte. of City of Boston*, No. 21-10330-WGY, 2021 WL 4489840, at *10–11 (D. Mass. Oct. 1, 2021), appeals docketed at Nos. 21-1303 & 22-1144 (1st Cir.); and *Christa McAuliffe Intermediate Sch. PTO v. de Blasio*, 364 F. Supp. 3d 253, 277–80 (S.D.N.Y.), *aff'd on other grounds*, 788 F. App'x 85 (2d Cir. 2019) (strict scrutiny inappropriate); *see also Boston Parent Coal. for Academic Excellence Corp. v. Sch. Cmte. of City of Boston*, 996 F.3d 37, 45–50 (1st Cir. 2021) (denying request for injunction pending appeal and concluding that strict scrutiny would likely not apply).

Only this Court can resolve that split of authority and answer the important underlying constitutional question. This Court has already long wrestled with the conflict between race-*conscious* admissions and the Constitution's "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted)).[2] And it will do so again next Term in a pair of cases concerning discrimination against Asian-American applicants to elite universities. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.)

[2] *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (*Fisher II*).

(docketed at No. 20-1199); *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, No. 1:14CV954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021), *cert. before judgment granted*, 142 S. Ct. 896 (2022) (mem.) (docketed at 21-707). But while the *explicit* use of race in admissions automatically triggers strict scrutiny, the question here is whether the Board may avoid that demanding standard of review by utilizing "a facially neutral proxy motivated by discriminatory intent." App. 18a. Particularly if school districts are limited in whether they may explicitly use race going forward, the resolution of this question may determine the future of selective K-12 admissions policies nationwide.

Additionally, and more generally, the various school admissions cases have revealed a circuit split regarding the elements of a claim of discriminatory intent under *Arlington Heights* that this case also implicates. *See* Sup. Ct. R. 10(a). Outside of the admissions context, the Fourth Circuit has recognized that a plaintiff alleging racial discrimination need not prove racial *animus* or *hatred* on the part of any decisionmaker. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). Rather, he need only prove that the decisionmakers intentionally targeted members of a particular race to achieve a desired result. *See id.* at 222–23 ("[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics."). But the First Circuit required much more in the *Boston Parent Coalition* case, denying a motion for an injunction pending

appeal even in the face of substantial evidence that the decisionmakers sought racial balance to the detriment of Asian-American and white students at Boston's exam schools, as well as "comments of the School Committee chair who resigned after being heard making fun of the names of several Asian-Americans who spoke at a public meeting." 996 F.3d at 49. Judge Heytens followed a similar approach concurring in the grant of a stay in this case. App. 8a–11a.

These decisions further demonstrate the need for this Court to consider whether the *Arlington Heights* analysis differs in cases where the government relies on an interest in promoting diversity. Although the Court's precedent is clear that even supposedly "benign" racial discrimination must satisfy strict scrutiny, *see Parents Involved*, 551 U.S. at 720; *Grutter*, 539 U.S. at 326–27, lower courts are divided as to whether the stated purpose of promoting diversity diminishes a claim of discriminatory intent. *Compare Ass'n for Educ. Fairness*, 2021 WL 4197458, at *19, *with Christa McAuliffe*, 364 F. Supp. 3d at 278–79. Only this Court can answer that question for school districts across the country. It likely will grant certiorari to do so following final disposition in the court of appeals.

II. THE COURT OF APPEALS' STAY IRREPARABLY HARMS THE COALITION AND ITS MEMBERS

Without vacatur of the stay, the Coalition and its members will be seriously and irreparably harmed. The district court found that the current TJ admissions policy—which will remain in effect absent relief from this application—violates the equal protection rights of Asian-American students. App. 34a. The deprivation of a

constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

Here, the children of Coalition members and others will be deprived of their right to equal protection for much more than a "minimal period[]" of time. *Id.* One cycle of students has already endured an admissions system in which they were "disproportionately deprived of a level playing field." App. 38a; *see also Parents Involved*, 551 U.S. at 719 ("[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff[.]"). Unless the stay is vacated, a second cycle of students will be admitted under this same unconstitutional system in a matter of weeks, to meet the Board's self-imposed April 30 decision deadline. App. 12a. Although the Fourth Circuit granted a motion to expedite the appeal, oral argument on the merits will not occur until September, just a month before a *third* round of admissions would begin under the discriminatory policy. Unless vacatur is granted, Asian-American applicants to TJ will be forced to compete for at least two more application cycles in a racially discriminatory system that the district court has already concluded will prejudice them. App. 34a.

The losses suffered by each round of applicants denied equal treatment cannot be recovered. TJ is unlike any other high school in northern Virginia. It is an academic, year-round Governor's School, entirely dedicated to educating students gifted in STEM subjects. App. 23a. It is considered the best high school in America

by U.S. News & World Report.[3] Ninety-nine percent of TJ's graduates attend a four-year college, compared to the all-district average of just 62.4 percent.[4] TJ students have opportunities most students do not experience until college, including course offerings like multivariable calculus, neurobiology, and machine learning, and research projects at one of TJ's thirteen on-campus laboratories or through externships with corporate, government, or university research laboratories.[5] There is no monetary or equitable compensation for the loss of the chance to compete for a place at this extraordinary school on a level playing field; vacatur is the only way to prevent irreparable harm to this and future years' Asian-American applicants.

III. THE COURT OF APPEALS DEMONSTRABLY ERRED IN GRANTING THE STAY APPLICATION

As Judge Rushing noted in dissent from the court of appeals' decision to issue a stay, a stay pending appeal is "extraordinary relief." App. 15a (citing *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers)). It amounts to an "intrusion into the ordinary processes of administration and judicial review." *Nken v.*

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[3] U.S. News & World Report, Thomas Jefferson High School for Science and Technology, https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology-20461.

[4] School Profile, Thomas Jefferson High School for Science and Technology 2021-2022, https://tjhsst.fcps.edu/sites/default/files/media/inline-files/school-profile%202021-22.pdf; FCPS Post-Secondary Profile 2021-22, https://www.fcps.edu/about-fcps/performance-and-accountability/fcps-postsecondary-profile.

[5] School Profile, Thomas Jefferson High School for Science and Technology 2021-2022, https://tjhsst.fcps.edu/sites/default/files/media/inline-files/school-profile%202021-22.pdf.

Holder, 556 U.S. 418, 427 (2009) (citation omitted). To obtain such a remedy, the Board had to demonstrate (1) a "strong showing" that it will likely succeed on the merits on appeal; (2) that the Board will suffer irreparable injury absent a stay; (3) that a stay would not substantially injure the other parties interested in the proceeding; and (4) that a stay is in the public interest. *Id.* at 434. The Board failed to meet any of the requirements and the court of appeals' decision otherwise was demonstrably wrong.

A. The Board did not make the requisite "strong showing" that the district court's judgment would be reversed on appeal

On the merits, the district court "follow[ed] the Supreme Court's directive in *Arlington Heights*" and "undertook the 'sensitive inquiry' into all 'circumstantial and direct evidence' of the Board's intent in adopting TJ's current admissions policy." App. 17a. The district court also followed binding Fourth Circuit precedent—*McCrory*—in all respects. While it is *possible* the appellate panel would take a different view of the undisputed record evidence, the Board had to show more than that "grave or serious *questions* are presented." *See Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010) (mem.) (recognizing that the Fourth Circuit's former "relaxed" view on the requirement to show likelihood of success to obtain a preliminary injunction was no longer good law). It had to make a *strong* showing that it would *likely* succeed on appeal. *Nken*, 556 U.S. at 434. That it did not do. The Court of Appeals failed to hold the Board to its required burden and thus was demonstrably wrong.

1. The admissions overhaul has a substantial disparate impact on Asian-American applicants

Concurring in the decision to grant the stay, Judge Heytens took issue with the district court's disparate impact analysis, arguing that the court wrongly relied on a comparison between the proportion of Asian-American students admitted before and after the changes. App. 7a. Judge Heytens suggests—as the Board did below, *see* App. 75a–78a—that the only proper comparator is instead the "percentage of applicants versus the percentage of offers." App. 7a. This is wrong for at least two reasons. First, *Arlington Heights* directs courts to consider the "impact of the official action." 429 U.S. at 266. The "official action" here was the Board's decision to replace the old TJ admissions system with the new one. After that, dramatically fewer Asian-American students were admitted, even though TJ's class size increased. App. 26a. Particularly under governing law in the Fourth Circuit, that was enough to show disparate impact in the context of an intentional discrimination claim. After all, the Fourth Circuit did not require the plaintiffs in *McCrory* to prove that Black voters would be worse off *than white voters* after North Carolina's election reform—it was enough that "African Americans disproportionately used each of the removed mechanisms." 831 F.3d at 231. The drastic drop in Asian-American acceptance to TJ was enough on its own to support a finding of disparate impact.

Second, Judge Heytens and the Board are wrong because the racial composition of the applicant pool cannot be the benchmark against which to judge the impact to a racial group. Racial balancing for its own sake is "patently unconstitutional." *Fisher I*, 570 U.S. at 311. It is "no less pernicious if, instead of using

a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent." App. 18a. If disparate impact were measured based on the racial composition of the applicant pool, the Board could use such proxies to obtain racial balance while avoiding strict scrutiny—the very problem *Arlington Heights* exists to prevent. *See Miller*, 515 U.S. at 913 (strict scrutiny applies "not just when [enactments] contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object"). Previous success by members of a racial group is no license to employ discriminatory tactics against the group's members in the name of racial balancing.

Yet the record includes more evidence of disparate impact than a simple before-and-after comparison. According to data produced by the Board—and undisputed below—the Board's decision to guarantee each middle school seats at TJ for 1.5% of its eighth-grade class disproportionately limited opportunities for Asian-American students to access TJ. Because the seats guaranteed to other schools left only about 100 "unallocated" seats, *see* App. 26a, the 1.5% plan effectively limited the seats available for students at six middle schools that previously had great success with TJ admissions. These schools—where more than 65% of the TJ applicants were Asian American last year, *see* App. 238a—saw nearly 100 *fewer* Asian-American students get into TJ under the challenged plan than before. *Compare* App. 144a (factual assertions in Paragraph 19 of Coalition's opening summary judgment brief), *with* App. 64a–65a (Paragraph 19 of the Board's summary judgment response). By contrast, students at middle schools designated historically "underrepresented" in TJ

admissions not only benefitted from the 1.5% allotment, but gained 45 additional points in the "holistic" system. Although the total applicant pool was about half Asian American last cycle, only 27.2% of the students who benefitted from this point bonus were Asian American. App. 113a. Since three of the four "Experience Factors" substantially disadvantaged Asian-American applicants (while the fourth had a neutral effect), App. 110a–113a, it is no surprise that the number of admitted Asian-American students fell so drastically. The plan is designed so that this effect will continue indefinitely.

The district court was right to resist the Board's invitation to "require[] too much" proof of disparate impact "in the context of an intentional discrimination claim." *McCrory*, 831 F.3d at 231. Under the proper standard, the Board's argument is far from a *strong showing* that the disparate impact determination is likely to be reversed. *See* 18a–19a.

2. Undisputed evidence shows that the Board overhauled TJ admissions to achieve racial balancing

Considering the record as a whole, the district court's conclusion that "[t]he discussion of TJ admissions changes was infected with talk of racial balancing from its inception" was correct. App. 47a. As Judge Rushing noted, "Board member discussions were permeated with racial balancing, as were its stated aims and its use of racial data to model proposed outcomes." App. 18a. The Board argued, and the Fourth Circuit majority accepted, that this is insufficient to mount a claim of discriminatory intent for two main reasons: (1) intent to increase Black and Hispanic enrollment does not constitute intent to decrease Asian-American enrollment; and

(2) the Board had *knowledge*, but not *intent*; it merely knew that its actions might have a racial impact. Both of these rationales are flawed: the first is based on a contested interpretation of *Arlington Heights* and *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979), while the second is belied by the record.

As the first argument goes, a plaintiff must show *racial animus* to prevail, and the intent to benefit certain racial groups in service of racial diversity does not amount to discriminatory intent without a showing of animus on the part of the decisionmakers.[6] For example, Judge Heytens' concurrence questioned whether the Board had discriminatory intent where its goal was to increase Black and Hispanic enrollment at TJ, rather than an explicit goal of reducing Asian-American enrollment. App. 9a. But in the context of zero-sum admissions, the Court has recognized that granting preferential treatment to members of certain groups *necessarily* disfavors those who do not receive the preference. *See Grutter*, 539 U.S. at 316–17, 326–27 (white applicant had standing to challenge the use of race as one factor in judging law school applicants, and the use of race automatically triggered strict scrutiny). It has consistently rejected the argument that racial discrimination

[6] The Board relied heavily on its argument that the Board members did not express any hatred towards Asian-American students—but Board member communications show that some of them recognized the anti-Asian nature of the proceedings to change TJ admissions. App. 178a–180a. Of course, "[m]unicipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). That's both why strict scrutiny applies even to racial classifications imposed for "benign" reasons, *see Johnson v. California*, 543 U.S. 499, 505 (2005), and why the *Arlington Heights* inquiry is necessary to ferret out discrimination in facially race-neutral actions.

deserves less scrutiny if it is supposedly meant to *help* members of some groups, rather than *hurt* members of others. *See Parents Involved*, 551 U.S. at 720; *Grutter*, 539 U.S. at 326–27.

Of course, where the discrimination is not overt, a showing of intent is necessary to trigger strict scrutiny. The Court has explained that discriminatory intent exists where the decisionmakers "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. The paradigmatic example of a policy enacted in spite of its disparate impact is *Feeney* itself, which concerned a state employment preference for veterans. Nearly all veterans at the time were men, but the Court rejected the argument that the statute was intended to discriminate against women. *See id.* at 279–80. The disparate impact against women was a mere byproduct, rather than the intent of the legislation.

This case is fundamentally different because the Board sought racial balance in a zero-sum process. Indeed, given the same class of applicants to TJ, the only way to increase the proportion of Black and Hispanic students admitted is to change the criteria in a way that makes it disproportionately harder for Asian-American students to get in.[7] As one court noted, a school board acts "with a discriminatory

[7] In the district court, the Board often accused the Coalition of arguing that *any* invocation of diversity as a goal triggers strict scrutiny. To the contrary the Coalition's view is that the Board can express a long-term goal of having more Black and Hispanic students attend TJ without treating applicants differently based on factors designed to produce a racial result. It can even take some actions designed to produce that result, such as expanding advanced academic programming, eliminating

motive" when it "set[s] out to increase and (by necessity) decrease the representation of certain racial groups" in a selective program "to align with districtwide enrollment data." *Ass'n for Educ. Fairness*, 2021 WL 4197458, at *17. That is exactly what the Board did here.[8]

Second, the Board has argued that Board members merely were aware or entertained a "hope" that the new policy would generate more racial diversity. But the record instead reveals that Board members were awash in "racial data to model proposed outcomes." App. 18a. Admissions staff carefully designed an application scoring rubric in such a way that would "level the playing field for [our] historically underrepresented groups." App. 186a–188a; App. 228a. Board members sought modeling to predict the precise racial effect of the bonus points. App. 195a–196a (testimony of admissions director Shughart); App. 232a–233a (emails between Shughart and Superintendent Brabrand discussing Board requests for data on the points system). Board members also had data showing the racial composition of applicants and students admitted to TJ from each middle school in FCPS, *see* App.

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application fees, offering free test prep, and the like. It is measures like these that "[courts have] *required* public officials to consider" before using a racial classification, App. 10a, not "prox[ies] motivated by discriminatory intent," App. 18a.

[8] The lack of explicit racial targets in the Board's policy is of little relevance. *See* App. 11a. After all, the Board made it clear that its goal was to have TJ's demographics mirror the school system or Northern Virginia. App. 51a. And while the Board's policy did not immediately make TJ's demographics look like FCPS, it moved quite a bit in that direction.

Similarly, the concurrence's discussion of the top 10 percent plan referenced in the *Fisher* cases is of questionable relevance. The plaintiff in *Fisher* did not challenge the constitutionality of the percent plan, and so the Court never ruled on it. The Court does not typically decide such important questions *sub silentio*.

115a (email from division counsel to all Board members containing racial data on TJ admissions from all FCPS middle schools), and from that understood that a middle-school-level guarantee would limit enrollment from "feeder" schools that had traditionally sent most of the Asian-American students to TJ. The Board was not shooting blindfolded when it enacted its policy. It knew what it wanted, and the policy was designed to achieve that goal.

Returning then to the standard—a stay of a final judgment pending appeal is only appropriate upon a *strong showing* that the judgment is *likely* to be reversed. *Nken*, 556 U.S. at 434. Yet the Board's stay motion presented at best a question for litigation, one that has been debated in the lower courts and that merits this Court's review. Where disagreement exists among district courts within the Fourth Circuit and elsewhere over the interpretation of Supreme Court and Fourth Circuit precedent, it is difficult, if not impossible, to make a showing strong enough to merit a stay. Regardless, the Board fell well short of that standard here. Therefore, the panel majority demonstrably erred in granting extraordinary relief.

B. The Board suffers no irreparable harm if it must comply with the district court's injunction

Even putting the merits to one side, however, the decision to grant a stay was demonstrably wrong. As Justices have explained when asked for a stay pending appeal to the Supreme Court, "[a] lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). A stay "disrupts the usual manner of hearing and considering an appeal before rendering a

decision and granting relief." *Louisiana v. Am. Rivers*, No. 21A539, slip op. at 2 (U.S. Apr. 6, 2022) (Kagan, J., dissenting). That is why "a reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at 427. It instead must require a party moving for a stay to demonstrate "an exceptional need for immediate relief" through "concrete proof." *Am. Rivers*, No. 21A539, slip op. at 2 (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)).

The Board's case that it will suffer irreparable harm in the absence of a stay is particularly weak here because the district court specifically warned last September that the Board should be ready for an adverse decision. When the Coalition filed a second motion for a preliminary injunction in August 2021, the district court questioned the necessity of preliminary relief because the case would be resolved before admissions decisions were made. But Judge Hilton made clear that "the [B]oard's on notice. They understand that we're trying this case, and we don't know what the outcome is going to be yet, so they've got to be prepared for that, don't they?" App. 247a. He reinforced the point later in the hearing, noting that there would be a January trial date, after which the parties would "get a decision. It seems to me that that's plenty of time to get corrected whatever needs to be corrected, if that's warranted from the findings after the trial of the case." App. 260a.

The Board failed to heed Judge Hilton's warnings and prepare an alternative admissions plan. Instead, once his injunction was issued, it sought a stay based on administrative inconvenience and alleged damage to the Board's and FCPS' reputations from having to revise the TJ admissions policy in short order. But as Judge Rushing correctly noted, "[w]hile designing and implementing a new admissions policy on a short timeline may be inconvenient, it is not irreparable." App. 16a. Both this Court and the Fourth Circuit have been crystal clear that "'[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.'" *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). That is especially true when the Board's alleged injuries are at least in part self-inflicted. The panel majority failed to hold the Board to its substantial burden to demonstrate irreparable harm. Therefore, it is demonstrably wrong.

C. A stay substantially injures the Coalition for TJ's members and others

The panel majority was equally wrong when it determined, as Judge Heytens stated in his concurrence, that "the impact of a stay on the Coalition, if any, would be significantly less severe than the lack of a stay would be on the Board." App. 14a. Judge Heytens erroneously based his conclusion on his observation that "it appears the Coalition has identified only two children of its members who are even eligible for admission to TJ this year, and those children may yet be admitted." App. 13a–14a. Whether or not children of Coalition members may be admitted to TJ under the discriminatory policy is irrelevant; as this Court held in *Parents Involved*, the injury

suffered is "being forced to compete in a race-based system that may prejudice the plaintiff." 551 U.S. at 719 (citation omitted). The panel majority seriously erred in finding otherwise.

Further, the injury under the Equal Protection Clause is no less substantial whether it is suffered by one child or one thousand children, and the panel majority erred in discounting that harm based on the purported number of affected applicants. Indeed, the Coalition would have had standing to bring this lawsuit if it had just *a single* member with an elementary or middle school child who may have been denied admission to TJ when he or she applied in the future. *See id.* at 718–19. There is no requirement that the Coalition "represent a class or putative class of applicants," App. 13a, in order to bring this action to protect the constitutional rights of its members' children, and the Board has never shown otherwise. Many Asian-American applicants to TJ (both in and out of the Coalition) are harmed by the Board's discriminatory policy, and the panel majority demonstrably erred in requiring the Coalition to represent an unspecified number of affected children before the constitutional harm they suffer is considered to offset the administrative and reputational harm claimed by the Board. App. 13a–14a.

D. A stay is not in the public interest

The panel majority gave especially short shrift to the public interest. The "timing and logistical constraints" the Board may face if it can no longer use its discriminatory admissions policy do not outweigh the ongoing constitutional violation imposed on Asian-American applicants to TJ under a stay. *See Sampson*, 415 U.S. at

90 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Further, a stay was not warranted simply because some Asian-American students continue to be admitted to TJ under the plan that was held unconstitutional. Such an argument ignores the applicants' actual injury: being forced to compete for admission on an unequal playing field.

As Judge Rushing correctly noted in her dissent, "everyone—even temporarily frustrated applicants and their families—ultimately benefits from a public-school admissions process not tainted by unconstitutional discrimination." App. 19a (citing *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) ("[U]pholding constitutional rights is in the public interest.")). The district court held that the Board's admissions process suffered from such taint, and that judgment has not been reversed. The panel majority demonstrably erred in concluding that administrative inconvenience or justifiable delay in announcing admissions results could outweigh the public's fundamental and vital interest in public schools upholding their students' constitutional rights. *See Newsome ex rel. Newsome v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("[U]pholding constitutional rights serves the public interest.").

CONCLUSION

For the foregoing reasons, the Coalition's Emergency Application should be granted and the stay pending appeal vacated.

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Respectfully submitted,

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