

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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COALITION FOR TJ,

*Applicant,*

v.

FAIRFAX COUNTY SCHOOL BOARD,

*Respondent.*

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

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GLENN E. ROPER  
Pacific Legal Foundation  
1745 Shea Center Drive, Suite 400  
North Highlands, Colorado 80129  
Telephone: (916) 419-7111  
Email: GERoper@pacificlegal.org

ALISON E. SOMIN  
Pacific Legal Foundation  
3100 Clarendon Blvd., Suite 610  
Arlington, VA 22201  
(202) 888-6881  
Email: ASomin@pacificlegal.org

ERIN E. WILCOX\*  
*\*Counsel of Record*  
CHRISTOPHER M. KIESER  
JOSHUA P. THOMPSON  
Pacific Legal Foundation  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Email: EWilcox@pacificlegal.org  
Email: CKieser@pacificlegal.org  
Email: JThompson@pacificlegal.org

*Counsel for Applicant*

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## **Appendix A**

FILED: March 31, 2022

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 22-1280  
(1:21-cv-00296-CMH-JFA)

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COALITION FOR TJ,

Plaintiff – Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant – Appellant,

and

SCOTT BRABAND, in his official capacity as Superintendent of the Fairfax  
County School Board,

Defendant.

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**ORDER**

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The Court grants appellant’s motion for a stay pending appeal. Appellant has satisfied the applicable legal requirements for a stay pending appeal, see *Nken v. Holder*, 556 U.S. 418 (2009), and thus may proceed with its use of the challenged admissions plan.



Entered at the direction of Judge Heytens with the concurrence of Judge King. Judge Rushing voted to deny the motion.

Judge Heytens filed a concurring opinion. Judge Rushing filed a dissenting opinion.

For the Court

/s/ Patricia S. Connor, Clerk

TOBY HEYTENS, Circuit Judge, concurring:

I agree with the decision to grant a stay pending appeal. The issues in this case are materially different from those currently before the Supreme Court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (No. 20-1199), and *Students for Fair Admissions, Inc. v. University of North Carolina* (No. 21-707). There, the question is whether—and if so when—universities may use *race conscious* policies in admissions. Here, in contrast, it is undisputed that the challenged admissions policy is *race neutral*—indeed, evaluators are not told the race or even the name of any given applicant. And, under existing precedent, such policies are not constitutionally suspect unless a plaintiff can demonstrate (in addition to “actual discriminatory impact”) that the challenged policy was adopted “with discriminatory intent.” *North Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 302 (4th Cir. 2020); see *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

In my view, appellant Fairfax County School Board is likely to succeed in its appeal. I have grave doubts about the district court’s conclusions regarding both disparate impact and discriminatory purpose, as well as its decision to grant summary judgment in favor of a plaintiff that would bear the burden of proof on those issues at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986) (discussing how the burden of proof impacts summary judgment analysis). The other stay factors also weigh in the Board’s favor, in no small part because of the significant logistical difficulties and time constraints associated with creating a new admissions policy and making thousands of admissions decisions for

the class of 2026 under that new policy after the application process was complete and just as decisions were about to go out under the current one.

## **I. Background**

This case involves an Equal Protection Clause challenge to a high school admissions policy. Located in Fairfax County, Virginia, Thomas Jefferson High School for Science & Technology (TJ) offers advanced academic opportunities for students in the surrounding area. Plaintiff Coalition for TJ is an organization of parents and community members.

Because the district court's analysis depends heavily on the change from TJ's former admissions policy to its current one, I begin by describing the former policy. Before December 2020, applicants were required to reside in one of five participating school divisions, be enrolled in 8th grade, have a minimum 3.0 GPA, be enrolled in or have completed Algebra I, and pay a \$100 application fee. A-99.<sup>1</sup> Students meeting those criteria were administered three standardized tests. *Id.* Students who achieved a certain minimum percentile ranking on the standardized tests and maintained a 3.0 GPA were then administered another exam that included three writing prompts and a problem-solving essay and asked to submit two teacher recommendations. *Id.* Students who made it through all the required steps were selected for admission based on a holistic review of their application materials. A-99–100.

During the summer of 2020, statistics revealed that the number of Black students admitted to TJ's incoming class was too small to be reported. A-213. A state level task

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<sup>1</sup> This refers to the appendix filed with the Board's stay motion, CA4 ECF 8-2.

force on diversity, equity, and inclusion was convened to examine barriers to access at Virginia's Governor's Schools, including TJ. A-118, 214. Throughout the fall, the Board considered various changes to TJ's admissions policy.

In December 2020, the Board adopted the admissions policy challenged here by a vote of 10-1-1. A-217. Under that policy, prospective students must still reside in one of five participating school divisions, be enrolled in 8th grade, and be enrolled in or have completed Algebra I. A-100. Unlike the former policy, the minimum GPA has been raised (from 3.0 to 3.5) and students are required to have taken certain specified honors courses. *Id.* Eligible students are then evaluated holistically on their GPA, answers to essay questions, and experience factors: whether the applicant qualifies for free or reduced-price meals, is an English language learner, has an Individualized Education Plan, or attends a historically underrepresented middle school. A-212. Evaluators are not told the race, ethnicity, gender, or even names of applicants. A-100–01.

The current policy guarantees each participating public middle school a number of seats equivalent to 1.5% of that school's 8th grade class. A-212. Those slots are offered to the highest evaluated applicants from each middle school, with the remaining applicants competing for about 100 unallocated seats. *Id.*

The class of 2025 (who started at TJ this past fall) is the first cohort admitted under the new admissions process. A-101. In the policy's first year, 3,470 students applied and 550 received offers. *Id.* Just under half of applicants (48.59%) self-identified as Asian American and well over half of offers (54.36%) went to such students. A-102. Over the

previous five years, Asian American students had accounted for at least 65% of offers made. A-212, 222.

The Coalition sued the Board in March 2021. The Coalition twice moved for a preliminary injunction, but the district court denied both motions. D. Ct. ECF 50, 73. On February 25, 2022, the district court granted summary judgment to the Coalition, concluding the current policy triggered and failed strict scrutiny because it has a disparate impact on Asian American applicants and the Board acted with the purpose of disadvantaging such applicants. A-209–39. The same day, the district court enjoined use of the challenged admissions policy—including for the class of 2026, for whom the admissions cycle is currently ongoing. D. Ct. ECF 144. On March 11, the district court denied a stay pending appeal. D. Ct. ECF 150; see Fed. R. App. P. 8(a)(1)(a).

## **II. Stay factors**

I agree the Board is entitled to a stay pending appeal under the traditional *Nken* standard. See *Nken v. Holder*, 556 U.S. 418, 434 (2009). That is, the Board “has made a strong showing that [it] is likely to succeed on the merits,” that it “will be irreparably injured absent a stay,” that “issuance of the stay will [not] substantially injure the other parties interested in the proceeding,” and that a stay is in “the public interest.” *Id.* (quotation marks omitted).

### **A. Likelihood of success on the merits**

In my view, the district court’s reasoning on the merits of the Coalition’s Equal Protection Clause claim is questionable in multiple respects.

1. I think the district court’s disparate impact analysis is likely flawed because it relies on the wrong comparator. The court’s conclusion that the new admissions policy has a disparate impact on Asian American applicants appears to have rested almost exclusively on a comparison between the percentage of Asian American applicants offered admission under the current policy and the percentage of such applicants offered admission under the former one, *i.e.*, that “the number and proportion of Asian American students offered admission to TJ fell following the challenged changes.” A-222.

The district court never explained, however, why the percentage of Asian American applicants offered enrollment under the prior policy is the proper baseline for comparison. The only case the district court cited in support of its statement that a “simple before-and-after comparison” is the proper method for assessing disparate impact, A-223—*North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016)—simply does not say that. To the contrary, in addressing whether certain voting procedures disproportionately burdened African Americans, *McCrory* specifically *rejected* an election-to-election comparison of voter turnout to assess disparate impact. *Id.* at 232–33. Nor am I aware of any other authority for the proposition that current government policy creates a floor against which all future policies will be judged, a principle that would, if adopted, make it exceedingly difficult for government actors to change existing policies that have a real (albeit unintentional) racially disparate impact.

To me, the more obviously relevant comparator for determining whether this race neutral admissions policy has an outsized impact on a particular racial group is the percentage of applicants versus the percentage of offers. Such a metric targets more directly

the core question for assessing disparate impact: whether members of one group have, proportionally, more difficulty securing admission than others. And, by that metric, there does not seem to be any disparate impact whatsoever. Indeed, during the one previous year under the challenged policy, Asian American applicants made up a *higher* percentage of students offered a spot at TJ (54.36%) than of total applicants (48.69%). A-102.

The district court also suggested that the policy's allocation of 1.5% of seats for the highest evaluated applicants from each public middle school and the preference for students from underrepresented middle schools disparately impacts Asian American applicants. A-223–24. The problem is that conclusion is barely reasoned and is not supported by a single citation to the record. To be sure, the Coalition's brief opposing a stay includes its own citations in support of the district court's conclusions. CA4 ECF 17 at 15. But the Board's stay motion argues that the record shows just the opposite—that Asian American students are not differently situated from any other students when it comes to the 1.5% allocation or the preference for underrepresented middle schools, so those parts of the admissions policy do not disparately impact Asian American applicants at all. CA4 ECF 8-1 at 12–13. At the very least, the record reveals a likely dispute of fact on this question that would preclude summary judgment in favor of the Coalition.

2. I also am skeptical of the district court's conclusion that there is no genuine issue of material fact implicated by its conclusion that the Board adopted the current admissions policy for a constitutionally impermissible purpose. A-235–36. The centerpiece of the district court's analysis on this point is its statement that “the Board's policy was

designed to increase Black and Hispanic enrollment, which would, *by necessity*, decrease the representation of Asian-Americans at TJ.” *Id.* (emphasis added).

That approach seems flatly inconsistent with the Supreme Court’s decision in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). *Feeney* involved a constitutional challenge to a Massachusetts statute mandating a categorical employment preference for qualified veterans over qualified non-veterans. 442 U.S. at 259. Even though “over 98% of the veterans in Massachusetts were male,” *id.* at 270—and even though no one claimed that those who crafted and decided to maintain the law were unaware of that fact—the Supreme Court declined to apply heightened scrutiny. In language directly relevant to this case, the Court specifically held that “awareness of consequences” is not enough to show discriminatory intent and that a plaintiff challenging a facially neutral policy must show that a decisionmaker acted “at least in part ‘*because of*,’ not merely ‘*in spite of*,’ its adverse effects upon an identifiable group.” 442 U.S. at 279 (emphasis added).

Nor does the fact that the current policy may have been adopted, at least in part, with the expectation that it would “increase Black and Hispanic enrollment” change this analysis. A-235–36. Under *Feeney*, the question is whether the decisionmaker acted “at least in part because of [a race neutral policy’s] *adverse* effects upon an identifiable group,” 442 U.S. at 279 (quotation marks and emphasis added), and the Coalition has never claimed that the challenged policy was motivated by or has any sort of adverse effect on Black or Hispanic applicants. This aspect of *Feeney*’s holding operates as a critical limitation on the



potential to lodge constitutional challenges to facially neutral laws of all stripes, which often are passed with the aim of winning favor with a particular constituency.

The Supreme Court has repeatedly stated that it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means. Indeed, it has *required* public officials to consider such measures before turning to race conscious alternatives. See *Fisher v. University of Texas at Austin*, 570 U.S. 297, 312, 315 (2013) (stating that universities must consider whether “workable race-neutral alternatives would produce the educational benefits of diversity” before considering race and remanding for further consideration of whether the university had done so); see also *Texas Dep’t of Hous. and Community Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015) (local housing authorities may “choose to foster diversity” with race neutral tools); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989) (governments may “increase the opportunities available to minority business” through measures such as altered “bidding procedures” that do not “classify[] individuals on the basis of race”). Under the district court’s analysis, it is difficult to see why policies such as Texas’s famous Top Ten Percent Law—which “grants automatic admission to any public state college . . . to all students in the top 10% of their class at high schools in Texas,” *Fisher*, 570 U.S. at 305, and was plainly intended at least in part to ensure that Texas’s public universities retained some measure of racial diversity after the Fifth Circuit’s decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)—would not have triggered strict scrutiny. Given these decades of guidance, it would be quite the judicial bait-and-switch to hold that such race neutral efforts—much less, the *race blind* policy at issue here—are also subject to strict scrutiny.

I am no more persuaded by the Coalition’s argument that the challenged policy was motivated by impermissible “racial balancing,” CA4 ECF 17 at 13, a term the Supreme Court has defined as striving for “some specified percentage of a particular group merely because of its race or ethnic origin.” *Fisher*, 570 U.S. at 311 (quotation marks omitted). The race neutral policy challenged here includes no racial quotas or targets. And the Coalition appears to have identified no evidence that TJ’s current race neutral policy is intended to achieve a certain percentage of Black, Hispanic, or Asian American students—much less such overwhelming evidence as to warrant summary judgment in favor of the party that would bear the burden of proof at trial.<sup>2</sup>

The district court’s extensive reliance on alleged procedural irregularities in the Board’s adoption of the challenged admissions policy also strikes me as unpersuasive, especially for purposes of granting summary judgment to the Coalition. The district court acknowledged that the Board’s actions did not violate any state law or procedural rules, A-227, and, under *Arlington Heights*, procedural irregularities are not themselves proof of discriminatory intent, 429 U.S. at 267. Instead, “[d]epartures from the normal procedural sequence” are relevant to the extent they “afford evidence that improper purposes are playing a role.” *Id.* Here, the evidence the district court identified and certain statements highlighted by the Coalition, see CA4 ECF 17 at 17, tend to show what is not only obvious

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<sup>2</sup> The Coalition points to a presentation and various text messages between Board members discussing how certain proposed policies might reduce Asian American representation at TJ. CA4 ECF 17 at 6–8. As the Board explains, however, both the presentation and the messages were about *different* potential policies that the Board *rejected*. CA4 ECF 19 at 6–7 & n.4.

but, as discussed above, perfectly permissible under existing law—that the Board felt compelled to address TJ’s longstanding lack of diversity. Such evidence is hardly an appropriate basis for concluding—much less as a matter of law—that a race neutral policy was enacted with a constitutionally impermissible intent.

**B. Irreparable harm absent a stay**

The Board has also shown that it will suffer irreparable harm without a stay. Preventing elected representatives from carrying out “a duly enacted” policy always “constitutes irreparable harm.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Moreover, there are currently 2,540 students awaiting their TJ admissions decisions, which are supposed to be released “no later than April” 2022. A-246; A-283. The Board persuasively argues that there is no way for it simply to revert to the previous admissions policy. None of the current applicants was required to take the formerly mandated standardized tests, two-thirds of which are no longer commercially available. CA4 ECF 8-1 at 18; A-246. The Coalition insists that the Board should have approached competing vendors in anticipation of identifying replacement tests at some point last year or whipped up a fully formed backup plan even as it was defending its chosen policy in litigation, see CA4 ECF 17 at 20, 23, but that strikes me as completely unrealistic: It took the Board three months to adopt the challenged policy in the first place, A228–32, and the district court thought even that was “rushed,” A-232.<sup>3</sup>

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<sup>3</sup> The Coalition also argues the Board should have been on notice of the need for a backup policy because the district court suggested in September 2021 that it could “try this case in January and get a decision,” which would be “plenty of time to get corrected (Continued)

I also am persuaded that requiring the Board to design a new admissions policy and then solicit and review applications under a new process, all on a highly compressed timetable and with little opportunity for community input or outreach, would irreparably damage its credibility and reputation in the community and irreparably harm TJ's ability to compete for students, many of whom apply to other selective schools with late spring enrollment deadlines. See CA4 ECF 8-1 at 20. It is no mere "administrative inconvenience" the district court's order mandates, CA4 ECF 17 at 23, but a gigantic undertaking. Such a significant outlay of public resources goes far beyond requiring private citizens to initiate routine administrative processes, see, *e.g.*, *Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017), and constitutes a "genuinely extraordinary situation" justifying interim equitable relief, *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974).<sup>4</sup>

### **C. Effect on the Coalition and the public interest**

The Coalition does not represent a class or putative class of applicants; rather, it is a group of interested parents and community members. Based on the record, it appears the Coalition has identified only two children of its members who are even eligible for

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whatever needs to be corrected." CA4 ECF 17 at 9. But the district court did not reach a decision in January—instead, it granted summary judgment during the last week of February and did not deny the Board's motion to stay until mid-March.

<sup>4</sup> The Coalition suggests the Board could simply excise the two aspects of the current plan that the Coalition finds most objectionable. CA4 ECF 17 at 22. But if the Coalition is right that the current plan was adopted with discriminatory *intent*, it is not clear how these surgical alterations would remedy the constitutional problem. And, regardless, the Coalition offers zero analysis of how the current plan would function without those components.

admission to TJ this year, and those children may yet be admitted. See A-106; A-210; CA4 ECF 8-1 at 21. For that reason, it appears 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. See *Nken*, 556 U.S. at 435 (balance of the harms “assess[es] the harm to the opposing *party*” (emphasis added)).

Likewise—even factoring in potential harms to similarly situated Asian American students whose parents are neither Coalition members nor otherwise parties—I think the public interest favors a stay given the timing and logistical constraints associated with scrapping the current admissions policy and creating a new one so close to the end of the current admissions cycle. If the district court’s order is not stayed, thousands of students and their families will be thrown into disarray for the next several months. By contrast, undisputed data presented to the district court show that a higher percentage of Asian American students were admitted than applied even under the current plan. Taking all this into account, it seems the more prudent course is to allow the current admissions cycle to proceed according to settled expectations and require a change, if any, beginning with the next class.

RUSHING, Circuit Judge, dissenting:

In the fall of 2020, the Fairfax County School Board changed the admissions policy for Thomas Jefferson High School for Science and Technology (TJ), a magnet school in Alexandria, Virginia. A group of parents and community members, including Asian-American parents with children who have applied to TJ or intend to do so, sued the Board, alleging that the Board acted with discriminatory intent when it changed the admissions policy to disfavor Asian-American students. After discovery, both parties moved for summary judgment on the undisputed factual record. The district court concluded that the Board acted with discriminatory intent and, on February 25, 2022, enjoined the Board from further use of the revised admissions policy.

The Board now seeks a stay of the district court’s order pending appeal so that it can use the prohibited policy to make admissions decisions for the incoming class. Because the Board has not made the showing necessary to warrant the “extraordinary relief” of a stay, I would deny the motion. *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers).

One of the “most critical” factors in deciding a stay motion is “whether the applicant will be irreparably injured absent a stay.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). The Board claims that the district court’s order will require it to expend significant time and energy to design and implement a new policy, that it will have to delay admissions decisions until after the original April deadline, and that hurriedly changing the policy at this stage will injure its reputation and public confidence in the school. But “[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)); *see also A Helping Hand, LLC v. Balt. Cnty.*, 355 Fed. App. 773, 776 (4th Cir. 2009) (holding that being forced to relocate business was not irreparable harm because “time and energy expended,” “injury to reputation,” and “loss of profits” are not irreparable (internal quotation marks omitted)). As the Board acknowledges, it can move the April deadline—as it did last year due to this same litigation—and still field a superlative class of students. While designing and implementing a new admissions policy on a short timeline may be inconvenient, it is not irreparable. Nor is it unforeseen; since at least September of 2021, the Board has been on notice that it should be prepared with a new policy in the event of an adverse decision. And the Board offers no support for its speculation that complying with a court order to modify the admissions policy will irreparably harm its reputation.

Another important factor—“whether issuance of the stay will substantially injure the other parties interested in the proceeding”—counsels against granting a stay here. *Nken*, 556 U.S. 434 (internal quotation marks omitted). The district court found that the current admissions policy violates the Equal Protection rights of Asian-American students. The violation of constitutional rights ““for even minimal periods of time[] unquestionably constitutes irreparable harm.”” *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc) (quoting *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009)); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The Board disagrees with the district court’s ruling, but we need not (and do not)

yet decide whether the Board will ultimately prevail; that question will be answered later in this appeal, which we have expedited in recognition of the importance of a timely decision to both parties. Rather, the question before us now is whether the Board has made a sufficiently “strong showing” of likely success on the merits in view of the risk that, by granting a stay, we would perpetuate the denial of Asian Americans’ constitutional rights. *Nken*, 556 U.S. at 434 (internal quotation marks omitted). In my view, the Board has not yet carried its burden.

When motivated by discrimination, facially neutral policies like TJ’s admissions plan “are just as abhorrent, and just as unconstitutional, as [policies] that expressly discriminate on the basis of race.” *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016); *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 373–374 (1886) (prohibiting discriminatory enforcement of facially neutral laws). A “[c]hallenger[] need not show that discriminatory purpose was the sole or even a primary motive” behind the policy, “just that it was a motivating factor.” *McCrory*, 831 F.3d at 220 (internal quotation marks and alterations omitted). This means that, under current law, a facially neutral policy may be constitutional in one context but unconstitutional in another, depending on whether it was motivated in part by impermissible racial intent.

Here, following the Supreme Court’s directive in *Arlington Heights*, the district court undertook the “sensitive inquiry” into all “circumstantial and direct evidence” of the Board’s intent in adopting TJ’s current admissions policy. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The court considered the historical background, the sequence of events leading to the new policy, departures from normal



procedures in enacting the policy, the disproportionate impact of the policy, and relevant administrative history, including official and private statements by Board members, meeting minutes, and reports. *See McCrory*, 831 F.3d at 220. Based on the undisputed evidence before it, the district court found that the Board pursued the policy change “at least in part ‘because of,’ and not merely ‘in spite of,’ its adverse effects” upon Asian Americans. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Specifically, the court determined that the Board acted with an impermissible racial purpose when it sought to decrease enrollment of “overrepresented” Asian-American students at TJ to better “reflect the racial composition” of the surrounding area. As the court explained, Board member discussions were permeated with racial balancing, as were its stated aims and its use of racial data to model proposed outcomes.

The Supreme Court has repeatedly emphasized that racial balancing for its own sake is unconstitutional. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–730 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Racial balancing is no less pernicious if, instead of using a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent. And while the Supreme Court has endorsed certain race-based motivations—specifically to remedy past intentional discrimination or, in higher education, to obtain the benefits of diversity—neither motivation is at issue here.

The Board particularly disagrees with the district court’s evaluation of the policy’s disparate impact on Asian Americans. It suffices at this stage to observe that, under our precedent, when a plaintiff contends a law is motivated by discriminatory intent, 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. *McCrory*, 831 F.3d at 231 (internal quotation marks omitted). The district court found that, under the new policy, Asian-American enrollment dropped 19 percentage points from the previous year and decreased from a historical average of 71% over class years 2020–2024 to 54% in class year 2025. Although “such an onerous showing” is not required in every case, *id.* at 232, and a year-over-year comparison may be influenced by other variables, it is nevertheless probative. The Board has not yet made a “strong showing” of likely success on the merits sufficient to counter the risk that our premature action will, as the district court concluded, violate the constitutional rights of Asian-American students. This is especially true given the absence of irreparable harm to the Board.

Finally, the “public interest” likewise disfavors a stay. *Nken*, 556 U.S. at 434 (internal quotation marks omitted). The Board urges us to consider the current TJ applicants who are awaiting a decision for the upcoming school year. While it would be frustrating to receive an admissions decision later than expected, or to be asked for additional admissions materials at this point in the process, these harms simply do not outweigh the infringement of constitutional rights. And everyone—even temporarily frustrated applicants and their families—ultimately benefits from a public-school admissions process not tainted by unconstitutional discrimination. *See Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (“[U]pholding constitutional rights is in the public interest.”); *Newsom ex rel. Newsom v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (same).

I respectfully dissent.

## **Appendix B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

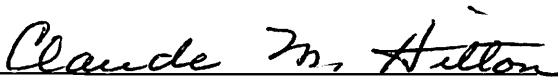
Alexandria Division

COALITION FOR TJ,	)	
	)	
Plaintiff,	)	
V.	)	Civil Action No. 1:21CV296
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Defendant.	)	
	)	

ORDER

This matter comes before the Court on the Defendant Fairfax County School Board's Motion For Stay Pending Appeal. For the reasons stated from the bench, it is hereby

ORDERED that the Defendant's Motion is DENIED.

  
\_\_\_\_\_  
CLAUDE M. HILTON  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
March 11, 2022

## **Appendix C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

COALITION FOR TJ,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil Action No. 1:21cv296
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Defendant.	)	
	)	

ORDER

This matter comes before the Court on Plaintiff The Coalition for TJ's and Defendant Fairfax County School Board's Cross-Motions for Summary Judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED, Defendant's Motion for Summary Judgment is DENIED, and Defendant Fairfax County School Board is enjoined from further use or enforcement of the Fall 2020 Admissions Plan for the Thomas Jefferson High School for Science & Technology.



CLAUDE M. HILTON  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
February 25, 2022

## **Appendix D**



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

COALITION FOR TJ,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil Action No. 1:21cv296
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff The Coalition for TJ's (hereinafter "Coalition") and Defendant Fairfax County School Board's (hereinafter "Board") Cross-Motions for Summary Judgment.

Thomas Jefferson High School for Science & Technology (hereinafter "TJ") is a high school in Fairfax County, Virginia, designated as an academic-year Governor's School. In 2020-21, the racial makeup of TJ's student body was 71.97% Asian American, 18.34% white, 3.05% Hispanic, and 1.77% Black.

TJ is part of Fairfax County Public Schools (hereinafter "FCPS"). FCPS is operated by the Board, a public body comprised of twelve elected members. According to FCPS, the county-wide racial makeup of FCPS students is: 36.8% white, 27.1% Hispanic,

19.8% Asian American, and 10% Black.

In 2020, Board members were: Ricardy Anderson, Karen Keys-Gamarra, Karen Corbett Sanders, Megan McLaughlin, Melanie K. Meren, Karl Frisch, Elaine Tholen, Stella Petarsky, Tamara Derenak Kaufax, Abrar Omeish, Rachna Sizemore Heizer, and Laura Jane Cohen. FCPS' superintendent was Scott Brabrand, TJ's admissions director was Jeremy Shughart, and TJ's principal was Ann Bonitatibus.

The Coalition for TJ has more than 200 members, including seventeen members of its core team and ten members of its leadership team. The Coalition was founded in August 2020 to oppose changes to admissions at TJ. The Coalition was concerned that admissions changes at TJ would discriminate against Asian-American students, and the leadership and core teams decided to pursue this case by unanimous consensus.

Coalition members include Asian-American parents with children who have applied to TJ or plan to do so in the near future. Among these are Dipika Gupta (whose son, A.G., is in eighth grade at Carson Middle School and has applied to TJ) and Ying McCaskill (whose daughter, S.M., is in seventh grade at Carson and plans to apply to TJ). Another member is Harry Jackson, whose daughter, V.J., an eighth grader at Carson, identifies as Black but is half Asian American.

Students must apply to TJ in order to be admitted. Students

residing in five participating school divisions are eligible to apply to TJ: Fairfax County, Loudoun County, Prince William County, Arlington County, and Falls Church City. In the fall of 2020, the Board altered the TJ admissions process.

Before the Board's fall 2020 changes, applicants to TJ were required to (a) reside in one of the five participating school divisions; (b) be enrolled in 8th grade; (c) have a minimum core 3.0 grade point average (GPA); (d) have completed or be enrolled in Algebra I; and (e) pay a \$100 application fee, which could be waived based on financial need.

Applicants who satisfied those criteria were administered three standardized tests: the Quant-Q, the ACT Inspire Reading, and the ACT Inspire Science. Those applicants who achieved certain minimum scores on the tests advanced to a "semifinalist" round. Students were selected for admission from the semifinalist pool based on a holistic review that considered GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay.

The Board's fall 2020 changes to admission at TJ removed the standardized tests requirement and altered the minimum requirements to apply. To be eligible for TJ under the new policy, students must: (a) maintain a 3.5 GPA; (b) be enrolled in a full-year honors Algebra I course or higher; (c) be enrolled in an honors science course; and (d) be enrolled in at least one

other honors course or the Young Scholars program.

The Board also changed the evaluation process, moving from a multi-stage process to a one-round holistic evaluation that considers GPA, a Student Portrait Sheet, a Problem Solving Essay, and certain "Experience Factors," which include an applicant's (a) attendance at a middle school deemed historically underrepresented at TJ; (b) eligibility for free and reduced price meals; (c) status as an English language learner; and (d) status as a special education student.

In addition to the changes to the eligibility and the evaluation criteria, the new process guarantees seats for students at each public middle school in participating school division equivalent to 1.5% of the school's eighth grade class size, with seats offered in the first instance to the highest-evaluated applicants from each school. After the guaranteed seats are filled, about 100 unallocated seats remain for students who do not obtain an allocated seat. The highest-evaluated remaining students are offered admission.

For the Class of 2025—the first year under the new system—the admitted class size increased by 64 students. Nevertheless, TJ admitted 56 fewer Asian-American students than it had the prior year. For the previous five years, Asian-American students never made up less than 65% of the admitted class. For the Class of 2024, Asian-American

students earned approximately 73% of the seats. Following the admissions changes, the proportion of Asian-American students admitted for the Class of 2025 fell to about 54%. For the Class of 2025, 48.59% of eligible applicants to TJ were Asian American.

In May 2020, the Virginia General Assembly enacted a requirement that Governor's Schools develop diversity goals and submit a report to the Governor by October 1, 2020. 2020 Va. Acts ch. 1289, item 145.C.27(i). The report must include the status of the school's diversity goals, including a description of admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students.

On May 25, 2020, George Floyd was murdered by a police officer in Minneapolis. Nationwide protests followed, including in Fairfax County and the greater metropolitan Washington D.C. area.

On June 1, 2020, the Class of 2024 TJ admissions statistics were made public, showing that the number of Black students admitted was too small to report. On June 7, Bonitatibus wrote a message to the TJ community that "recent events in our nation with black citizens facing death and continued injustices remind us that we each have a responsibility to our community to speak

up and take actions that counter racism and discrimination in our society." She went on to comment that the TJ community "did not reflect the racial composition in FCPS" and that if TJ did reflect FCPS's racial demographics, it "would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms."

In June emails, Corbett Sanders promised intentional action. In an email to Brabrand, Corbett Sanders wrote that "the Board and FCPS need to be explicit in how we are going to address the under-representation of Black and Hispanic students." At a June 18 Board meeting, Keys-Gamarra said that "in looking at what has happened to George Floyd, we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J."

In the summer of 2020, Keys-Gamarra, Brabrand, Bonitatibus, and Shughart all attended at least one meeting of a state-level task force on diversity, equity, and inclusion at Governor's Schools. The task force discussed solutions for admissions to Virginia's Governor's Schools. Among the solutions discussed was a potential state plan to require each school's diversity metrics to be within 5% of the system it represents within four years.

Brabrand testified that he perceived that there was "State-level dynamics, one, reflected by the October 1 report, and,

two, by the Secretary of Education's task force that simple status quo, a report with just, we're just doing the same thing we've always done was not going to be received well." Corbett Sanders and Omeish stressed the reporting deadline in emails.

FCPS staff then developed a proposal for a "Merit Lottery" for TJ admissions, which they presented to the Board on September 15. The proposal stated that "TJ should reflect the diversity of FCPS, the community and Northern Virginia." The proposal discussed the use of "regional pathways" that would cap the number of offers each region in FCPS (and the other participating jurisdictions) could receive. It included the results of Shughart's modeling, which showed the projected racial effect of applying the lottery with regional pathways to three previous TJ classes. Each of the three classes would have admitted far fewer Asian-American students under the proposed lottery system.

At an October 6 Board work session, FCPS staff proposed using a holistic review to admit the top 100 applicants, but otherwise retain the lottery and regional pathways. The presentation introduced consideration of "Experience Factors," and noted an "advantage" of the proposal was that it "statistically should provide some increase in admittance for underrepresented groups."

The Board also took several votes, which it typically

does not do during work sessions. One vote unanimously directed Brabrand to eliminate the TJ admissions examination. Another required that the diversity plan submitted to the state "shall state that the goal is to have TJ's demographics represent the NOVA region." The public description of the work session did not provide notice that votes would be taken, and no public comment was permitted before either vote. At the October 8 regular Board meeting, by a 6-6 vote, the Board rejected a motion that would have directed Brabrand to engage stakeholders regarding changes to TJ admissions for the 2021 freshman class prior to bringing the updated plan to the Board in December, and allow for more thorough community input and dialogue on TJ admissions.

Following this vote, multiple Board members expressed concern with the speed of the process and the adequacy of public engagement. Tholen wrote in her October newsletter to constituents that "the outreach to date has been one-sided and did not solicit input from all of our communities." Meren wrote in an October 6 email that she "was not okay with the rushed situation we are in." Sizemore Heizer wrote on October 4 that "personally I think we need to wait to implement anything [un]til next school year."

Beginning in November, FCPS staff presented an entirely holistic plan for the Board to consider alongside the revised



merit lottery. Board discussion of the new holistic plan was originally scheduled for November 17, but Corbett Sanders and Derenak Kaufax complained to Brabrand via email that they had only received the white paper containing analysis and modeling the night before. The discussion was postponed until December 7, when staff presented it to the Board alongside the revised merit lottery. The holistic plan retained the use of regional pathways, which capped the number of offers from each region.

Following the December 7 work session, Board members exchanged several draft motions in anticipation of the December 17 regular meeting. However, on December 16, Keys-Gamarra emailed Brabrand to express concern that "there were no posted motions for us to vote on." McLaughlin wrote that "it is unacceptable that no motions/amendments/follow-ons were posted nor provided to the full Board until 4:30 p.m.," which was 30 minutes before the Board went into Closed Session.

At the December 17 meeting, the Board voted down the revised merit lottery proposal. The Board ultimately voted 10-1-1 (with McLaughlin abstaining and Anderson, who had supported the lottery, voting no) for a version of the proposed holistic plan. The Board's enacted plan rejected the proposed regional pathways in favor of guaranteed admission for 1.5% of each eighth-grade class. Because it was a variation on staff's proposed holistic plan, the public did not see the 1.5% plan until motions were

posted just before the Board meeting.

Board member communications show a consensus that, in their view, the racial makeup of TJ was problematic and should be changed. Some Board members also expressed the belief that the process of revising TJ admissions had been shoddy and rushed along, with McLaughlin writing in emails that "this is not how the Board should conduct its business" and "in my 9 years, I cannot recall a messier execution of Board-level work." In an email after the final vote, she said she had "abstained largely because of the substandard process."

After the vote, several Board members were not sure whether the 1.5% guarantee would be based on the school a student actually attended or the one she was zoned to attend. Brabrand insisted that the Board had voted for "attending school," which "produced the geographic distribution the Board wanted."

Summary judgment "is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" ACLU v. Mote, 423 F.3d 438, 442 (4th Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)). "A genuine issue of material fact is one 'that might affect the outcome of the suit under the governing law.'" Metric/Kvaerner Fayetteville v. Fed.

Ins. Co., 403 F.3d 188, 197 (4th Cir. 2005) (quoting Anderson, 477 U.S. at 248). There are no material facts in dispute and the parties agree that this case is ripe for summary judgment.

An association may sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); see also Md. Highways Contractors Ass'n, Inc. v. Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991). The Coalition satisfies these requirements.

The Coalition is a membership organization with more than 200 members. Its leadership and core teams chose to pursue this case by unanimous consensus. It has members with children in seventh and eighth grade who have applied, or plan to apply, to TJ. These members would have standing to sue in their own right because the challenged policy renders their children unable to compete on a level playing field for a racial purpose. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).

The remaining Hunt factors are also not in dispute. The Coalition was formed precisely to oppose the Board's effort to change admissions at TJ. Because the Coalition seeks only

prospective injunctive relief, individual participation of members as parties is not necessary. United Food and Com. Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 546 (1996). The Coalition has standing to bring this action on behalf of its members.

Throughout 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. A means to accomplish their goal of achieving racial balance was to decrease enrollment of the only racial group "overrepresented" at TJ—Asian Americans. The Board employed proxies that disproportionately burden Asian-American students. Asian Americans received far fewer offers to TJ after the Board's admissions policy overhaul.

Strict scrutiny applies to 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 record demonstrates that the Board harbored such a purpose. Strict scrutiny therefore applies, and the Board cannot show that its actions meet this demanding standard of judicial scrutiny.

Determining racial purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be

available." Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977). Relevant factors include: (1) the impact of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; and (4) the legislative or administrative history . . . especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. Id. at 266-68.

Impermissible racial intent need only be a motivating factor. It need not be the dominant or primary one. Id. at 265-66. The Board members need not harbor racial animus to act with discriminatory intent. See N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016). To trigger strict scrutiny, the Board need only pursue a policy at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

Once strict scrutiny applies, the burden shifts to the Board to prove that the changes are narrowly tailored to further a compelling government interest. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). "This most exacting standard 'has proven automatically fatal' in almost every case." Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 316 (2013) (Scalia, J., concurring) (quoting Missouri v. Jenkins, 515 U.S. 70, 121

(1995) (Thomas, J., concurring)).

Here, no dispute of material fact exists regarding any of the Arlington Heights factors, nor as to the ultimate question that the Board acted with discriminatory intent. Under Arlington Heights, disparate impact is the starting point for determining whether the Board acted with discriminatory intent. The Board's overhaul of TJ admissions has had, and will have, a substantial disparate impact on Asian-American applicants to TJ.

A comparison of publicly available data for the Class of 2025 with earlier classes tells much of the story. As depicted in the table below, the number and proportion of Asian-American students offered admission to TJ fell following the challenged changes.

Class	Offers to Asian-American students	Asian American proportion of offers (rounded)
2025	299	54%
2024	355	73%
2023	360	73%
2022	316	65%
2021	367	75%
2020	335	69%

The proper method for determining the "impact of the official action," Arlington Heights, 429 U.S. at 266, is a

simple before-and-after comparison. See McCrory, 831 F.3d at 231(finding impact sufficient to support an inference of discriminatory intent where African Americans disproportionately used each of the removed mechanisms to vote).

This case presents substantial evidence of disparate impact. The undisputed evidence demonstrates precisely how the Board's actions caused, and will continue to cause, a substantial racial impact. The Board instituted a system that does not treat all applicants to TJ equally. The new process sets aside seats for students at each middle school amounting to 1.5% of the school's eighth-grade class. The highest-evaluated students at each school—so long as they meet the minimum admissions requirements—gain admission to TJ. Those applicants who do not attain one of the allocated seats at their school are relegated to compete for about 100 total unallocated seats. The set-aside disproportionately forces Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools.

The set-aside is only part of the equation. When applicants outside the top 1.5% are thrown into the unallocated pool, students are again treated unequally. This became publicly known when FCPS announced consideration of "Experience Factors" in the holistic evaluation. One of these factors is whether a student attends a middle school deemed "historically underrepresented at

TJ." None of the six major FCPS TJ feeder schools qualify, so students at these schools are placed at a significant disadvantage in the unallocated pool compared to their peers at underrepresented schools.

It is clear that Asian-American students are disproportionately harmed by the Board's decision to overhaul TJ admissions. Currently and in the future, Asian-American applicants are disproportionately deprived of a level playing field in competing for both allocated and unallocated seats.

Placing the Board's actions in historical context leaves little doubt that its decision to overhaul the TJ admissions process was racially motivated. In a November 2020 white paper presented to the Board, staff noted that over the past ten years, the admissions process has undergone a series of changes that were intended to impact issues of diversity and inclusion, but these changes have not made a significant impact on the diversity of the applicants or admitted students. The supposed ineffectiveness of this decade-long tinkering provides the basis for understanding how 2020 events effected the Board's admissions changes.

Two specific triggering events accelerated the Board's process and timeline. First, the Virginia General Assembly passed a budget bill in March that required Governor's Schools to submit a report to the Governor on the existence of and progress



towards diversity goals, including a description of admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students. Second, the murder of George Floyd on May 25, 2020, shortly followed the release of the Class of 2024 admissions data on June 1, showing that the number of Black students admitted was too small to be reported.

The Board and FCPS reacted by pushing TJ admissions changes. On June 7, Bonitatibus sent a statement to the TJ community that referenced the George Floyd murder and lamented that TJ "does not reflect the racial composition in FCPS," specifically noting the number of Black and Hispanic students TJ would have if it truly reflected FCPS. Around the same time, Corbett Sanders stated in a series of emails that she was "angry and disappointed" about the TJ admissions results and expected "intentful action forthcoming." She relayed a similar message to Brabrand, writing that "the Board and FCPS needed to be explicit in how we are going to address the under-representation of Black and Hispanic students." Cohen told a constituent that the number of Black students admitted was "completely unacceptable," and that the Board was "committed to examining and bettering" the admissions process. Later that month, Keys-Gamarra said at a Board meeting "in looking at what has happened to George Floyd,

we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to TJ."

Over the summer of 2020, Keys-Gamarra, Brabrand, and Shughart participated in state-level task force meetings on admissions to Governor's Schools, after which Brabrand told the Board there "was talk about the state creating a four-year timeline for diversity, requiring Governor's schools to be within 5% of diversity in their local districts." The looming specter of a Richmond takeover pushed the Board to act quickly to change TJ admissions with an explicit eye towards its racial composition. As Brabrand testified, he believed this October 1 requirement to submit a report meant "we needed to look at our admissions process at TJ." In August, he told Corbett Sanders via email that "whatever the Board decides to do or not do in September will ultimately influence what the Governor and the Secretary of Education decide in January." Omeish wrote in a September email that she had "come to understand that the Virginia Department of Education plans to intervene if we do not."

The impetus to overhaul TJ admissions came from several sources, all of which confirm that the Board and high-level FCPS actors set out to increase and decrease the representation of certain racial groups at TJ to align with districtwide enrollment

data. Board members promised action on TJ admissions that would specifically address the school's racial makeup. After the summer state task force, FCPS officials scrambled to meet a perceived deadline from Richmond to overhaul admissions with race in mind.

Arlington Heights requires consideration of "the 'specific sequence of events leading up to the challenged decision.'" McCrory, 831 F.3d at 227 (quoting Arlington Heights, 429 U.S. at 267). "In doing so, a court must consider '[d]epartures from the normal procedural sequence,' which may demonstrate that 'improper purposes are playing a role.'" Id. (quoting Arlington Heights, 429 U.S. at 267). Here, there are several indications that (1) the process for changing TJ admissions was unreasonably hurried and (2) there was a noticeable lack of public engagement and transparency—even among Board members. While the Board does not appear to have broken any procedural rules, the evidence shows that, for such a significant set of actions, the procedure was remarkably rushed and shoddy. All this suggests that the Board sought to move quickly because, as Board member Omeish put it in a November email, the Board was "currently incurring reputational/political risks" meaning that "now is better timing."

After they participated in the state task force, Brabrand, Shughart, and other staff developed a "Merit Lottery" proposal

for TJ admissions. Brabrand presented the proposal at a Board work session on September 15, 2020. The presentation detailed a proposal to select TJ students via a lottery with regional pathways for five separate FCPS regions and the remaining jurisdictions that TJ serves. The presentation focused on the projected racial effect, presenting the results of modeling Shughart had run to demonstrate the effect of applying the lottery to three previous TJ classes. Namely, a drastic drop in Asian-American students at TJ. Brabrand's PowerPoint indicated that a final decision on implementing the lottery could be made as early as the October 8, 2020, regular Board meeting.

The Board disrupted these plans. Three days after the September 15 work session, Corbett Sanders told Brabrand in an email that the plan released on Monday "has caused confusion in the community because of the over-reliance on the term lottery vs. merit." Once it became clear that most of the Board members were opposed to a lottery for various reasons, Brabrand told the Board on September 27 that staff would prepare and present an alternative admissions proposal. Corbett Sanders expressed hope that, unlike the first proposal, "[i]deally we will be able to look at the plan in advance of the meeting."

There was also the issue of the October state reporting deadline. Corbett Sanders emailed Brabrand on September 19 that "it is not the timing of the work session that is energizing the

community. It is the timing of looking at TJ." She suggested that "we make it clear that we are responding to a statutory mandate." In an earlier email to Brabrand, she suggested that he "clarify that we have a statutory requirement to submit a plan to the state by 9 October." Yet other Board members questioned whether the Board had to overhaul admissions in such a short timeframe. McLaughlin told a constituent that "Brabrand has created a false urgency that FCPS must drastically overhaul the TJ Admissions process within a three week decision-making window." Tholen forwarded to Board colleague Pekarsky an email from a member of the community who said she had talked to the Virginia Department of Education and was told that the plan submitted to the state could be "aspirational" and "general" and there was "no mandate for Governor's Schools to produce a more diverse population."

Nevertheless, the Board pursued admissions policy changes. At an October 6 work session, the Board viewed a presentation from Brabrand that proposed a revised merit lottery. It would have set aside seats for the 100 highest-evaluated applicants and selected the remaining seats via lottery among the students who met the minimum requirements after holistic review. The Board also took several votes at the work session, something it has acknowledged it does not typically do. Among these, it unanimously voted to remove the longstanding admissions exam

without any public notice that such a vote would occur. Then, while Board members expressed concern at a process that was moving too fast, the Board, at its regular meeting two days later, rejected a motion that would have directed Brabrand to engage stakeholders and allow for more community input before presenting a final plan. Tholen lamented to her constituents that the motion had failed and "the outreach to date has been one-sided and did not solicit input from all of our communities."

After the October 6 work session, with support for any sort of lottery waning, the Board sought an entirely holistic proposal. A next-step for the staff was to bring to the Board a holistic admissions approach that did not contain a lottery as an alternative plan. On November 16, FCPS staff released a white paper detailing a holistic option alongside the hybrid merit lottery. The white paper included voluminous racial modeling and discussion of efforts to obtain racial diversity at TJ. These plans were initially to be discussed at a November 17 work session, but multiple Board members protested that the white paper was posted far too late for proper consideration.

The TJ discussion was ultimately postponed until December 7, when Brabrand presented the hybrid merit lottery and the new holistic plan at another work session. The holistic method involved consideration of GPA, the Student Portrait Sheet, the

Problem Solving Essay, and the "Experience Factors," including attendance at an underrepresented middle school, with regional caps similar to those in the Merit Lottery. Thereafter, Board members exchanged draft motions almost right up until the Board met to make a final decision on December 17. In the early morning of December 16, Keys-Gamarra emailed Brabrand and expressed concern that there were "no posted motions for us to vote on." McLaughlin chastised the Board both during the December 17 meeting and afterward, noting the failure to post any motions to the public or for the full Board until a half hour before the closed session began.

At the December 17 meeting, the Board voted down the hybrid merit lottery proposal by a vote of 4-8. Then it voted on a motion to direct Brabrand to implement the holistic proposal, except replacing the regional pathways with guaranteed admission to the top 1.5% of the 8th grade class at each public middle school who meet the minimum standards. The 1.5% plan had not been presented publicly in any meeting before it was voted on. The vote passed by a margin of 10-1-1, with Anderson (who had voted for the lottery) voting no and McLaughlin abstaining. McLaughlin later wrote that she abstained at least in part because of the problematic process. She later wrote that "this is not how the Board should conduct its business," and that she "could not recall a messier execution of Board-level work in her

nine years on the Board."

After the vote, Board members were unsure whether the top 1.5% was to be selected by a student's base school or attending school—a question with significant ramifications because some FCPS schools have Advanced Academic Program (AAP) Level IV centers that draw in students from other middle school zones to attend them. Multiple Board members questioned staff regarding this topic after the Board voted to implement the holistic plan. Brabrand insisted that the Board had voted for "attending school," which represented the "geographic distribution the Board wanted." In the rush to overhaul admissions, some Board members were confused about what they had done.

The evidence shows the process was rushed, not transparent, and more concerned with simply doing something to alter the racial balance at TJ than with public engagement. The decision to vote on eliminating the TJ admissions examination at a work session without public notice is an unusual procedure. The same can be said for the lack of public engagement. The Board held full, public meetings on renaming Mosby Woods Elementary School and Lee High School, but the public did not even see the proposed plan that the Board actually adopted for TJ admissions until 30 minutes before the final meeting.

"The legislative history leading to a challenged provision 'may be highly relevant, especially where there are



contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.'" McCrary, 831 F.3d at 229 (quoting Arlington Heights, 429 U.S. at 268). Here, emails and text messages between Board members and high-ranking FCPS officials leave no material dispute that, at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup to TJ to the detriment of Asian-Americans.

The discussion of TJ admissions changes was infected with talk of racial balancing from its inception. This was apparent from the first proposal FCPS staff released after Brabrand attended the state task force and told the Board about a potential state plan to require demographic balance at Governor's Schools. The second slide of the initial merit lottery presentation declared that TJ should reflect the diversity of FCPS, the community and Northern Virginia. The subsequent slides, comparing historical TJ admissions data by race with the racial makeup of FCPS and focusing on the racial effect of implementing a lottery, make clear that diversity primarily meant racial diversity.

While a majority of the Board did not support Brabrand's lottery proposal, the dissenters nonetheless embraced racial balancing. McLaughlin, who opposed the lottery, proposed her own plan based on her experience as a university admissions officer. Referencing that the Supreme Court has ruled that diversity is a

compelling state interest, McLaughlin's proposal was designed to mimic those universities that use holistic admissions to ensure their accepted student pools reflect both the demographic diversity and the high-achievement of their applicant pools. To help the acceptance pool more closely reflect the applicant pool's demographic diversity, the proposal set aside seats for demographically diverse students. Tholen responded to McLaughlin's plan with similar skepticism of a lottery, stating that a lottery "seems to leave too much to chance" and asking: "will chance give us the diversity we are after?" Some Board members opposition to the lottery was at least in part due to a fear that a lottery might not go far enough to achieve racial balancing.

At the next work session on October 6, the Board adopted a resolution requiring that FCPS' annual diversity report to the state "shall clarify that the goal is to have TJ's demographics represent the NOVA region." It passed 11-0-1, with only Meren abstaining. This was more than an aspirational goal to be achieved by encouraging Black and Hispanic students to apply to TJ. Board members sought to use geography to obtain their desired racial outcome. Corbett Sanders advised Brabrand in late September that "it will be important to better communicate why a geographic distribution of students across the county will result in a change in demographics to include

more students that are FRM [qualify for free or reduced-price meals], ELL [English language learners], black, Hispanic, or twice exceptional." The day before the work session, she emailed a constituent that she was "urging the superintendent to modify his plan to take into account geographic diversity as well as students on free and reduced lunch, which should result in greater diversity in the demographics." Sizemore Heizer wrote to Brabrand to suggest that he frame his plan as "increasing diversity through redefining merit." Omeish used more aggressive language, writing that she planned to "support the proposal towards greater equity, to be clearly distinguished from equality."

Even aside from the statements confirming that the Board's goal was to bring about racial balance at TJ, the Board's requests for and consideration of racial data demonstrate discriminatory intent under McCrory. This does not mean "that any member of the [Board] harbored racial hatred or animosity toward [Asian Americans]." McCrory, 831 F.3d at 233. Discriminatory intent does not require racial animus. What matters is that the Board acted at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group. Feeney, 442 U.S. at 279. That is the case here—the Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at

TJ. Ass'n for Educ. Fairness, 2021 WL 4197458, at \*17; see also Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 553 (3d Cir. 2011) (discriminatory intent exists when a facially neutral policy was "developed or selected because it would assign benefits or burdens on the basis of race"); Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) ("[t]o allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because" it is facially race-neutral "is inconsistent with the Supreme Court's holdings"). Therefore, strict scrutiny applies.

The burden then shifts to the Board to demonstrate that the Board's actions were narrowly tailored to further a compelling interest. Adarand, 515 U.S. at 227. Strict scrutiny applies to facially neutral actions "motivated by a racial purpose or object" in the same manner as when they contain "express racial classifications." Miller, 515 U.S. at 913. The Board has not argued that its actions satisfy strict scrutiny.

The Supreme Court has recognized only two interests as sufficiently compelling to justify race-based action remedying past intentional discrimination and obtaining the benefits of diversity in higher education. Parents Involved, 551 U.S. at 720-23. No remedial interest exists here. In Parents Involved, the Court refused to extend the diversity rationale to K-12

schools, writing instead that Grutter had "relied upon considerations unique to institutions of higher education," and that lower courts that had applied it "to uphold race-based assignments in elementary and secondary schools" had "largely disregarded" Grutter's limited holding. Id. at 724-25.

The Board's main problem is its focus on the goal to have TJ reflect the demographics of the surrounding area, described primarily in racial terms. Far from a compelling interest, racial balancing for its own sake is "patently unconstitutional." Fisher, 570 U.S. at 311 (quoting Grutter, 539 U.S. at 330). The Board cannot transform racial balancing into a compelling interest "simply by relabeling it 'racial diversity.'" Id. (quoting Parents Involved, 551 U.S. at 732 (plurality opinion)). The school districts in Parents Involved tried various verbal formulations to deflect from their intent to racially balance schools through race-based transfers. See Id. at 725, 732 (plurality opinion). The Board here did not even bother with such "verbal formulations." Board members and high-level FCPS actors did not disguise their desire for TJ to represent the racial demographics of Fairfax County or Northern Virginia as a whole. Whether accomplished overtly or via proxies, racial balancing is not a compelling interest.


Even if the Board could identify a compelling interest that might justify its racially discriminatory changes to the TJ

admissions process, it still must prove that the changed admissions policy is "necessary" to accomplish that interest. Fisher, 570 U.S. at 312 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)). The plan must be a "last resort" to accomplish the purportedly compelling interest. Parents Involved, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). These steps and others, like further increasing the size of TJ or providing free test prep, could have been implemented before the Board defaulted to a system that treats applicants unequally in hopes of engineering a particular racial outcome. Since overhauling the process was not the last resort for the Board to accomplish its goals, the Board's actions were not narrowly tailored.

The Fourth Circuit has repeated that "once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, . . . court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs." McCrory, 831 F.3d at 239 (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982)). The proper remedy for a legal provision enacted with discriminatory intent is invalidation.

For the foregoing reasons, Plaintiff The Coalition for TJ is entitled to summary judgment, and the Defendant Fairfax County School Board's Motion for Summary Judgment should be

denied. An appropriate Order shall issue.

  
\_\_\_\_\_  
CLAUDE M. HILTON  
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia  
February 25, 2022

## **Appendix E**



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

COALITION FOR TJ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 1:21-cv-00296-CMH-JFA
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Defendant.	)	

**BRIEF IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Sona Rewari (VSB No. 47327)  
Daniel Stefany (VSB No. 91093)  
HUNTON ANDREWS KURTH LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
Telephone: (202) 955-1500  
Facsimile: (202) 778-2201  
srewari@HuntonAK.com  
dstefany@HuntonAK.com

Trevor S. Cox (VSB No. 78396)  
HUNTON ANDREWS KURTH LLP  
951 E. Byrd Street  
Richmond, VA 23219  
Telephone: (804) 788-7221  
Facsimile: (804) 788-8218  
tcox@HuntonAK.com

*Counsel for Defendant*

December 23, 2021

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## INTRODUCTION

The Coalition for TJ’s motion for summary judgment confirms that its Equal Protection claim is both factually unsupported and legally defective. To prevail on that claim, the Coalition must demonstrate both that TJ’s new race-neutral admissions policy disparately impacts Asian applicants, and that the School Board adopted the new policy “because of” the disparate impact. The Coalition’s summary judgment brief (“PSJ”) (ECF 122) establishes neither element.

But first, the record now conclusively establishes the Coalition’s lack of standing to sue. Indeed, the three new declarations offered by the Coalition (two by parents who are not true members, one by the parent of a Black student) merely prove that the Coalition lacks both standing *and* a coherent theory of racial discrimination. To the extent that the Coalition has any real members at all, they do not include any parents of TJ-eligible Asian students. This case can and should be dismissed for lack of standing.

On the merits, the Coalition’s claim fails at the threshold because it cannot establish disparate impact. Despite a plethora of contrary authority, the Coalition seeks to establish a disparate impact *exclusively* by a “simple before and after comparison” of results under the new admissions process to results under the prior process. PSJ at 14. But as explained in the School Board’s summary judgment opening brief (“DSJ”) (ECF 111), using such a baseline for disparate impact analysis indefensibly requires this Court to presume that a certain group of applicants will always “outperform” another by virtue of their race. *See* DSJ at 24–26. The Court should reject that repugnant assumption, and instead analyze disparate impact by comparing the demographics of the admission pool against the applicant pool in the Class of 2025. That comparison establishes as a matter of law that Asian applicants—who *outperformed* their share of the applicant pool—are not disparately impacted by the admissions policy.

The Coalition also cannot prove a discriminatory purpose. Its case rests on the fiction

that any action taken to increase access for an underserved racial group is equivalent to an action taken to harm all other racial groups. But it is well-settled that the “motive of increasing minority participation and access is not suspect,” *Anderson ex rel. Dowd v. City of Bos.*, 375 F.3d 71, 87 (1st Cir. 2004), and it defies both precedent and common sense to suggest that any attempt to eliminate barriers for underserved populations amounts to unconstitutional discrimination against those who already enjoy unhindered access. The distinction in the law is clear, and it is critical. Action taken “because of” adverse effects on an identifiable group is suspect; action “in spite of” such effects is not. *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). The Coalition’s attempt to ignore this critical distinction exposes a flaw to its claim: there is not a shred of record evidence, under any of the *Arlington Heights* factors, to support the inference that the Board reformed the admissions policy “because of” the hypothetical adverse effects the reforms might have on Asian students. *Id.*

The Coalition’s motion for summary judgment should therefore be denied, and summary judgment should be entered for the School Board.

### **COUNTER-STATEMENT OF MATERIAL FACTS (“CMF”)**

1. Disputed in part. During the 2020–21 school year, 4.88% of TJ’s student body identified as a racial group “Other” than White, Asian, Black, or Hispanic/Latino. PSJ Ex. 57.

2. Disputed in part. As required by federal and state law, FCPS collects and reports the racial identification data that enrolling parents select for their respective students, based on the racial groups categories specified by law. The proportions of White, Hispanic/Latino, Asian, and Black students stated in paragraph 2 are based on this self-reported information provided by parents of FCPS students, and not “according to FCPS,” and also pertain only to Fall 2020 student enrollment numbers. *See* PSJ Ex. 58. Plaintiff has omitted Multiracial, American Indian, and Native Hawaiian students, who comprised 5.9%, 0.3%, and 0.1%, respectively, of the

180,076 students enrolled in FCPS in Fall 2020. *Id.*

3. Undisputed except the spelling of Stella Pekarsky's last name.

4. Disputed. The Coalition's count of 200 "members" is based on individuals who have merely filled out a "Contact Us" form that does not purport to be a membership application. DSJ Ex. 40, Nomani Dep., at 78:2–13; DSJ Ex. 42. The Coalition's core team has 13 members, and leadership team has seven members. *See* DSJ Ex. 44,<sup>1</sup> Nomani Dep. at 44:20–46:6 (confirming that Coalition's leadership team and core team members are identified on the "organizational document" marked Exhibit 3); DSJ Ex. 45, (organizational document); DSJ Ex. 46, Coalition's Responses to RFP Nos. 6 & 7 (referring to same organizational document as sufficient to show identities of core and leadership team members).

5. Disputed. The Coalition was formed "to advocate for diversity and excellence at [TJ]" and "to oppose ... efforts by the Virginia Governor's Office to replace [TJ's] merit-based admissions with race-based policies." DSJ Ex. 47, Coalition Email Describing Itself. Some of Coalition's core team were the ones who decided to file suit. DSJ Ex. 48, Miller Dep. at 19:1–13. The Coalition has never put any decisions to a vote, even by its leadership and core teams, so it cannot say that this or any other decision was "unanimous." DSJ Ex. 40, Nomani Dep., at 44:15–18, 51:2–6.

6. Disputed. The Coalition's leadership team does not include any parents of Asian students who are seventh- or eight-grade students planning to apply to TJ, and the persons whom it calls general "members" are not members at all. *Id.* at 53:16–58:9; *see also* CMF ¶ 4. The Coalition does not collect racial information about its "members," nor does it ask members

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<sup>1</sup> To simplify matters for the Court, the School Board continues its exhibit numbering from its opening brief. DSJ Exs. 44–52 are being filed contemporaneously with this response brief.



where they reside, whether they have children, or what grades their children attend. DSJ Ex. 40, Nomani Dep., at 83:1–17, 93:6–7. It did not identify Gupta or McCaskill as persons having relevant knowledge, far less identify them as “members” of the Coalition. DSJ Ex. 49, Rule 26(a)(1) Disclosures. McCaskill submitted two previous declarations, but did not claim in either that he was a member of the Coalition.<sup>2</sup> See ECF 16-2 & 59-2. Neither McCaskill nor Gupta appears as the author or recipient of even a single document, message, or email produced by the Coalition in this case.<sup>3</sup> Whether or not Jackson is a member of the Coalition, he is not “Asian,” and his daughter identifies as Black. DSJ Ex. 44, Nomani Dep., at 92:18–21.

7–8. Undisputed.

9. Undisputed except that the eligibility criteria have changed over the years, and those described in paragraph 9 applied to “[a]pplicants seeking to enter TJ in the ninth grade in Fall 2020.” ECF 95, Stip. Facts ¶ 9.

10. Disputed in part. Advancement to the “semifinalist” round was based on “percentile rankings,” not “minimum scores.” *Id.* Students were selected for admission after a “holistic” review that was “based on the selection criteria identified in Regulation 3355.13.” *Id.*

11. Disputed in part. The Fall 2020 changes removed the standardized tests, but not the written exams. *Id.* ¶¶ 11, 13. These changes apply only to applicants seeking to enter TJ in the 9th grade, and the eligibility criteria continue to require applicants to reside in one of the five participating jurisdictions. *Id.* ¶ 13.

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<sup>2</sup> McCaskill’s first declaration averred that the admissions process would discriminate against his then eighth-grade child applying to TJ. ECF 16-2, ¶¶ 6-7. That child subsequently received an offer to TJ, as his current declaration concedes. ECF 100, ¶ 5.

<sup>3</sup> The only time Gupta is even *referenced* in a document produced by the Coalition is from one of the Telegram “chat” transcripts, in which a “core” member of the Coalition asks who she is—and gets no reply. See DSJ Ex. 50 (“Does anyone know Dipika Gupta ....”).

12. Disputed in part. The prior process included one more stage than does the current process—the stage during which applicants took three standardized tests—so the Coalition’s descriptors of the prior process as “multi-stage” and the current process as “one-round” are incorrect. *See* DSJ Ex. 3(A), FCPS Regulation 3355.13; DSJ Ex. 3(B), FCPS Regulation 3355.14. The current process takes into account exactly four “Experience Factors,” which are whether: (1) whether the applicant qualifies for Free or Reduced-price Meals (FRM), (2) is an English Language Learner (ELL), (3) has an Individualized Education Plan (IEP), or (4) attends a historically underrepresented school. ECF 95, Stip. Facts ¶ 13.

13. Disputed in part. Applicants are given 45 points if they currently have an IEP, are receiving ELL services 1 through 6, or attend a historically underrepresented middle school. PSJ Ex. B; PSJ Ex. N, Shughart Dep., at 162:13–164:1.

14. Disputed in part. The process does not guarantee “seats for students at each public middle school;” rather, seats are allocated to each school based on the school’s 8<sup>th</sup>-grade student population, and each school must have a sufficient number of students both apply and meet the eligibility criteria in order to exhaust its allocation. ECF 95, Stip. Facts ¶ 14.

15. Undisputed.

16. Disputed in part. The Board increased the size of the admitted freshman class from approximately 486 to 550 students, and the Class of 2025 offers reflects this increase. *Id.* In 2020, 355 students who identify as Asian were offered admission; in 2021, 299 students who identify as Asian were offered admission. PSJ Exs. 50 & 51.

17. Disputed in part. Each year’s applicants are a distinct group of eighth-grade students and necessarily are different from the students who applied the previous year, so the proportion of Asian students offered admission to the Class of 2025 did not “fall.” *See* DSJ Ex.

3(A), FCPS Regulation 3355.13; DSJ Ex. 3(B), FCPS Regulation 3355.14.

18. Disputed in part. With 27.2% of applicants from underrepresented schools, Asian students represented the second largest racial group, and were just 0.7% shy of tying the largest racial group (White students), of applicants from the schools that were considered historically underrepresented for Class of 2025 admissions. DSJ Ex. 51, Shughart Decl. II ¶ 10 & Ex. B. Asians were the *largest* racial group of all applicants who received points for the ELL (49.2%) and FRM (33.9%) experience factors—the latter of which counted for double the points of any other experience factor. *Id.* ¶ 10 & Ex. B. At 31.3%, Asians were the second-largest racial group (second only to White students) to receive points for the Special Education experience factor. *Id.* ¶ 10 & Ex. B.

19. Disputed. Cooper had a total of two Asian students admitted to TJ in three of the five admission cycles prior to the Class of 2025, so it was not among the top six middle schools in terms of Asian students admitted to TJ. *Id.* ¶ 5. Cooper had very few students of any race admitted to TJ during those three years. *Id.* The other five schools selected by Plaintiff were the schools with the most students—of any race—admitted during the five years prior to the Class of 2025. *Id.* ¶ 4. For example, the same schools identified by Plaintiff were the “top feeder” schools for Hispanic students during the same five-year period. *Id.* ¶ 6. And they also include the “top feeder” schools for White and Black students. *Id.* ¶¶ 7-8. No school was “guaranteed” admission under the prior process, nor is any school “capped” in how many students it may have admitted to TJ under the current process. ECF 95, Stip. Facts ¶ 14. Four of Plaintiff’s six “top feeders”—Carson, Cooper, Longfellow, and Rocky Run—received 88.6% (78 of 88) of the unallocated seats offered to all FCPS students in 2021. DSJ Ex. 51, Shughart Decl. II ¶ 12. By contrast, only two of the 10 FCPS “underrepresented” middle schools exceeded their allocations

and, even then, received just 7.95% (7 of 88) of unallocated seat offers. *Id.* Of the 299 Asian students who received offers in 2021, 108, not 102, were students at the six schools identified in paragraph 19. PSJ Ex. A.

20. Disputed in part. The General Assembly enacted the requirement on May 21, not March, 2020. *See* 2020 Va. Acts ch. 1289. It required each Academic Year Governor's School to, among other things, "set diversity goals for its student body and faculty" and to submit a report to the Governor "by October 1 of each year," not just 2020. *Id.*, Item 145.C.27(i).

21. The cause of George Floyd's death is neither disputed nor material in this case.

22-23. Undisputed.

24. Disputed in part. Corbett Sanders stated that "a priority for the Board has been to ensure greater equity of access to TJ," that the Board had "asked for the process to be revised to ensure that opportunities for TJ were available to our African American, Hispanic and students with disabilities," and that "in seeing the numbers when they were released, we know the current approach is unacceptable." PSJ Ex. O. She told Senator Surovell that she "believe[d] there will be intentful action forthcoming" to address the fact that TJ had the smallest proportion of disadvantaged students among all 19 Governor's Schools every year for the previous five years. PSJ Ex. 32.

25. Disputed in part. According to a hearsay account of an August meeting of the task force, there was "talk about the state creating a 4 year timeline to see diversity in the Governor's schools within 5% of diversity of the systems they represent." PSJ Ex. 19.

26. Disputed in part. Neither Corbett Sanders nor Omeish "stressed the reporting deadline in emails." *See* PSJ Exs. 16 & 26. The emails cited by the Coalition show that Corbett Sanders stressed the need for clearer communication to the community about "what we are

doing,” and the need to incorporate into the plan submitted to the state what she saw as the “4 pillars of what must be done to create a diverse and inclusive environment at TJ which preserves its commitment to excellence in the sciences.” PSJ Ex. 16 at 3. Omeish’s email said nothing whatsoever about the report to the Governor, far less the October 1 deadline. PSJ Ex. 26.

27. Undisputed.

28. Disputed in part. The September 15, 2020 presentation to the Board showed projections of how the demographics, including racial makeup and proportions of Economically Disadvantaged (FRM) and ELL students, of TJ classes of 2015, 2019, and 2024 would have looked under a regional pathway lottery system as compared to the results under the existing holistic system. PSJ Ex. 7 at 18–20. The slides showed that Asian students would have still constituted the largest racial group of admitted students. *Id.*

29. Disputed in part. The revised—or hybrid merit lottery—proposal presented to the Board by FCPS staff differed from the original proposal in more than one respect: it proposed to use a holistic review to identify the top 100 applicants, and to fill the remaining 400 seats by a regional lottery system that distributed seats proportionally to each region based on enrollment. PSJ Ex. 46 at 11. Staff advised the Board that the hybrid approach “ensures that the students with the strongest applications are admitted into [TJ] while allowing for the advantages of the Merit Lottery approach: a higher probability of traditionally disadvantaged students gaining admittance along with the concomitant increase in applications anticipated by this approach.” PSJ Ex. N at Shughart Dep. Ex. 12. The slide presentation noted that the revised proposal “statistically should provide some increase in admittance for underrepresented groups,” but that was in contrast to the original proposal which “statistically should provide the greater increase in admittance for underrepresented groups among the two proposals.” PSJ Ex. 46 at 7, 14. It also

noted among the “concerns” about the revised proposal was that it “may continue to admit more students from a few top performing middle schools” while the full lottery would “provide[] the greatest geographic diversity among FCPS students.” *Id.* The October 6 presentation did not include any projections of what the racial demographics of TJ’s classes would look like under the hybrid merit lottery proposal. *Id.*

30. Disputed in part. The Board was not precluded by its own internal policy or Virginia law from taking a vote on the admission process at a work session. *See* Va. Code Ann. § 2.2-3707 (Supp. 2020); Va. Code Ann. § 22.1-73 (2016). The Board has taken votes on other topics at work sessions. DSJ Ex. 8, Brabrand Dep. at 126:14–18. Work sessions do not include a public comment portion, and the Board had received public comment, through a variety of means, regarding TJ admissions in advance of the October 6 work session. DSJ Ex. 24, Pekarsky Dep., at 25:5–8.

31. Disputed in part. Staff presented the Board with a draft of a scoring system under which each of the three evaluative components—GPA and responses to the Student Portrait Sheet and Problem-Solving Essay— would be assigned points (up to a maximum number for each components), and a fixed number of “bonus” points would be given for each of four Experience Factors, namely Economically Disadvantaged/FRM, ELL, Special Education, or Historically Underrepresented Middle School (which would apply only to FCPS students). *See* PSJ Ex. N at Shughart Dep. Ex. 12.

32. Disputed. Brabrand’s email to Shughart on October 6, 2020, stated nothing about “experience factors,” and did not state that “Board members sought modeling to determine whether points for experience factors would ‘change who got in.’” *See* PSJ Ex. N at Shughart Dep. Ex. 13. Shughart also did not “thereafter” ask for a “review of the current weighting” to

see whether it would be “enough to level the playing field for our historically underrepresented groups”; that request was made to the director of the Office of Research and Strategic Improvement on September 27, 2020—before the October 6 closed meeting. *See* PSJ Ex. N at Shughart Dep. Ex. 11. Also, the “historically underrepresented” groups referenced in his email included some Asian students: those who are FRM/economically disadvantaged, who are English Language Learners, or who have Individualized Education Plans. PSJ Ex. N at Shughart Dep. 138:9–17.

33. Disputed in part. Hruda’s email also discussed students facing challenges of “living in poverty and special ed.” PSJ Ex. N at Shughart Dep. Ex. 11. She also advised that “it is hard to know what will level the playing field,” and pointed out that “the experience factors include some things that some more privileged students are likely to get points on.” *Id.*

34. Undisputed.

35. Disputed. The three examples of Board members’ comments cited in paragraph 35 express a variety of views and demonstrate that Board members were giving thoughtful consideration to TJ admissions, providing their own ideas for solutions, and were not making rushed decisions. *See* PSJ Exs. 28; 29 at 7; 41 at 1–2.

36. Undisputed.

37. Disputed in part. The Board was scheduled to discuss TJ admissions—including both the Holistic Review and the Hybrid Merit Lottery Proposals—at a work session on November 17, 2020. *See* PSJ Ex. 6. The “white paper” that was posted by FCPS staff on November 16 did not contain any “analysis” or “modeling” of the Holistic Review Proposal. *See* DSJ Ex. 30. FCPS staff did not even do any modeling of the demographic results under the Holistic Review Proposal. DSJ Ex. 8, Brabrand Dep., at 106:5–107:3.

38. Disputed in part. Virginia law does not require motions to be posted in advance of public meetings. *See* Va. Code Ann. § 2.2-3707. The Board follows Robert’s Rules of Order, and allows motions to be brought at any time during a meeting. DSJ Ex. 24, Pekarsky Dep., at 50:12–21. A single Board member expressed frustration that motions were not posted until 4:30 pm, and that Board member—McLaughlin—also abstained from voting on the motion by which the Board adopted the 1.5% Plan. *See* PSJ Ex. 24; DSJ Ex. 37 at 4–5.

39. Disputed in part. The Board did not adopt either of the two proposals presented by FCPS staff, and its 1.5% Plan does not provide “guaranteed admission for 1.5% of each eighth grade class.” Instead, the Board directed the Superintendent to ensure that each public middle school would have seats in the TJ freshman class equivalent to 1.5% of its 8th-grade class size, with seats offered in the first instance to the top applicants from that school. DSJ Ex. 3, Shughart Decl. ¶ 10(f); DSJ Ex. 37 at 4–5. The 1.5% proposal was not presented as part of the Superintendent’s PowerPoint presentation because it was developed by Board members, and not FCPS staff. DSJ Ex. 3, Shughart Decl. ¶ 10(g).

40. Disputed. No Board members expressed the view that the “racial makeup” of TJ was “problematic,” nor did the Board reach any “consensus” on such a view. None of the Board member communications cited by the Coalition even mentions the “racial makeup” of TJ. Rather, some just express concern about “the equity in admissions issues for TJ.” PSJ Ex. 32 at 1 (Corbett Sanders); *accord* PSJ Ex. O at 2 (Corbett Sanders: desire to “ensure that opportunities for TJ were available to our African American, Hispanic, and students with disabilities.”). Others cite the low numbers of Black students admitted to TJ in the Class of 2025 as a “symptom of a bigger problem” in “how we identify and support all students who have the potential to have their educational experiences improved by advanced academic opportunities.” PSJ Ex. 40



(Cohen); *see* PSJ Ex. 5 at 6 (Keys-Gamarra: the “unacceptable numbers of African Americans that have been accepted to T.J. ... is a manifestation of problems within our system and we have to have greater access and opportunity to advanced academics...”); PSJ Ex. 13 (Omeish: agreeing “100% with” FCPS Chief Academic Officer’s thoughts on “how we’re using the TJ admissions test – it clearly disadvantages historically underrepresented subgroups”).<sup>4</sup> And some simply talk about increasing “diversity” broadly. *See* PSJ Ex. 30 (Tholen: “I do not see how a lottery will help us get the best freshman class at TJ.... Will chance give us the diversity we are after? Will the students that will really thrive at TJ get in? I agree that the process needs adjustment so that we can increase diversity but this lottery seems too sweeping.”); PSJ Ex. 15 (Corbett Sanders: proposing that Board “We all support this goal” to “increase the diversity of the admissions at TJ”).<sup>5</sup>

41. Disputed. No Board members expressed anti-Asian sentiment, or expressed that

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<sup>4</sup> The Coalition also cited its Exhibit 13 as purported evidence of Omeish’s communications regarding TJ’s racial make-up, but that exhibit does not include any communications involving Omeish at all. *See* PSJ Ex. 13. The Board member whose emails are contained in that exhibit—Corbett Sanders—also did not complain about the “racial makeup of TJ.” Corbett Sanders noted “the decrease year over year” in the number of Black students offered admission to TJ and asked that the Board be updated on how the Superintendent would be responding “to the Legislature’s requirement to provide a diversity plan by October 1, 2020.” PSJ Ex. 36 at 5.

<sup>5</sup> The Coalition also cites communications expressing no view on whether or why the admissions policy needed changing, *see* PSJ Ex. 37 (Sizemore Heiser: urging changes in FCPS’s external communications about potential changes to TJ admissions “to fit what we are actually doing”), as well as communications by the two Board members who did not vote in favor of the 1.5% Plan. *See* PSJ Ex. 30 (McLaughlin); PSJ Ex.60 (Anderson). But even the latter communications say nothing about a need to change the “racial makeup” of TJ, and at most, speak to the need to improve the admissions process to increase access for students of all backgrounds. *See* PSJ Ex. 30 (outlining ideas for a holistic process “to ensure a level playing field for all students regardless of background or circumstance”); PSJ Ex. 61 at 1 (Anderson: “we haven’t engaged our community in this assessment and examination robustly enough to lead to actionable steps that address the reasons our students of color and of socio-economic disadvantage are consistently locked out of opportunity—including but not limited to admissions to TJ”).

any of their colleagues harbored such sentiment. Nor did any Board members indicate that they believed that the changes adopted by the Board on October 6 and December 17 would discriminate against Asians. The two text message exchanges cited by the Coalition as “evidence” of this baseless claim were between two Board members and show just the opposite: that two Board members were particularly sensitive to the perspective and experience of Asian constituents. *See* PSJ Exs. J–M; DSJ Ex. 52, Pekarsky Decl. ¶¶ 4-7, 10.

42. Disputed. “Board members” did not express the view that the Board had “rushed along” or done “shoddy” work in changing the TJ admissions process. Both cited emails are written by a single Board member—McLaughlin—who abstained from the December 17 vote by which the Board adopted its 1.5% Plan. *See* PSJ Exs. 22 & 24. Before the vote, many Board members discussed the time and effort devoted to considering TJ admissions in the months leading to the decision and expressed readiness to make an informed decision.<sup>6</sup>

43. Disputed. The emails cited by the Coalition show, at best, confusion by constituents, not Board members. The motion passed by the Board on December 17 stated clearly the “top 1.5% of the eighth grade class *at each public middle school*,” so there was no

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<sup>6</sup> *See* DSJ Ex. 38, Tr. of Dec. 17, 2020 Board Mtg., at 98:11–13 (Omeish: “[W]e’ve been hashing this out for many weeks and months.”); *id.* at 100:7–9 (Anderson: “[W]e have been debating this issue for many months now.”); *id.* at 109:1–6 (Tholen: “I ...thank the many advocates for the hours of discussion and research on this”); *id.* at 111:3–9 (Pekarsky: “I want to thank the many community advocates who have shared their thoughts and comments during this process, and I encourage my fellow board members to support this motion tonight so our students and their families know what their path forward is for next year.”); *id.* at 112:9–24 (Corbett Sanders: “I approach the work before us with a lot of thought and a lot of deliberation. ... I’ve spent a lot of time speaking with advocates and researching best practices and admissions policies across the country.”); *id.* at 118:5–10 (Meren: “I’ve learned a lot in these past months. I’ve read analysis, letters, reports, historical accounts of TJ and proposals, had conversations and I’m making the best decision I can tonight...”); *id.* at 121:21–122:1 (Sizemore Heiser: “I have listened very thoughtfully to ... everybody, done the research, read hundreds of pages of documents and really sat and thought about what is the best path forward.”).

ambiguity that applicants would be considered to be “at” the middle school they actually attend, and not one they do not attend. PSJ Ex. 1 at 4. If any confusion existed about whether students who attend another schools are nevertheless members “of the eighth grade class at” another public middle school, it would be immaterial.

## **ARGUMENT**

### **I. The Coalition Lacks Members with Standing.**

The Coalition has failed to carry its burden of establishing “specific facts,” “by affidavit or other evidence,” sufficient to establish associational standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). Indeed, the Coalition’s brief confirms that it *cannot* satisfy that burden. It is neither a “traditional voluntary membership organization” nor its functional equivalent; instead, it is just an alter ego of a band of individuals who oppose the Board’s policy changes, but who are without “standing to sue in their own right” because they are not parents of Asian students affected by the policy changes. *Hunt v. Wash. State Apple Adv. Comm’n*, 432 U.S. 333, 343–45 (1977).

Though the Coalition claims to have two “tiers” of membership—a “general” tier and a “leadership” tier—the “general” tier are not members in any legally meaningful sense of the word. These “general members” paid no dues, cast no votes, played no role in the filing of this lawsuit, and took no affirmative action to become “members.” ECF 99, Nomani Decl., ¶¶ 17, 27, 47. The only thing these “members” did was to fill out an online “Contact Us” form that nowhere informed them that doing so would make them “members” of the Coalition. DSJ Ex. 40, Nomani Dep. at 78:10–1; DSJ Ex. 42, “Contact Us” form. Counting the “general members” as part of the Coalition does not make it a “traditional membership organization,” or demonstrate any—much less all—the indicia of such an organization. *Heap v. Carter*, 112 F. Supp. 3d 402, 418 (E.D. Va. 2015); *see also* DSJ at SUF ##64–71; *id.* at 18–23.

The fact that the Coalition has some “leaders” calling the shots also does not confer standing. For starters, as explained in the Board’s opening brief, *see* DSJ. at 19–23, the “leadership team” still looks nothing like a “traditional membership organization” or its “functional equivalent,” *Heap*, 112 F. Supp. 3d at 418. Indeed, the most that can be said about the Coalition’s leadership is that it “serv[es] in the entity,” *id.*, and exercises “control over the organization,” *Grp. Health Plan, Inc. v. Philip Morris, Inc.*, 86 F. Supp. 2d 912, 918 (D. Minn. 2000), which still leaves most *Heap* elements unsatisfied. *See* DSJ at 20–23.

Even if the Coalition’s leadership could somehow meet the indicia of a traditional membership organization, none of the Coalition’s leadership has “standing to sue in their own right.” *Hunt*, 432 U.S. 343. The Coalition’s Rule 30(b)(6) designee admitted she could not identify anyone on the leadership team with children eligible to apply to TJ. DSJ Ex. 40, Nomani Dep. at 53:16–58:9. In a desperate move to circumvent this fatal admission, the Coalition has offered three brand-new declarations—but even those cannot salvage the Coalition’s claim. Two declarations are by individuals who are *not members* of the Coalition’s leadership team, Gupta and McCaskill. *See* PSJ at 12; *see also* ECF Nos. 100, 101. Neither was a member of the leadership team at the outset of this case, *see* DSJ Ex. 45 (Coalition org. chart), an essential requirement.<sup>7</sup> Even now, both Gupta and McCaskill claim only to be general “members.” ECF 100 ¶ 3; ECF 101 ¶ 3. But as demonstrated above, the Coalition cannot prove standing by appending a meaningless “general membership” tier, so these declarations do not satisfy its burden to show standing.

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<sup>7</sup> *See Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) (“The standing inquiry asks whether a plaintiff had the requisite stake in the outcome of a case ‘at the outset of the litigation.’” (citation omitted)); *Pollack v. U.S. Dep’t of Just.*, 577 F.3d 736, 743 n.2 (7th Cir. 2009) (“[A] plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterward.”).

While the third declaration *is* from a member of the Coalition’s “leadership” team—Jackson—his declaration sinks the Coalition’s case on *both* standing and the merits. Jackson avers that he has a child eligible to apply to TJ, and that the child identifies as Black. ECF 102, ¶ 6. He then avers that, if left in place, the TJ admissions policy “will discriminate” against that child. *Id.* ¶ 8. Jackson’s declaration thus disproves any notion that the Coalition serves the “specialized segment of the community” that it claims. *Heap*, 112 F. Supp. 3d at 418. It also torpedoed the Coalition’s claim that the TJ admissions process unlawfully *helps* Black and Hispanic students and *harms* Asian students.

The Coalition’s Equal Protection claim fails for lack of standing.<sup>8</sup>

## **II. The Coalition’s Equal Protection Claim Fails on the Merits.**

The claim is equally defective on the merits. Though unmentioned in its brief, the Coalition’s burden in challenging a race-neutral admissions program is well-settled. It must establish as a matter of law *both* (1) that the new TJ admissions process has a discriminatory impact on Asian applicants *and* (2) that the adverse impact was intentional—*i.e.*, that it was enacted with “invidious discriminatory purpose.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). The Coalition can show neither.

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<sup>8</sup> In contrast, other organizations with similar missions have formalized their governance and membership control. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 164, 184 (1st Cir. 2020) (plaintiff is a “validly incorporated 501(c)(3) nonprofit organization,” with actual voting members, bylaws, and a defined mission to oppose Harvard’s affirmative-action policy), *petition for cert. filed* (U.S. Mar. 1, 2021) (No. 20-1199); *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 598 (D.C. Cir. 2015) (standing found because “all” of [its] current members [were] voting members entitled to elect its Board, no new voting members [could] join the organization unless approved by the present voting membership, and Board membership [was] limited to individuals who ‘have demonstrated a commitment to the mission and purposes of’ [the organization]”) (internal citations omitted).

**A. The Coalition has not demonstrated disparate impact.**

The Coalition’s evidence of disparate impact relies exclusively on a comparison of the statistics for Asian applicants under the prior admissions policy and the first year of results under the current TJ admissions policy. Utilizing this “before-and-after” comparison, the Coalition asserts there has been a “substantial disparate impact” on Asian applicants attributable to two elements of the new TJ admissions process: (1) the 1.5% Plan, and (2) the use of underrepresented schools as one of four “experience factors” considered as part of the holistic review of each applicant. The Coalition’s arguments are factually and legally wrong.

**1. Disparate impact must be measured against the applicant pool—not the previous results of a prior system involving different students.**

The Coalition’s “before and after” theory of disparate impact makes no sense in the context of a challenge to an admissions policy. And this pervasive, fundamental error in the Coalition’s analysis is fatal to its ability to show any disparate impact.

The Coalition is flat wrong to suggest that its “before-and-after” approach follows the analysis in *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016). The Fourth Circuit did not even discuss the baseline in *McCrory*, much less engage in the “simple ‘before-and-after’ comparison” the Coalition claims. PSJ at 14. Just the opposite, the court there merely observed the “undisputed facts” that African Americans comprised a disproportionate number of the population impacted by the law compared *to the general voting population*, and concluded that disparate impact had been shown. *McCrory*, 831 F.3d at 232.

The “substantive elements of proof” for a claim of intentional discrimination “are the same” under both Title VII and the Equal Protection Clause. *DePriest v. Milligan*, 823 F.3d 1179, 1185 (8th Cir. 2016). Title VII case law makes crystal-clear that the appropriate baseline for assessing disparate impact is the expected racial composition of the resulting work force in

the absence of the challenged practice or criterion—not what the work force had looked like under a prior practice. *In re Emp. Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999) (courts must ask “what should the racial composition of the job force look like absent the offending employment practice”). In examining hiring practices, courts thus look to the demographics of the hiring pool—not the demographics of previous hiring classes produced under different hiring policies.<sup>9</sup> The same logic applies to admissions cases, where the appropriate comparator is the applicants who do not share the trait that is claimed to be the subject of discrimination. Only by comparing apples to apples—the applicants in a given year versus the accepted students in the same year—can a court determine whether and to what extent a given practice disproportionately harms a particular racial group, *i.e.*, whether it “has the effect of denying the members of one race equal access[.]” *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

As explained in the Board’s opening brief, *see* DSJ at 24–26, the Coalition’s disparate impact analysis requires this Court to adopt the opposite reasoning. In equating Asian applicants to the Class of 2025 with Asian applicants from prior years, who were admitted based on different criteria and eligibility, the Coalition reduces consideration of all applicants to their respective races. It assumes both that, year over year, all applicants of a given race will perform exactly the same as other applicants of that race, and that Asian students will always significantly outperform students of other races, under any admissions criteria. It is both illogical and racially

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<sup>9</sup> *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977); *see also Mandala v. NTT Data, Inc.*, 975 F.3d 202, 210 (2d Cir. 2020) (“[T]he relevant comparison is between ‘the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.’”); *Moore v. Hughes Helicopters, a Div. of Summa Corp.*, 708 F.2d 475, 482 (9th Cir. 1983) (“Disparate impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate.”).

offensive to argue that “Asian students are ... ‘losing’ seats simply because last year different ... Asian students were exceedingly privileged to win a high number of seats.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. 21-10330-WGY, 2021 WL 4489840, at \*15 n.20 (D. Mass. Oct. 1, 2021).

Moreover, if the goal in assessing disparate treatment is to identify what the racial composition of the admitted students pool “*should* . . . look like,” *In re Emp. Discrimination Litig. Against State of Ala.*, 198 F.3d at 1312 (emphasis added), it simply makes no sense to use racially-skewed statistics as the baseline. As the Coalition itself has conceded, the prior TJ admissions process’s reliance on standardized testing screened out deserving candidates who lacked access to test preparation and other resources, and it is undisputed that a disproportionate number of those candidates were Black and Hispanic. DSJ, Ex. 5, Miller Dep. 98:7–100:20. Thus, in relying on prior years’ numbers, the Coalition is asking this Court to assess disparate impact using, *as a baseline for comparison*, a system that the Coalition itself contends disproportionately excluded students of other racial groups. *Id.* Further, the Coalition urges the Court adopt, *as a baseline*, the assumption that Asian applicants will outperform other applicants simply by virtue of their race—*i.e.*, in a perfect world, the accepted students’ class “should” look disproportionately Asian. This “before and after” comparison theory is both disingenuous and morally offensive, and this Court should renounce it.

Rather, the only logical comparator in assessing disparate impact is the Class of 2025 applicant pool. As explained in the Board’s opening brief, that analysis establishes as a matter of law that the new TJ admissions policy does not adversely impact Asian applicants. Under the new policy, Asian applicants for the Class of 2025 received more offers of admission (54.36%) than any other racial group, and constituted one of only two racial groups that “outperformed”



their share of the applicant pool (48.59% of the pool, 54.36% of admitted students). ECF 95, Stip. Facts ¶ 20. Moreover, Asian applicants also comprised the highest percentage of students that benefited from experience factors in the initial round of offers for the Class of 2025—comprising a near-majority of applicants to receive points for ELL status (49%), a plurality of applicants to receive points for FRM status (34%), the second-highest group of students to receive points for Special Education status (31%), and the second-highest group of students to receive points for attending a historically underrepresented school (27%). DSJ Ex. 51, Shughart Decl. I ¶ 10 & Ex. B. That is far from a disparate impact.

## **2. The 1.5% Plan had no disparate impact on Asian applicants.**

The Coalition’s specific arguments alleging disparate impact fare no better. In challenging the 1.5% Plan, the Coalition’s argument boils down to the assertion that Asian students who want to attend TJ are clustered at six middle schools, so the 1.5% Plan makes it harder for Asian students at those schools to gain admission because they must “compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools.” PSJ at 15–16. But even if the Coalition could show that to be true (which it cannot), that still would not show disparate impact. What it would need to establish disparate impact is evidence showing that the 1.5% Plan disproportionately burdens Asian applicants as a group versus non-Asian applicants.

The Coalition provides no such analysis. Having failed to procure expert testimony, the Coalition provides no statistical evidence regarding what Asian enrollment would be in the absence of the 1.5% Plan, holding all other variables constant. *Cf., e.g., Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (observing that “it is impossible—as a statistical matter—to draw meaningful conclusions” from a disparate impact analysis that does not control for variables). Nor does the Coalition say anything whatsoever about how the 1.5% Plan impacts other racial

groups—*i.e.*, what makes the 1.5% Plan’s impact on Asians *disparate*, as opposed to merely an impact felt across all demographics. Indeed, all that the Coalition’s arguments establish is that certain schools sent more students (of all races) to TJ than other schools under the prior system. That fact is undisputed. But it is also irrelevant.

Rather than conduct a meaningful disparate impact analysis using the admissions statistics for the Class of 2025, the Coalition simply cherry-picks six of the eight schools that sent the most students to TJ in previous years (under different admissions criteria and eligibility requirements); argues that those schools have high Asian enrollment; and—without further data or analysis—concludes that Asian applicants are disparately impacted.<sup>10</sup> However, even setting aside the flawed nature of the previous-year comparison, the Coalition’s six-school analysis makes little sense. Of the six, only two—Carson and Rocky Run—have markedly high numbers of Asian students. The Asian student populations at the other four are indistinguishable from other middle schools that have historically *not* sent many students to TJ. DSJ Ex. 51, Shughart Decl. II ¶ 9 & Ex. A. For example, Lanier (24.0%), Franklin (26.3%), and Liberty (27.9%) all have higher or comparable Asian enrollment to Frost (24.5%), Kilmer (25.5%), and Longfellow (27.7%), *see id.*, and yet are omitted from the Coalition’s analysis.

The explanation for these omissions is simple: the demographics and applicant numbers from those schools do not support the Coalition’s narrative. Specifically, while it may be true that Asian applicants enrolled at Carson face stiffer competition for the initial 1.5% seats for admission due to a high percentage of eligible applicants, it is likewise true that Asian applicants

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<sup>10</sup> The Coalition’s focus on these six schools is brand-new, reflecting a failure of facts to satisfy its previous narrative that the 1.5% Plan unfairly burdens *four* middle schools that historically sent high numbers of students to TJ. *See* ECF 1, Compl. ¶ 49; ECF 59, Br. in Supp. of Prelim. Inj., at 7; DSJ Ex. 48, Miller Dep. at 49:5-19, 133:18-134:5.

at schools with lower percentages of eligible students (*e.g.*, Liberty) face comparatively less competition. But the Coalition fails to even engage with this issue. As a result, and at most, the Coalition’s arguments tend to show that Asian applicants at certain middle schools benefit from the 1.5% Plan, while Asian applicants at other middle schools do not.

But the same is true for *all* racial groups. Every racial group has a markedly above-average representation in at least two of FCPS’s 26 middle schools—which is all that the Coalition has shown. In the 2020–2021 school year, for example, Glasgow and Poe had enrollments that were 53.3% and 61.3% Hispanic; Cooper and Irving had enrollments that were 52.4% and 50.1% White; and Hayfield and South County had enrollments that were 25% and 21.2% Black. DSJ Ex. 51, Shughart Decl. II, Ex. A. These numbers substantially exceed each group’s representation across FCPS as a whole (27.1% Hispanic, 36.8% White, 10% Black).<sup>11</sup> Under the Coalition’s “cluster” theory, the 1.5% Plan disproportionately impacts some members of every racial group, because each racial group has members who are “clustered” in some middle schools and the 1.5% Plan applies to all middle schools. But, of course, a practice that burdens some members of every race is not discrimination against any race. The Coalition’s real complaint—as Jackson’s declaration makes evident—is that the 1.5% Plan expands middle-school representation at TJ. The Coalition struggles in vain to shoehorn that grievance into the rubric of a race-discrimination claim. The facts just don’t support it.

### **3. The Coalition fails to establish disparate impact based on the use of underrepresented schools.**

The Coalition next claims that the “holistic review” for unallocated seats “exacerbates” the purported disparate impact on Asian students by allocating points to students who apply from

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<sup>11</sup> FCPS-wide demographic information is reported at <https://www.fcps.edu/about-fcps> (last accessed Dec. 20, 2021).

historically underrepresented schools.<sup>12</sup> The Coalition offers no rigorous analysis to support this claim, resorting instead to a simple comparison to prior years' admissions numbers. Again, the Coalition's analysis holds no water.

The Coalition's arguments with respect to underrepresented schools suffer from the same flaw that forecloses its disparate impact arguments as a whole—reliance on the wrong baseline for comparison. But the Coalition's focus on underrepresented schools is particularly misplaced. In the first year of the admissions process, there were ten FCPS schools that qualified as historically underrepresented. DSJ Ex. 51, Shughart Decl. II ¶ 11. When offers were made to students last June, *eight* of those ten schools did not exceed their total 1.5% allotment—meaning that no students from those schools received an offer for an unallocated seat, and the 45-point bump for underrepresented students made no impact at all. *Id.* The other two schools designated as underrepresented—Glasgow and Twain—exceeded their allotment by just seven students. These seven offers comprise 7.95% of the 88 unallocated-seat offers made to FCPS students. *Id.* By comparison, 78 unallocated-offers were extended to students from the same six “feeder” schools that the Coalition claims are being disproportionately harmed by the use of the underrepresented school experience factor. *Id.* ¶ 12. So the applicant's attendance at an underrepresented school only had an impact on less than 8% of offers. *Id.*

That is not enough for the Coalition to meet its burden. To demonstrate that the underrepresented-school experience factor is impermissible, the Coalition must show a *racially* disproportionate impact. The Coalition has not done so, and for good reason: *Over half of the*

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<sup>12</sup> The Coalition apparently finds no fault with the allocation of additional points for the other experience factors, namely, eligibility Special Education services, ELL services, or FRM status. That is unsurprising. Asian applicants received more points for experience factors than any other racial demographic, and comprised a near-majority (49.2%) of those applicants who received a bump for ELL status. DSJ Ex. 51, Shughart Decl. II ¶ 10 & Ex. B.

*students* who received offers from Glasgow and Twain (the only two underrepresented schools that exceeded their 1.5% allocation) identify as *Asian*. *Id.* ¶ 12.

The Coalition’s claim that Asian applicants are disproportionately disadvantaged is disproved by the record evidence.

**B. The School Board did not act with discriminatory purpose.**

The Coalition’s Equal Protection claim independently fails because it cannot show an “invidious discriminatory purpose.” *Arlington Heights*, 429 U.S. at 265. The Coalition has failed to present any evidence that the Board, or any of its members, voted to change the TJ admission policy “because of” any potential adverse effect on Asian students. *Feeney*, 442 U.S. at 279. Tellingly, the Coalition does not even try.

Rather than offer any evidence of *actual* discriminatory purpose, the Coalition spends most of its brief marshalling evidence to prove the unremarkable conclusion that the Board was motivated, at least in part, by the desire “to increase Black and Hispanic enrollment” at TJ. PSJ at II.B, 32. But such a purpose, even if assumed true, is not suspect—particularly where, as here, even by the Coalition’s lights, the prior system disproportionately impacted Black and Hispanic applicants. DSJ Ex. 5, Miller Dep. 98:7–100:20.

The Coalition fails to grasp this point. It simply *assumes* that if any members of the Board desired to increase access for underserved racial groups, strict scrutiny must apply. PSJ, II.2–4. Not so. Even if the Coalition could show that a majority of the Board shared this desire (which it has not done), that would not help its Equal Protection claim. Eliminating inequitable barriers to access is a laudable goal, not a constitutionally suspect one. *See Anderson*, 375 F.3d at 87 (“The Supreme Court has explained that the motive of increasing minority participation and access is not suspect.”). Nor does that goal become suspect whenever it concerns a finite resource, such as school admissions. And the aspiration of creating a system that does *not*

disproportionately burden any racial groups—such that the demographics of the accepted students pool tends to reflect that of the applicant pool in any given year—is not “racial balancing,” no matter how many times the Coalition abuses that term to say so.

**1. A motive of increasing minority access is constitutional, and the “zero sum” nature of admissions does not change that fact.**

The Coalition’s brief confirms that its Equal Protection claim rises and falls on the theory that any action adopted to increase access for underserved racial minorities is constitutionally suspect, at least with respect to admissions, because any such action necessarily hurts the groups who are not underserved. Indeed, the Coalition itself sums up its case in precisely that way: “[T]he Board’s policy was designed to increase Black and Hispanic enrollment, which would (by necessity) decrease the representation of Asians at TJ. Therefore, strict scrutiny applies.” PSJ at 32 (citations omitted). But even if the Coalition could prove its premise—that the Board changed the TJ admissions process in part to increase access for Black and Hispanic students—its conclusion does not follow. Strict scrutiny does not apply to actions taken with the purpose of increasing access for underserved racial minorities, even in the context of school admissions.

As a general matter, it is well-settled that “the motive of increasing minority participation and access is not suspect.” *Anderson*, 375 F.3d at 87. Justice Kennedy’s concurrence in *Parents Involved* makes clear that school boards may consciously “adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” 551 U.S. at 788. Any doubt about the precedential value of this aspect of Justice Kennedy’s concurrence, *see* PSJ at 34 n.29, is dispelled by the fact that its key language was embraced by the majority in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). There the Supreme Court quoted *Parents Involved* for the proposition that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other

means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods.” *Id.* at 545.<sup>13</sup>

In other words, not every motivation connected to race constitutes an “invidious discriminatory purpose” under an *Arlington Heights* analysis.<sup>14</sup> And the analysis is no different because, as the Coalition likes to say, admissions is a “zero-sum” game. The Supreme Court has made clear that there is intentional discrimination under the Equal Protection clause only where action is taken “because of,” not merely “in spite of,” its *adverse* effects upon an identifiable group.” *Feeney*, 442 U.S. at 279 (emphasis added). The Coalition’s zero-sum logic collapses that distinction entirely, automatically transforming every “in spite of” case into a “because of” case. A multitude of Circuit Court cases—as well as every Supreme Court case on higher admissions ever authored—rightly forecloses that reasoning.<sup>15</sup>

The Coalition cannot credibly argue that school admissions are uniquely “zero-sum.”

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<sup>13</sup> In any event, courts and scholars disagree with the Coalition’s persistent assertion that Justice Kennedy’s concurrence is not controlling. *See, e.g.,* J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There is No Other Way*, 121 HARV. L. REV. 158, 170 (2007); *Spurlock v. Fox*, 716 F.3d 383, 395 (6th Cir. 2013).

<sup>14</sup> *See, e.g., Rothe Dev., Inc. v. United States Dep’t of Def.*, 836 F.3d 57, 72 (D.C. Cir. 2016) (“Policymakers may act with an awareness of race ... without thereby subjecting the resultant policies to the rigors of strict constitutional scrutiny”); *Hayden v. Cty. of Nassau*, 180 F.3d 42, 50–51 (2d Cir. 1999) (“A desire to reduce the adverse impact on black applicants ... is not analogous to an intent to discriminate against non-minority candidates.”); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) (“Benign intentions do not immunize government action, but they substantially narrow the inquiry.”).

<sup>15</sup> In support of its zero-sum logic, the Coalition relies heavily on Judge Xinis’s non-binding decision in *Ass’n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, No. 8:20-cv-02540-PX, 2021 WL 4197458 (D. Md. Sept. 15, 2021). But that decision came on a motion to dismiss, and cannot be divorced from that procedural posture. *See id.* at \*17 (holding that whether the district sought “to racially balance the middle magnet programs” is “not capable of resolution at this stage”). Nevertheless, to the extent Judge Xinis’s opinion could be read to embrace the broader idea that improving access for minorities is the same as hurting others, it should be rejected as contrary to binding precedent for the reasons explained in this section.

Societal resources are rarely infinite, so that argument has been made, and rejected, in a variety of contexts. The D.C. Circuit in *Rothe* considered a challenge to a race-neutral law that was allegedly passed to increase access and opportunity for minority-owned businesses to receive government contracts. 836 F.3d at 72. The Second Circuit’s decision in *Hayden* involved a challenge to a new admissions test for county police officers, which was “designed with race in mind ... to minimize the discriminatory impact on minority candidates.” 180 F.3d at 46. And the First Circuit’s decision in *Rago* concerned a challenge to a HUD decree whose undisputed purpose was “to increase minority opportunities for apartments” in a specific subdivision. 135 F.3d at 16. All three cases involved a “zero sum” environment: a government contract can be awarded to only one bidder, job openings for police officers are finite, and housing in a specific subdivision is necessarily limited. Nevertheless, strict scrutiny did not apply in any of the cases.

The challengers in *Hayden* made the very argument that the Coalition presses here: that “designing the police officers’ entrance exam to mitigate the negative impact on minority candidates (thereby improving their chances for selection) is akin to an intent to discriminate against [non-minority candidates.]” *Hayden*, 180 F.3d at 50–51. The Second Circuit flatly rejected that theory, deeming it “wholly insufficient to state a claim that the County intended to discriminate against appellants[,] because it does not demonstrate that the County designed the 1994 exam ‘because of’ some desire to adversely affect appellants.” *Id.* (quoting *Feeney*, 442 U.S. at 279). It explained that, “where an exam that discriminates against a group or groups of persons is reviewed, studied and changed in order to eliminate, or at the very least, alleviate such discrimination, *there is a complete absence of intentional discrimination.*” *Id.* (emphasis added).

The same logic holds here. The Coalition concedes that the prior admissions process had a disparate impact on certain students from underrepresented areas of the county, and that those



students were disproportionately Black and Hispanic. DSJ Ex. 5, Miller Dep. 98:7–100:20. The Coalition complains that the Board acted in part to alleviate that disproportionate impact, but such motivation—even if it could be proven—shows “a complete absence of intentional discrimination.” *Hayden*, 180 F.3d at 51.<sup>16</sup> “While the increase of a zero-sum resource to one group necessitates the reduction of that resource to others, the case law is clear—the concern is action taken because of animus toward a group, not in spite of an action’s necessary effect on a group or groups.” *Bos. Parent Coal.*, 2021 WL 4489840, at \*15 (citing *Feeney*, 442 U.S. 258).

**2. The illogic of the Coalition’s reasoning is underscored by Supreme Court precedent endorsing race-neutral means to achieve diversity.**

Decades of Supreme Court jurisprudence involving college admissions show why the Coalition is flat wrong to argue that a race-neutral admissions policy is subject to strict scrutiny if the policy was adopted with even a partial goal of increasing enrollment of students from underserved racial minorities. Indeed, all the Supreme Court admissions cases have *presumed*, as part of the analysis, that schools can pursue “the educational benefits of diversity,” and can do so using facially race-neutral methods. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003); *see also Rothe*, 836 F.3d at 72 (“The Supreme Court’s ensuing affirmative action decisions confirm that point by countenancing, and characterizing as ‘race neutral,’ alternatives designed to advance the same ends as affirmative action programs but that do not rely on racial criteria.”). The disputes in these cases instead have centered around whether these goals can be pursued using *express*

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<sup>16</sup> *See also Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 211 (2d Cir. 2006) (“[T]o equate a ‘desire to eliminate the discriminatory impact’ on some disadvantaged groups with ‘an intent to discriminate against’ other groups ‘could seriously stifle attempts to remedy discrimination.’”); *Raso*, 135 F.3d at 16 (“[T]he plaintiffs are mistaken in treating ‘racial motive’ as a synonym for a constitutional violation. Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically ‘suspect’ under the Equal Protection Clause.”).

racial classifications—*i.e.*, explicitly considering race—and the law currently holds that a university can use race in making admission decisions, so long as race remains but one of many “plus factors” in the calculus. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 305 (2013).

The strict scrutiny given to race-based policies requires courts to examine whether there has been “good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks” before approving admissions policies that explicitly consider race. *Grutter*, 539 U.S. at 340; *see also Fisher*, 570 U.S. at 298 (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”). Notably, one such “race-neutral” method that the Court has assumed is lawful is the implementation of “percentage plans ... that guarantee admission to all students above a certain class-rank threshold in every ... school.” *Grutter*, 539 U.S. at 340.

Supreme Court jurisprudence endorses the use of race-neutral alternatives to bypass the rigors of strict scrutiny. So the Coalition’s theory that strict scrutiny applies to “race-neutral alternatives” makes no sense.

### **3. The *Arlington Heights* factors all cut against the Coalition’s case.**

The Coalition fares just as poorly when it attempts to find facts showing “invidious discriminatory purpose was a motivating factor” in the challenged decision. *Arlington Heights*, 429 U.S. at 266. Aside from the specific disparate impact caused by the challenged action, those factors include:

- (1) evidence of a “consistent pattern” of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

*Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Arlington Heights*, 429 U.S. at 266–68).

None of these factors supports an Equal Protection claim here. At best, the Coalition can only show that some Board members desired to eliminate the barriers to access for groups that included racial minorities—evidence that is insufficient for the reasons described above. What the Coalition needs, but lacks, is evidence of *invidious* discriminatory intent, *i.e.*, “discriminatory animus.” *Id.* (“[E]ven when a facially neutral statute has a ‘racially disproportionate impact,’ a discriminatory animus must nevertheless be proved to establish an equal protection violation.”).

i. The history of (non)discrimination against Asian students

The first and second *Arlington Heights* factors ask if the historical background indicates a prior history of discrimination or pattern of engaging in actions that disproportionately burden the plaintiffs’ racial group. *Id.* Here, the answer to both questions is obviously “no.” There is no evidence of a history of discrimination within Fairfax County against Asian students, nor any pattern or practice of actions by the Board that disproportionately harm Asians. *Id.* Indeed, the Coalition has not attempted to argue otherwise.<sup>17</sup> For that reason alone, this is not *McCrary*, in which North Carolina’s “long history of race discrimination generally and race-based vote suppression in particular” informed the court’s analysis, and where the record was “replete” with evidence of a continued pattern “in which the North Carolina legislature ha[d] attempted to suppress and dilute the voting rights of African Americans.” *McCrary*, 831 F.3d at 223. The first and second factors cut clearly against the Coalition.

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<sup>17</sup> On historical background, the Coalition notes only the school system’s previous unsuccessful attempts at increasing access for underrepresented minorities at TJ. PSJ at 19.

- ii. The sequence of events leading to the December 17, 2020 vote disproves the Coalition’s claim of a rushed process.

Neither the events leading up to the Board’s votes nor the process the Board followed suggests invidious discrimination. At most, the sequence of events noted by the Coalition—from the May 2020 budget bill requiring Governor’s Schools to submit annual reports regarding diversity goals, through the December 17, 2020 vote enacting the 1.5% Plan—suggests the Board was responding to state-level concerns that the old admissions process disproportionately excluded some students, including Black and Hispanic students. But as already explained, that concern was appropriate, not suspect. Likewise, to the extent the Board made changes to “get ahead” of directives it anticipated from the Governor’s office, as the Coalition suggests, that is a legitimate, non-discriminatory purpose—not something that aids the Coalition’s case.

The Coalition’s arguments that the Board’s actions were rushed and lacked transparency likewise also do not withstand scrutiny. The Board member comments cited by the Coalition to show that the process to change TJ admissions was rushed or had not been fully vetted by the public, *see* PSJ at 22–23, come from Board meetings in early *October*—shortly after the Superintendent first presented his initial merit lottery proposal. But the Board did not enact a new TJ admissions policy in October, nor make any of the changes that the Coalition challenges in this case.<sup>18</sup> Instead, the Board directed staff to return with revised admissions proposals for the Board’s consideration. DSJ, SUF #30. What followed were more than ten weeks of deliberation, town halls, back-and-forth between FCPS staff and Board members, robust

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<sup>18</sup> As set forth in the Coalition’s summary judgment brief, the Coalition challenges only the adoption of the 1.5%-per-school allotment and the use of underrepresented schools as an experience factor within the holistic review criteria. PSJ at 15–16. The Coalition has not argued that the elimination of either the standardized test or admissions fee (the two changes to the admissions process adopted on October 6, 2020) disparately impacts Asians, and thus cannot state a claim under the Equal Protection Clause with respect to those changes.

community feedback, and multiple additional presentations—all *before* the Board voted to enact a new admissions plan for TJ on December 17, 2020. *See id.*, SUF ##33–43. By that point, multiple Board members had expressed the sentiment that the process had already taken too *much* of their time. *See* CMF ¶ 43 & n.5; DSJ at 33–34 (quoting Board members). The Coalition *itself* accused the Board of spending too much time on TJ. DSJ, SUF #25.

In contrast to the post-*Shelby County* voting-rights bill at issue in *McCrory*, which was revealed to the public and passed without amendments *in three days*, 831 F.3d at 228, the Board’s deliberations over TJ admissions lasted many months and dozens of hours of public meetings. Indeed, the October 6 meeting *alone* took more time (four-and-a-half hours) than the voting rights bill took in moving through the North Carolina House (two hours). *Id.*; DSJ, SUF #29. There is no fair comparison between the process followed by the Board and *McCrory*.

iii. Board members’ contemporaneous statements do not evince any invidious discriminatory purpose.

Finally, the fourth *Arlington Heights* factor—the contemporary statements by Board members—also does not support any inference of invidious discriminatory intent. The Board has provided transcripts of the key meetings during the discussion of TJ admissions, and videos are available for viewing by this Court. *See* DSJ, SUF #14, Exs. 15, 23, 34, 38. There is not one statement in the record suggesting that even a single Board member voted to change the TJ admissions policy out of a desire to harm Asian students. Nothing.

Unable to identify even a single comment evincing animus towards Asian applicants, the Coalition instead attempts to spin statements that indicate a desire to make TJ more diverse as evidence of an intent to engage in unlawful racial balancing. But no Board member statement in the record evinces such a purpose, and the record as a whole refutes any suggestion that the new admissions policy constitutes racial balancing.

For starters, the Coalition’s invocation of “racial balancing” does not jibe with its meaning. “Outright racial balancing”—*i.e.*, structuring admissions to ensure “some specified percentage of a particular group merely because of its race or ethnic origin”—is “patently unconstitutional.” *Fisher*, 570 U.S. at 311 (internal citations omitted). Aspiring to an admissions process that puts all racial groups on a level playing field, where the demographics of admitted students resemble the demographics of qualified applicants, is *not* racial balancing, and is not unconstitutional. It is just another way of aiming to develop an admissions system that does not disparately impact any racial groups. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989) (explaining that disparate impact must be measured by comparing “the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs”).

The Coalition’s accusations of racial balancing are also off-base because its evidence of purported balancing concerned variations of a lottery proposal that the Board rejected. *See* PSJ 27–31. Instead, the Board adopted a race-blind 1.5% Plan structured around geographic and middle-school diversity. *See* DSJ at 31 (summarizing Board member comments in support of the 1.5% Plan); SUF #49. Moreover, the Board’s plan *expressly directs* that the “admissions process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance, or targets.” PSJ Ex. 1, Minutes of Dec. 17, 2020 Mtg., at 3. Then, to effectuate that instruction—and make “racial balancing” impossible—the admissions regulation was amended to require that every applicant’s “name, race, ethnicity, [and] sex” “not be provided to admissions evaluators.” DSJ Ex. 3, FCPS Regulation 3355.14, at 4. If that were not enough, the Coalition itself has admitted to this Court—in defending why its own predictions for the demographics of the Class of 2025 so wildly missed the mark—that it was simply not possible to accurately predict the racial outcomes that the Board’s new policy would produce. *See* DSJ Ex.

39, Tr. of 9/17/21 Hr'g at 19:6–9 (“[E]veryone would acknowledge that ... it was very difficult to project the outcome of what would happen because of the holistic factors that go into evaluation of the applicants.”).

The remainder of the statements highlighted by the Coalition contradict its narrative.

- The staff (not Board) comments regarding the appropriate weighting of experience factors confirm that the goal in designing a new admissions process was to achieve a “level” playing field, not one that disproportionately hinders any particular race. PSJ at 30.<sup>19</sup>
- The quotes from emails lifted by the Coalition regarding “diversity” confirm that Board members did *not* view diversity or the problem of underrepresentation at TJ through an exclusively racial lens, but instead also had in mind socioeconomic and geographic diversity, among other attributes. *See, e.g.*, PSJ Ex. 30.
- The Board member text messages cited by the Coalition refute any suggestion of Asian animus by the Board, instead confirming that Board members were sensitive to how the Superintendent’s remarks were alienating some Asians, agreed with the Coalition’s views on the lottery proposal, and were opposed to any measures that they believed would reduce the proportion of Asians. *See* DSJ Ex. 52, Pekarsky Decl., ¶¶ 4-6.

Finally, the Coalition’s contention that the Board’s “consideration of racial data ... would be enough to demonstrate discriminatory intent under *McCrory*,” PSJ at 32, grossly distorts the record in this case and the Fourth Circuit’s analysis in *McCrory*. In *McCrory*, the Fourth Circuit found it notable that legislators had requested and received a racial breakdown of “DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting,” and

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<sup>19</sup> Even if such comments demonstrated that FCPS staff were motivated by racial animus—which they do not—the Coalition still would be foreclosed from arguing that the *Board*’s actions were controlled by staff. The Supreme Court has flatly rejected the “application to legislative bodies” of such a “‘cat’s paw’ theory,” under which a plaintiff in an employment discrimination case “typically seeks to hold the plaintiff’s employer liable for ‘the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.’” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 (2011)).

then, “relying on this racial data ... enacted legislation restricting all—and only—practices disproportionately used by African Americans.” 831 F.3d at 230. This sequence provided some support for the “because of” inference of racial animus necessary to support a claim of intentional discrimination. *Id.* There is nothing remotely resembling such evidence here.

The Board did not receive a racial breakdown of the TJ-eligible students at each middle school before enacting the 1.5% Plan, nor any modeling of any kind illustrating how the Board’s plan would impact any particular racial group. DSJ, SUF #49. The Board likewise did not receive any breakdown of the intersectionality of race and any of the experience factors adopted as part of the holistic review process, much less a breakdown that it acted upon in selecting which criteria to use for that review. *See* DSJ Ex. 52, Pekarsky Decl., ¶ 9. There is simply nothing analogous about the record before this Court and the record considered in *McCrary*.

In sum, like the other *Arlington Heights* factors, examination of the contemporaneous statements of Board members reveals no evidence that the Board changed TJ admissions “because of” an expected adverse impact on Asian applicants. *Feeney*, 442 U.S. at 279. Moving the goal posts, the Coalition tries instead to prove that increasing access to TJ for underserved students, including underserved racial minorities, was one of the Board’s considerations in enacting the changes. But such a goal is worthy—not suspect—and proving such a motivation falls far short of an Equal Protection Clause violation. Just as it fails to show disparate impact, the Coalition fails to show even a triable issue on discriminatory purpose.

### **CONCLUSION**

The Court should deny the Coalition’s motion for summary judgment and instead grant summary judgment in favor of the School Board.

Respectfully submitted,



FAIRFAX COUNTY SCHOOL BOARD

By: /s/ Sona Rewari  
Sona Rewari (VSB No. 47327)  
Daniel Stefany (VSB No. 91093)  
HUNTON ANDREWS KURTH LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
Telephone: (202) 955-1500  
Facsimile: (202) 778-2201  
srewari@HuntonAK.com  
dstefany@HuntonAK.com

Trevor S. Cox (VSB No. 78396)  
HUNTON ANDREWS KURTH LLP  
951 E. Byrd Street  
Richmond, VA 23219  
Telephone: (804) 788-7221  
Facsimile: (804) 788-8218  
tcox@HuntonAK.com

*Counsel for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2021, I electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record for all Parties.

By: /s/ Sona Rewari  
Sona Rewari (VSB No. 47327)

# **EXHIBIT 51**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

COALITION FOR TJ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 1:21-cv-00296-CMH-JFA
	)	
FAIRFAX COUNTY SCHOOL BOARD,	)	
	)	
Defendants.	)	

**DECLARATION OF JEREMY SHUGHART**

My name is Jeremy Shughart, and I certify that the following information is true to the best of my knowledge, information, and belief.

1. I am over the age of 18 and make this declaration based on my own personal knowledge.
2. I am employed by the Fairfax County School Board as the Director of Admissions for the Thomas Jefferson High School for Science and Technology (“TJ”).
3. My office collects, compiles, and reports the data regarding TJ admission applications and offers.
4. I understand that the Plaintiff in this case is contending that six of the 26 FCPS middle schools—Carson, Cooper, Frost, Kilmer, Longfellow, and Rocky Run—had the most students admitted to TJ during the five years prior to the 2020 changes to the admissions process. That is not correct. Cooper was not in the top six. The table below shows the top 8 schools in terms of offered students for the five-year period:

<b>School</b>	<b>Students Offered</b>
Carson	411
Longfellow	279
Rocky Run	181
Kilmer	134
Frost	102
Jackson	89
Lake Braddock	83
Cooper	81

5. I also understand that the Plaintiff is contending that these six schools—Carson, Cooper, Frost, Kilmer, Longfellow, and Rocky Run—were also the “top six feeder” schools for Asian-American students for the Classes of 2020 through 2024. But Cooper had just two Asian-American students admitted to TJ during three of those five years (Classes of 2020 through 2022), and was not even among the top six of schools to have students, of any race, offered admission to TJ during those years. Cooper had a total of 12 students (of any race) admitted to TJ in the Classes of 2020 through 2022.

6. Plaintiff’s “top six feeder” schools for Asian-Americans also were the “top feeder” schools for Hispanic students during the same five-year period. These schools in order are: (1) Longfellow and Frost (tie); (2) Carson and Lake Braddock (tie); (3) Cooper; and (4) Kilmer and Rocky Run (tie).

7. Three of Plaintiff’s “top six feeder” schools for Asian-Americans also were the among the top “feeder” schools for White students. Longfellow, Carson, and Kilmer were the top three schools with most White students offered admission to TJ during the same five-year period.

8. Two of Plaintiff’s “top six feeder” schools for Asian-Americans (Carson and Kilmer) were also among the top six feeder schools for Black students, *i.e.*, who had the largest numbers of Black students admitted to TJ during the same five-year period.

9. I also understand that Plaintiff in this case is contending that Carson, Cooper, Frost, Kilmer, Longfellow, and Rocky Run are more likely to have Asian-American applicants. The table attached as Exhibit A to this declaration shows the racial demographics of all 26 FCPS middle schools for each of the four academic years from 2017-2021. As Exhibit A shows, only Carson and Rocky Run have markedly large proportions of Asian-American students. The Asian student populations at the other four schools are not far from the division-wide average of 19.8% Asian students (2020-21) and comparable to other middle schools that have not been major “feeders” to TJ:

<b>School</b>	<b>Average % of Asian Students (2017-21)</b>
Longfellow	27.83%
Liberty	27.81%
Franklin	26.41%
Frost	25.84%
Cooper	25.81%
Kilmer	24.21%

10. I also understand that the Plaintiff is claiming that Asian-American applicants were somehow disadvantaged by the four experience factors that were adopted by the 2020 TJ admissions process changes. That is not correct. Using the data attached as Exhibit A to Plaintiff’s brief, Exhibit B shows the racial demographics of the applicants who received points for each of the four experience factors. As the below tables show, Asian-American students were the largest or second-largest racial demographic of both applicants and offered-students.

<b>Economically Disadvantaged (FRM)</b>				
	<b>Applicants</b>	<b>% of FRM Applicants</b>	<b>Offers</b>	<b>% of FRM Offers</b>
AI/AN/NH/PI	2	0.5%	1	0.7%
Asian	131	33.9%	51	37.0%
Black (not Hispanic orig)	86	22.2%	23	16.7%
Hispanic	107	27.6%	38	27.5%
Two or More Races	14	3.6%	5	3.6%
White (not Hispanic orig)	47	12.1%	20	14.5%
<b>Total</b>	<b>387</b>		<b>138</b>	

<b>English Language Learners (ELL)</b>				
	<b>Applicants</b>	<b>% of ELL Applicants</b>	<b>Offers</b>	<b>% of ELL Offers</b>
AI/AN/NH/PI	1	0.8%	0	0.0%
Asian	58	49.2%	13	38.2%
Black (not Hispanic orig)	19	16.1%	5	14.7%
Hispanic	15	12.7%	7	20.6%
Two or More Races	1	0.8%	1	2.9%
White (not Hispanic orig)	24	20.3%	8	23.5%
<b>Total</b>	<b>118</b>		<b>34</b>	

<b>Special Education (SPED)</b>				
	<b>Applicants</b>	<b>% of SPED Applicants</b>	<b>Offers</b>	<b>% of SPED Offers</b>
AI/AN/NH/PI	0	0.0%	0	0.0%
Asian	15	31.3%	4	30.8%
Black (not Hispanic orig)	2	4.2%	0	0.0%
Hispanic	5	10.4%	2	15.4%
Two or More Races	8	16.7%	2	15.4%
White (not Hispanic orig)	18	37.5%	5	38.5%
<b>Total</b>	<b>48</b>		<b>13</b>	

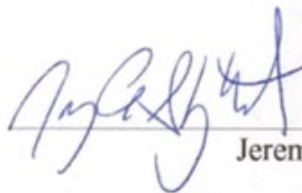
<b>Underrepresented Schools (URS)</b>				
	<b>Applicants</b>	<b>% of URS Applicants</b>	<b>Offers</b>	<b>% of URS Offers</b>
AN/AN/NH/PI	4	0.6%	0	0.0%
Asian	187	27.2%	56	33.3%
Black (not Hispanic orig)	117	17.0%	21	12.5%
Hispanic	144	21.0%	42	25.0%
Two or More Races	43	6.3%	10	6.0%
White (not Hispanic orig)	192	27.9%	39	23.2%
<b>Total</b>	<b>687</b>	<b>282</b>	<b>168</b>	

11. For the Class of 2025 admissions, ten FCPS schools were designated as underrepresented. Eight of the ten did not exceed their 1.5% allocation when offers were made in June 2021, meaning that the 45 bonus points given to applicants from underrepresented schools did not affect admission from eight of the ten underrepresented schools. Only two schools designated as underrepresented for purposes of Class of 2025 admissions exceeded their 1.5% allocation: Glasgow and Twain. Glasgow and Twain were allocated a combined 18 seats under the 1.5% plan (10 and 8 respectively), but received a combined 25 offers of admission (15, and 10 respectively). Of the 25 total offers extended to Glasgow and Twain students, thirteen (52%) identified as Asian-American.

12. FCPS students received offers for 88 of the 93 unallocated seats offered to applicants for the TJ Class of 2025 last June. Students from Carson, Cooper, Longfellow, and Rocky Run were offered 78 of those 88 (88.6%) unallocated seats. Students from underrepresented schools received just seven of the 88 (7.95%).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2021.



Jeremy Shughart

Attachments:

Exhibit A (Enrollment Data)

Exhibit B (Experience Factor Data Summary)



# **Exhibit A**

## Carson

thnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	672	45.44	683	45.47	714	46.45
Black (Not Of Hispanic Origin)	90	6.09	96	6.39	105	6.83
Hispanic Or Latino	128	8.65	151	10.05	156	10.15
White (Not Of Hispanic Origin)	498	33.67	493	32.82	466	30.32
Other	91	6.15	79	5.26	96	6.25

## Cooper

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	183	20.11	251	24.46	279	27.9
Black (Not Of Hispanic Origin)	19	2.09	19	1.85	17	1.7
Hispanic Or Latino	57	6.26	63	6.14	66	6.6
White (Not Of Hispanic Origin)	594	65.27	614	59.84	558	55.8
Other	57	6.26	79	7.7	80	8

## Franklin

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	226	25.74	240	27.27	236	26.4
Black (Not Of Hispanic Origin)	61	6.95	47	5.34	53	5.93
Hispanic Or Latino	113	12.87	114	12.95	130	14.54
White (Not Of Hispanic Origin)	423	48.18	427	48.52	414	46.31
Other	55	6.26	52	5.91	61	6.82

## Frost

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	330	27.09	338	27.02	310	24.74
Black (Not Of Hispanic Origin)	52	4.27	52	4.16	70	5.59
Hispanic Or Latino	148	12.15	145	11.59	159	12.69
White (Not Of Hispanic Origin)	612	50.25	632	50.52	630	50.28
Other	76	6.24	84	6.71	84	6.7

## Glasgow

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	230	13.71	203	11.36	218	11.53
Black (Not Of Hispanic Origin)	182	10.85	205	11.47	230	12.17
Hispanic Or Latino	816	48.63	912	51.04	971	51.38
White (Not Of Hispanic Origin)	413	24.61	421	23.56	425	22.49
Other	37	2.21	46	2.57	46	2.43

## Herndon

	2017-18	2018-19	2019-20
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Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	683	45.47	714	46.45	726	49.29
Black (Not Of Hispanic Origin)	96	6.39	105	6.83	126	8.55
Hispanic Or Latino	151	10.05	156	10.15	134	9.1
White (Not Of Hispanic Origin)	493	32.82	466	30.32	383	26
Other	79	5.26	96	6.25	104	7.06

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	251	24.46	279	27.9	288	30.77
Black (Not Of Hispanic Origin)	19	1.85	17	1.7	24	2.56
Hispanic Or Latino	63	6.14	66	6.6	63	6.73
White (Not Of Hispanic Origin)	614	59.84	558	55.8	490	52.35
Other	79	7.7	80	8	71	7.59

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	240	27.27	236	26.4	236	26.25
Black (Not Of Hispanic Origin)	47	5.34	53	5.93	58	6.45
Hispanic Or Latino	114	12.95	130	14.54	134	14.91
White (Not Of Hispanic Origin)	427	48.52	414	46.31	404	44.94
Other	52	5.91	61	6.82	67	7.45

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	338	27.02	310	24.74	298	24.51
Black (Not Of Hispanic Origin)	52	4.16	70	5.59	75	6.17
Hispanic Or Latino	145	11.59	159	12.69	165	13.57
White (Not Of Hispanic Origin)	632	50.52	630	50.28	584	48.03
Other	84	6.71	84	6.7	94	7.73

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	203	11.36	218	11.53	199	10.32
Black (Not Of Hispanic Origin)	205	11.47	230	12.17	236	12.23
Hispanic Or Latino	912	51.04	971	51.38	1,028	53.29
White (Not Of Hispanic Origin)	421	23.56	425	22.49	410	21.25
Other	46	2.57	46	2.43	56	2.9

	2018-19	2019-20	2020-21
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Defendant's Exhibit

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exhibitsticker.com

Ethnicity	#	%	#	%	#	%
Asian	101	9.23	99	8.76	95	8.62
Black (Not Of Hispanic Origin)	94	8.59	88	7.79	77	6.99
Hispanic Or Latino	493	45.06	572	50.62	548	49.73
White (Not Of Hispanic Origin)	359	32.82	330	29.2	337	30.58
Other	47	4.3	41	3.63	45	4.08

Holmes

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	198	19.9	195	20.46	196	19.9
Black (Not Of Hispanic Origin)	217	21.81	191	20.04	192	19.49
Hispanic Or Latino	371	37.29	389	40.82	407	41.32
White (Not Of Hispanic Origin)	181	18.19	157	16.47	160	16.24
Other	28	2.81	21	2.2	30	3.05

Hughes

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	105	10.18	102	9.76	90	8.59
Black (Not Of Hispanic Origin)	167	16.2	165	15.79	166	15.84
Hispanic Or Latino	260	25.22	258	24.69	301	28.72
White (Not Of Hispanic Origin)	424	41.13	446	42.68	416	39.69
Other	75	7.27	74	7.08	75	7.16

Irving

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	159	13.96	157	14.29	139	12.31
Black (Not Of Hispanic Origin)	126	11.06	122	11.1	113	10.01
Hispanic Or Latino	214	18.79	190	17.29	206	18.25
White (Not Of Hispanic Origin)	555	48.73	537	48.86	584	51.73
Other	85	7.46	93	8.46	87	7.71

Jackson

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	361	25.09	256	22.61	210	20.25
Black (Not Of Hispanic Origin)	106	7.37	62	5.48	58	5.59
Hispanic Or Latino	521	36.21	488	43.11	497	47.93
White (Not Of Hispanic Origin)	383	26.62	267	23.59	216	20.83
Other	68	4.73	59	5.21	56	5.4

Key

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	184	22.58	184	22.41	161	19.44

Ethnicity	#	%	#	%	#	%
Asian	99	8.76	95	8.62	86	7.6
Black (Not Of Hispanic Origin)	88	7.79	77	6.99	76	6.71
Hispanic Or Latino	572	50.62	548	49.73	572	50.53
White (Not Of Hispanic Origin)	330	29.2	337	30.58	341	30.12
Other	41	3.63	45	4.08	57	5.04

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	195	20.46	196	19.9	191	19.92
Black (Not Of Hispanic Origin)	191	20.04	192	19.49	187	19.5
Hispanic Or Latino	389	40.82	407	41.32	397	41.4
White (Not Of Hispanic Origin)	157	16.47	160	16.24	153	15.95
Other	21	2.2	30	3.05	31	3.23

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	102	9.76	90	8.59	87	8.61
Black (Not Of Hispanic Origin)	165	15.79	166	15.84	158	15.63
Hispanic Or Latino	258	24.69	301	28.72	328	32.44
White (Not Of Hispanic Origin)	446	42.68	416	39.69	373	36.89
Other	74	7.08	75	7.16	65	6.43

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	157	14.29	139	12.31	152	12.64
Black (Not Of Hispanic Origin)	122	11.1	113	10.01	137	11.39
Hispanic Or Latino	190	17.29	206	18.25	203	16.87
White (Not Of Hispanic Origin)	537	48.86	584	51.73	603	50.12
Other	93	8.46	87	7.71	108	8.98

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	256	22.61	210	20.25	214	19.93
Black (Not Of Hispanic Origin)	62	5.48	58	5.59	64	5.96
Hispanic Or Latino	488	43.11	497	47.93	514	47.86
White (Not Of Hispanic Origin)	267	23.59	216	20.83	222	20.67
Other	59	5.21	56	5.4	60	5.59

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	184	22.41	161	19.44	148	18.48

Black (Not Of Hispanic Origin)	127	15.58	114	13.89	99	11.96
Hispanic Or Latino	338	41.47	372	45.31	438	52.9
White (Not Of Hispanic Origin)	134	16.44	115	14.01	102	12.32
Other	32	3.93	36	4.38	28	3.38

Kilmer

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	291	24.19	260	23.28	275	23.87
Black (Not Of Hispanic Origin)	57	4.74	47	4.21	49	4.25
Hispanic Or Latino	182	15.13	189	16.92	218	18.92
White (Not Of Hispanic Origin)	580	48.21	543	48.61	530	46.01
Other	93	7.73	78	6.98	80	6.94

Lanier

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	202	20.93	208	20.41	238	22.33
Black (Not Of Hispanic Origin)	100	10.36	110	10.79	106	9.94
Hispanic Or Latino	248	25.7	277	27.18	295	27.67
White (Not Of Hispanic Origin)	356	36.89	366	35.92	358	33.58
Other	59	6.11	58	5.69	69	6.47

Liberty

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	301	28.72	304	27.69	296	26.93
Black (Not Of Hispanic Origin)	97	9.26	105	9.56	101	9.19
Hispanic Or Latino	218	20.8	241	21.95	267	24.29
White (Not Of Hispanic Origin)	352	33.59	384	34.97	378	34.39
Other	80	7.63	64	5.83	57	5.19

Longfellow

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	417	30.09	359	27.22	352	26.35
Black (Not Of Hispanic Origin)	34	2.45	38	2.88	59	4.42
Hispanic Or Latino	129	9.31	154	11.68	162	12.13
White (Not Of Hispanic Origin)	723	52.16	679	51.48	666	49.85
Other	83	5.99	89	6.75	97	7.26

Poe

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	155	17.34	153	16.81	172	17.03

Black (Not Of Hispanic Origin)	114	13.89	99	11.96	94	11.74
Hispanic Or Latino	372	45.31	438	52.9	434	54.18
White (Not Of Hispanic Origin)	115	14.01	102	12.32	103	12.86
Other	36	4.38	28	3.38	22	2.75

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	260	23.28	275	23.87	289	25.49
Black (Not Of Hispanic Origin)	47	4.21	49	4.25	59	5.2
Hispanic Or Latino	189	16.92	218	18.92	214	18.87
White (Not Of Hispanic Origin)	543	48.61	530	46.01	493	43.47
Other	78	6.98	80	6.94	79	6.97

Johnson (formerly Lanier)

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	208	20.41	238	22.33	262	23.99
Black (Not Of Hispanic Origin)	110	10.79	106	9.94	109	9.98
Hispanic Or Latino	277	27.18	295	27.67	287	26.28
White (Not Of Hispanic Origin)	366	35.92	358	33.58	370	33.88
Other	58	5.69	69	6.47	64	5.86

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	304	27.69	296	26.93	300	27.88
Black (Not Of Hispanic Origin)	105	9.56	101	9.19	92	8.55
Hispanic Or Latino	241	21.95	267	24.29	269	25
White (Not Of Hispanic Origin)	384	34.97	378	34.39	352	32.71
Other	64	5.83	57	5.19	63	5.86

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	359	27.22	352	26.35	367	27.66
Black (Not Of Hispanic Origin)	38	2.88	59	4.42	53	3.99
Hispanic Or Latino	154	11.68	162	12.13	161	12.13
White (Not Of Hispanic Origin)	679	51.48	666	49.85	645	48.61
Other	89	6.75	97	7.26	101	7.61

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	153	16.81	172	17.03	156	16.03

Black (Not Of Hispanic Origin)	102	11.41	93	10.22	104	10.3
Hispanic Or Latino	539	60.29	559	61.43	611	60.5
White (Not Of Hispanic Origin)	72	8.05	80	8.79	101	10
Other	26	2.91	25	2.75	22	2.18

Rocky Run

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	624	47.42	605	47.41	520	44.71
Black (Not Of Hispanic Origin)	50	3.8	52	4.08	54	4.64
Hispanic Or Latino	148	11.25	156	12.23	155	13.33
White (Not Of Hispanic Origin)	421	31.99	402	31.5	373	32.07
Other	73	5.55	61	4.78	61	5.25

Sandburg

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	103	6.94	86	5.7	91	6.03
Black (Not Of Hispanic Origin)	256	17.24	244	16.16	251	16.64
Hispanic Or Latino	502	33.8	545	36.09	603	39.99
White (Not Of Hispanic Origin)	563	37.91	570	37.75	507	33.62
Other	61	4.11	65	4.3	56	3.71

South County

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	197	18.45	208	19.33	207	19.42
Black (Not Of Hispanic Origin)	215	20.13	233	21.65	226	21.2
Hispanic Or Latino	173	16.2	169	15.71	171	16.04
White (Not Of Hispanic Origin)	419	39.23	393	36.52	383	35.93
Other	64	5.99	73	6.78	79	7.41

Stone

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	94	12.47	94	12.18	104	13.47
Black (Not Of Hispanic Origin)	64	8.49	62	8.03	57	7.38
Hispanic Or Latino	222	29.44	249	32.25	246	31.87
White (Not Of Hispanic Origin)	338	44.83	326	42.23	320	41.45
Other	36	4.77	41	5.31	45	5.83

Thoreau

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	109	11.56	205	16.78	241	18.34

Black (Not Of Hispanic Origin)	93	10.22	104	10.3	101	10.38
Hispanic Or Latino	559	61.43	611	60.5	596	61.25
White (Not Of Hispanic Origin)	80	8.79	101	10	102	10.48
Other	25	2.75	22	2.18	18	1.85

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	605	47.41	520	44.71	465	44.5
Black (Not Of Hispanic Origin)	52	4.08	54	4.64	42	4.02
Hispanic Or Latino	156	12.23	155	13.33	137	13.11
White (Not Of Hispanic Origin)	402	31.5	373	32.07	338	32.34
Other	61	4.78	61	5.25	63	6.03

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	86	5.7	91	6.03	89	5.84
Black (Not Of Hispanic Origin)	244	16.16	251	16.64	255	16.73
Hispanic Or Latino	545	36.09	603	39.99	652	42.78
White (Not Of Hispanic Origin)	570	37.75	507	33.62	455	29.86
Other	65	4.3	56	3.71	73	4.79

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	208	19.33	207	19.42	196	18.61
Black (Not Of Hispanic Origin)	233	21.65	226	21.2	223	21.18
Hispanic Or Latino	169	15.71	171	16.04	168	15.95
White (Not Of Hispanic Origin)	393	36.52	383	35.93	394	37.42
Other	73	6.78	79	7.41	72	6.84

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	94	12.18	104	13.47	98	13.23
Black (Not Of Hispanic Origin)	62	8.03	57	7.38	65	8.77
Hispanic Or Latino	249	32.25	246	31.87	226	30.5
White (Not Of Hispanic Origin)	326	42.23	320	41.45	303	40.89
Other	41	5.31	45	5.83	49	6.61

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	205	16.78	241	18.34	235	19.28

Black (Not Of Hispanic Origin)	19	2.01	45	3.68	58	4.41
Hispanic Or Latino	111	11.77	186	15.22	226	17.2
White (Not Of Hispanic Origin)	623	66.07	699	57.2	705	53.65
Other	81	8.59	87	7.12	84	6.39

Twain

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	148	14.38	157	14.85	159	14.53
Black (Not Of Hispanic Origin)	179	17.4	198	18.73	199	18.19
Hispanic Or Latino	325	31.58	310	29.33	332	30.35
White (Not Of Hispanic Origin)	310	30.13	320	30.27	336	30.71
Other	67	6.51	72	6.81	68	6.22

Whitman

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	48	5.02	42	4.24	40	4.1
Black (Not Of Hispanic Origin)	247	25.84	260	26.26	236	24.21
Hispanic Or Latino	427	44.67	487	49.19	508	52.1
White (Not Of Hispanic Origin)	184	19.25	155	15.66	145	14.87
Other	50	5.23	46	4.65	46	4.72

Hayfield Middle

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	139	15.51	116	12.11	113	11.25
Black (Not Of Hispanic Origin)	222	24.78	274	28.6	263	26.2
Hispanic Or Latino	198	22.1	218	22.76	234	23.31
White (Not Of Hispanic Origin)	261	29.13	279	29.12	317	31.57
Other	76	8.48	71	7.41	77	7.67

Lake Braddock Middle

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	299	20.54	272	18.94	287	19.37
Black (Not Of Hispanic Origin)	125	8.59	116	8.08	152	10.26
Hispanic Or Latino	236	16.21	234	16.3	245	16.53
White (Not Of Hispanic Origin)	686	47.12	699	48.68	688	46.42
Other	110	7.55	115	8.01	110	7.42

Robinson Middle

Ethnicity	2017-18		2018-19		2019-20	
	#	%	#	%	#	%
Asian	136	11.32	161	13.27	146	12.7

Black (Not Of Hispanic Origin)	45	3.68	58	4.41	56	4.59
Hispanic Or Latino	186	15.22	226	17.2	219	17.97
White (Not Of Hispanic Origin)	699	57.2	705	53.65	635	52.09
Other	87	7.12	84	6.39	74	6.07

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	157	14.85	159	14.53	149	13.35
Black (Not Of Hispanic Origin)	198	18.73	199	18.19	178	15.95
Hispanic Or Latino	310	29.33	332	30.35	365	32.71
White (Not Of Hispanic Origin)	320	30.27	336	30.71	342	30.65
Other	72	6.81	68	6.22	82	7.35

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	42	4.24	40	4.1	43	4.74
Black (Not Of Hispanic Origin)	260	26.26	236	24.21	188	20.73
Hispanic Or Latino	487	49.19	508	52.1	476	52.48
White (Not Of Hispanic Origin)	155	15.66	145	14.87	159	17.53
Other	46	4.65	46	4.72	41	4.52

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	116	12.11	113	11.25	114	11.86
Black (Not Of Hispanic Origin)	274	28.6	263	26.2	242	25.18
Hispanic Or Latino	218	22.76	234	23.31	232	24.14
White (Not Of Hispanic Origin)	279	29.12	317	31.57	308	32.05
Other	71	7.41	77	7.67	65	6.76

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	272	18.94	287	19.37	298	19.44
Black (Not Of Hispanic Origin)	116	8.08	152	10.26	164	10.7
Hispanic Or Latino	234	16.3	245	16.53	281	18.33
White (Not Of Hispanic Origin)	699	48.68	688	46.42	653	42.6
Other	115	8.01	110	7.42	137	8.94

Ethnicity	2018-19		2019-20		2020-21	
	#	%	#	%	#	%
Asian	161	13.27	146	12.7	152	12.55

Black (Not Of Hispanic Origin)	76	6.33	81	6.68	79	6.87
Hispanic Or Latino	184	15.32	181	14.92	199	17.3
White (Not Of Hispanic Origin)	713	59.37	697	57.46	637	55.39
Other	92	7.66	93	7.67	89	7.74

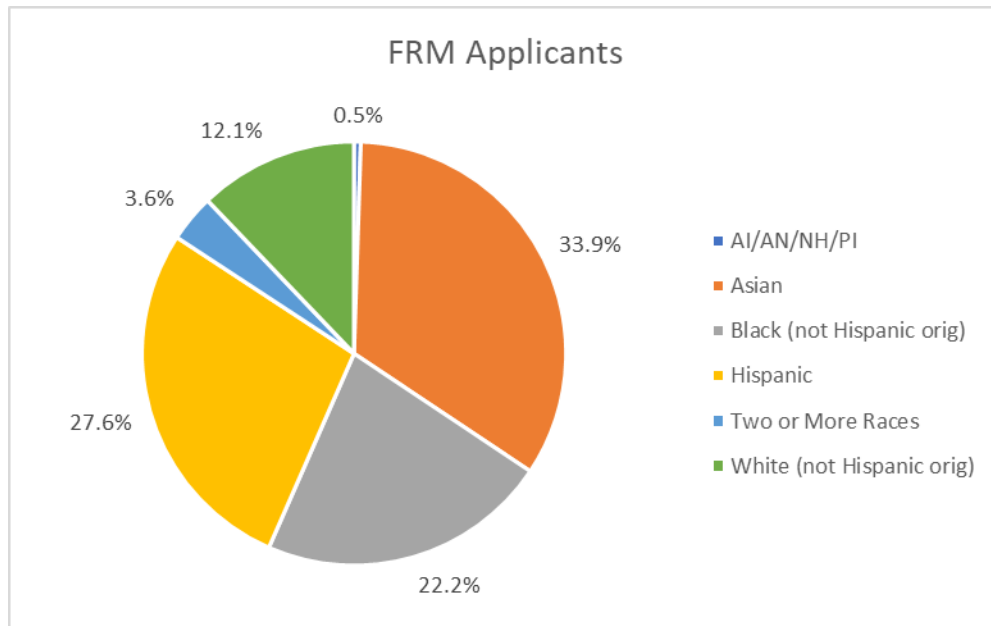
Black (Not Of Hispanic Origin)	81	6.68	79	6.87	74	6.11
Hispanic Or Latino	181	14.92	199	17.3	209	17.26
White (Not Of Hispanic Origin)	697	57.46	637	55.39	689	56.9
Other	93	7.67	89	7.74	87	7.18

# **Exhibit B**

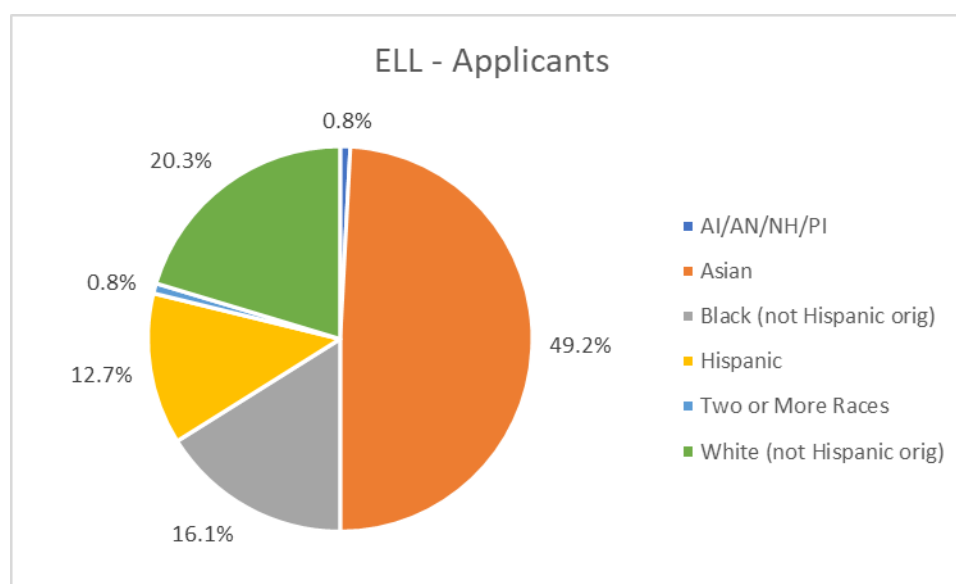


**EXHIBIT B**

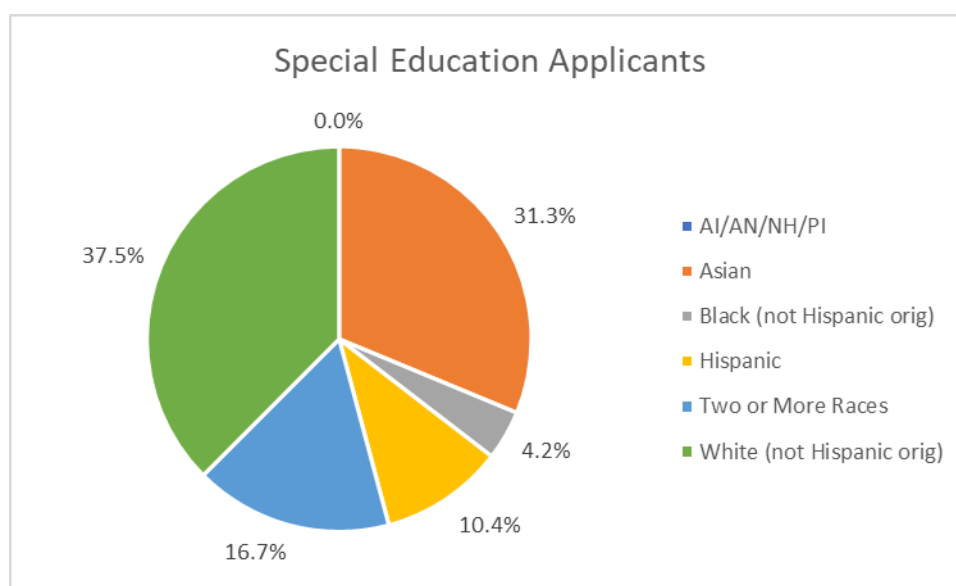
<b>Economically Disadvantaged (FRM)</b>				
	<b>Applicants</b>	<b>% of FRM Applicants</b>	<b>Offers</b>	<b>% of FRM Offers</b>
AI/AN/NH/PI	2	0.5%	1	0.7%
Asian	131	33.9%	51	37.0%
Black (not Hispanic orig)	86	22.2%	23	16.7%
Hispanic	107	27.6%	38	27.5%
Two or More Races	14	3.6%	5	3.6%
White (not Hispanic orig)	47	12.1%	20	14.5%
<b>Total</b>	<b>387</b>		<b>138</b>	



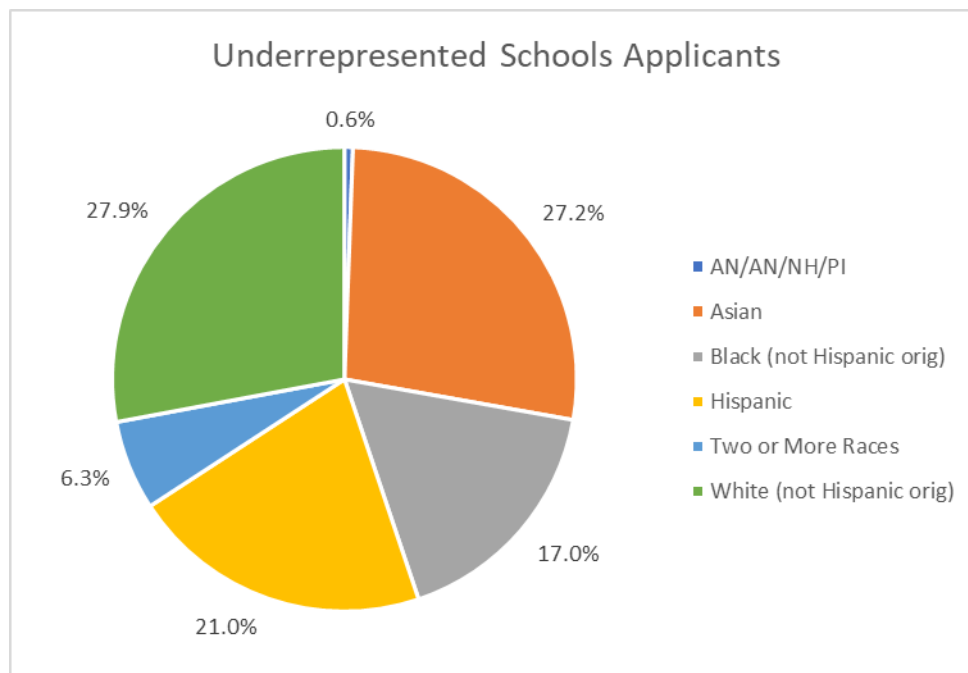
English Language Learners (ELL)				
	Applicants	% of ELL Applicants	Offers	% of ELL Offers
AI/AN/NH/PI	1	0.8%	0	0.0%
Asian	58	49.2%	13	38.2%
Black (not Hispanic orig)	19	16.1%	5	14.7%
Hispanic	15	12.7%	7	20.6%
Two or More Races	1	0.8%	1	2.9%
White (not Hispanic orig)	24	20.3%	8	23.5%
<b>Total</b>	<b>118</b>		<b>34</b>	



Special Education (SPED)				
	Applicants	% of SPED Applicants	Offers	% of SPED Offers
AI/AN/NH/PI	0	0.0%	0	0.0%
Asian	15	31.3%	4	30.8%
Black (not Hispanic orig)	2	4.2%	0	0.0%
Hispanic	5	10.4%	2	15.4%
Two or More Races	8	16.7%	2	15.4%
White (not Hispanic orig)	18	37.5%	5	38.5%
<b>Total</b>	<b>48</b>		<b>13</b>	



Underrepresented Schools (URS)				
	Applicants	% of URS Applicants	Offers	% of URS Offers
AN/AN/NH/PI	4	0.6%	0	0.0%
Asian	187	27.2%	56	33.3%
Black (not Hispanic orig)	117	17.0%	21	12.5%
Hispanic	144	21.0%	42	25.0%
Two or More Races	43	6.3%	10	6.0%
White (not Hispanic orig)	192	27.9%	39	23.2%
<b>Total</b>	<b>687</b>	<b>282</b>	<b>168</b>	



## **Appendix F**

## **Exhibit 68**

## Message

**From:** Muhlberg, Ilene [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=825BE3D8342D4AC4AFAE7A8306A1E2C5-MUHLBERG, I]  
**Sent:** 9/29/2020 11:30:58 PM  
**To:** School Board Executive Administrative Assistants [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=db78a7def3d24c11810b46865693f07b-School Boar]  
**Subject:** FW: TJ School Data Request  
**Attachments:** All Middle Schools by year\_Admissions\_2020\_ethnicity\_10\_years.pdf; All Middle Schools by year\_Admissions\_2020\_ethnicity\_10\_years\_redacted.pdf; All Middle Schools by year\_Admissions\_2020.pdf

FYI

**From:** Foster, John  
**Sent:** Friday, September 25, 2020 8:14 PM  
**To:** School Board Members <SchBoard@fcps.edu>  
**Cc:** Brabrand, Scott S <ssbrabrand@fcps.edu>; Ivey, Frances W <FWIvey@fcps.edu>; Smith, Marty K. <mksmith@fcps.edu>; Shughart, Jeremy A <jshughart@fcps.edu>; Muhlberg, Ilene <idmuhlberg@fcps.edu>; Kneale, Marcy G <mgkneale@fcps.edu>; Ritenour, Tracy M <tmritenour@fcps.edu>  
**Subject:** TJ School Data Request

Dear School Board Members,

Please see the attached data on TJ admissions for all FCPS middle schools, including for ethnicity and FRM status.

Attorney-Client Privilege

Attorney-Client Privilege

John

John E. Foster  
 Division Counsel  
 Office of Division Counsel  
 Fairfax County Public Schools  
 8115 Gatehouse Road  
 Falls Church, Virginia 22042  
 571-423-1250  
[John.Foster@fcps.edu](mailto:John.Foster@fcps.edu)

**IMPORTANT CAUTION:** This email contains confidential attorney-client privileged communications. It is exempt from disclosure under the Virginia Freedom of Information Act (Va. Code § 2.2-3705.1(2) (2005)) and may not be forwarded or disclosed to anyone outside FCPS without the prior approval of Division Counsel. In addition, do not forward or disclose to anyone within FCPS, except employees who need this information to carry out official FCPS business. If you must disclose internally, please caution the receiving employee about the importance of confidentiality.

Failure to follow these rules may waive the attorney-client privilege and jeopardize FCPS's legal position in pending disputes. If you need assistance responding to the public on the topic of this email, please call Division Counsel, who can help you provide information without jeopardizing the attorney-client privilege.

## **Appendix G**



## **Exhibit 61**

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF VIRGINIA  
3                   ALEXANDRIA DIVISION  
4           -----x  
5   COALITION FOR TJ,                   :  
6                                   Plaintiff,   :  
7           v.                                   :   Civil Action No.:  
8   FAIRFAX COUNTY SCHOOL               : 1:21-cv-00296-CMH-JFA  
9   BOARD,                                   :  
10                                   Defendant.   :  
11   -----x

12  
13                   Deposition of JEREMY SHUGHART  
14                                   McLean, Virginia  
15                                   Thursday, October 14, 2021  
16                                   9:14 a.m.

17  
18                                   CONFIDENTIAL

19  
20   Job No.: 403754

21   Pages: 1 - 209

22   Reported by: Judith E. Bellinger, RPR, CRR

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C O N T E N T S		
EXAMINATION OF Jeremy Shughart		PAGE
By Mr. Kieser		7
E X H I B I T S		
(Attached to the transcript)		
Shughart Exhibits:		PAGE
Exhibit 1	TJ Admissions Merit Lottery Proposal	24
	School Board Work Session 9/15/2020	
Exhibit 2	Email chain. Top email to Marty Smith, 6/14/2020	42
Exhibit 3	Academic Year Governor's School	67
	Diversity Goals and Report 8/25/2020	
Exhibit 4	Email chain. Top email from Jeremy Shughart to Marty Smith, 8/12/2020	70
Exhibit 5	Email from Jeremy Shughart to Julie P. Fowler, 11/2/2020	85
Exhibit 6	Thomas Jefferson High School for Science and Technology: Improving Admissions Process, November 2020	96
Exhibit 7	Email from Stephanie Sheridan to Laura Jane H Cohen	110

CONFIDENTIAL  
Transcript of Jeremy Shughart  
Conducted on October 14, 2021

5

1	E X H I B I T S C O N T I N U E D		
2	Exhibit 8	Email from Jeremy Shughart to Marty	112
3		K. Smith, 8/10/2020	
4	Exhibit 9	Chart	124
5	Exhibit 10	Chart	136
6	Exhibit 11	Email from Jeremy Shughart to	136
7		Ludmila Hruda, 9/27/2020	
8	Exhibit 12	Hybrid Merit Lottery Closed School	149
9		Board Work Session, October 6, 2020	
10	Exhibit 13	Email chain. Top email from Jeremy	156
11		Shughart to Scott Brabrand,	
12		10/6/2020	
13	Exhibit 14	Email chain. Top email from Julie	162
14		P. Fowler to Jeremy Shughart,	
15		11/13/2020	
16	Exhibit 15	TJ Admissions Statistics by FCPS	173
17		Middle Schools Class of 2021-2024	
18	Exhibit 16	TJ Admissions Statistics by FCPS	173
19		Middle Schools Class of 2015-2024	
20	Exhibit 17	Email from Jeremy Shughart to Laura	193
21		Jane H Cohen, 12/17/2020	
22			

1	E X H I B I T S C O N T I N U E D		
2	Exhibit 18	Email chain. Top email from Laura	193
3		Jane H. Cohen to Jeremy Shughart,	
4		12/22/2020	
5	Exhibit 19	Press release, June 23, 2021	201
6	Exhibit 20	Press release, June 01, 2020	201
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1 lottery. It could have been combined. I really  
2 don't remember now.

3 Q Okay. Can you look at that scoring  
4 system that's on the next page there, page 3, I  
5 think it says, document?

6 A Sure. Where at the top it says  
7 "Teacher" --

8 Q "Teacher Recommendation Points." Yeah.  
9 Had you -- in your time as admissions  
10 director, had you ever, before, had an explicit  
11 scoring system where you get points for  
12 applications before?

13 A No. Not during my time.

14 Q So this is a new proposal?

15 A This would have been new.

16 Q Okay. Can you flip to the next page.

17 A (The witness complies.)

18 Q Can you explain what experience factors  
19 are?

20 A Experience factors were the students'  
21 experiences in an academic setting, as represented  
22 by the table below.

1 MR. KIESER: Back on the record.

2 (Shughart Exhibit 13 marked for  
3 identification and attached to the transcript.)

4 MR. KIESER: And the Bates number on  
5 this one is 21813.

6 BY MR. KIESER:

7 Q Let me start with, do you recognize  
8 this document?

9 A I do.

10 Q Is it an email exchange between you  
11 and, I believe, Superintendent Brabrand and Marty  
12 Smith and, I believe, John Foster is copied on  
13 that?

14 A Correct. It was an email that Scott --  
15 the superintendent sent to myself, Marty, and  
16 John, and then kind of short back-and-forth  
17 between the group.

18 Q Can you read the email that  
19 Superintendent Brabrand sent on the second page?  
20 You may have to undo the --

21 A The email -- do you want me to read it  
22 out loud?

1 Q Yeah.

2 A "Marty, in the old days with points,  
3 would 200 points change who got in? That is the  
4 modeling that they are asking about. Can" -- I'm  
5 not sure, it's under the staple.

6 Q Can we.

7 A "Can we go back and look at points?  
8 Would 200 points be a game changer?"

9 Q Okay. To the best of your  
10 understanding, when Superintendent Brabrand says  
11 "That is the modeling they are asking about," is  
12 he referring to the school board members there?

13 MS. REWARI: Objection. Calls for  
14 speculation. Lack of foundation.

15 Q To the best of your understanding, you  
16 can answer.

17 A I would assume so.

18 Q To your understanding, when he says  
19 "change who got in," does that refer to the racial  
20 composition of TJ's admitted classes?

21 MS. REWARI: Objection. Calls for  
22 speculation. Lack of foundation.



1           Q     So that -- did that mean that the  
2 students who would not have received the  
3 1.5 percent allotment, then they would be into the  
4 unallocated pool?

5           A     Yes.

6           Q     Where they would not receive the 45  
7 points because they did not attend an  
8 underrepresented middle school?

9           A     From these schools?

10          Q     Yeah.

11          A     Yes.

12          Q     And they would have to compete against  
13 private schools and homeschool students in that  
14 unallocated pools?

15          A     Yeah. All students would compete.

16          Q     Did you ever do any analysis, after the  
17 2025 admission positions were released, to  
18 determine what the racial effect of the  
19 underrepresented school bonus points were?

20                MS. REWARI: Objection to the extent it  
21 calls for any analysis done at the request of  
22 counsel.

No. 403754

Re: Deposition of **Jeremy Shughart**

Date: 10/14/2021

Case: Coalition for TJ -v- Fairfax County School Board

Return to: transcripts@planetdepos.com

ACKNOWLEDGMENT OF DEPONENT

I, Jeremy Shughart, do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me and any corrections appear on the attached Errata sheet signed by me.

11/19/21

(Date)

Jeremy Shughart

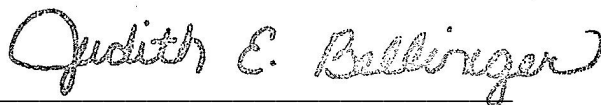
(Signature)

CERTIFICATE OF REPORTER - NOTARY PUBLIC

I, JUDITH E. BELLINGER, RPR, CRR, the  
officer before whom the foregoing deposition was  
taken, do hereby certify that the foregoing  
transcript is a true and correct record of the  
testimony given; that said testimony was taken by  
me and thereafter reduced to typewriting under my  
direction; that reading and signing was requested;  
and that I am neither counsel for, related to, nor  
employed by any of the parties to this case and  
have no interest, financial or otherwise, in its  
outcome.

IN WITNESS WHEREOF, I have hereunto set  
my hand and affixed my notarial seal this 2nd day  
of November, 2021.

My Commission Expires: September 30, 2024



NOTARY PUBLIC IN AND FOR  
THE COMMONWEALTH OF VIRGINIA

Message

**From:** Shughart, Jeremy A [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=77ED93A9176E4058A2847967265E7289-SHUGHART, J]  
**Sent:** 9/27/2020 8:51:24 PM  
**To:** Hruda, Ludmila (Lidi) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=717d2cd6b4994ec7be716f560bdf6627-Hruda, Ludm]  
**CC:** Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]  
**Subject:** TJ Admissions White Paper - Alternative  
**Attachments:** TJHSST\_Alternate\_White\_paper\_v2.docx

Lidi,

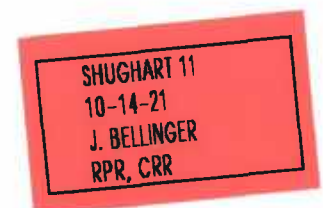
Good afternoon, I wanted to share a draft of our alternate white paper proposal for admissions. Could you look specifically at the table for "Experience Factors" and provide us a review of our current weighting and whether or not this would be enough to level the playing field for our historically underrepresented groups. Legal counsel has Attorney Client Privile  
Attorney Client Privilege Additionally, you can review the other weighting (similar to the old version of the points weighting of components).

The table is similar to the table we used with the previous white paper you reviewed this past spring. We are providing an alternative approach to the lottery proposal from a couple of weeks ago.

Note: I will be away from my computer for the next week hours. However, I will be back later this evening to answer any questions you may have. Please include Marty on the message as we have been working on this draft over the last few days and will be sharing with cabinet in the next day or so.

Thanks,  
Jeremy

**Jeremy Shughart, EDS.**  
Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770



### **TJHSST Admissions Alternate White Paper on Admissions**

TJHSST Admissions will select students using multiple pathways. Fairfax County will provide 5 pathways based on a regional approach. The participating jurisdictions will also be assigned a pathway for each county or city. The pathway process will be based on a 70%/30% model. 70% of students would be selected from Fairfax County (5 pathways) and 30% of students will be selected from our participating jurisdictions combined.

All applicants must meet minimum requirements; GPA, enrollment in Algebra I and residency. Student selection will be conducted using the following process. This process combines a holistic evaluation of Teacher Recommendations, Student Information Sheet (SIS), and Problem- Solving Essay. Additionally, weighted evaluations of diversity will also be included.

#### **Grade Point Average (GPA)**

- Minimum Requirement – 3.5 GPA
- Grade point average will be calculated based on a student's core GPA.
  - End of the year marks in 7<sup>th</sup> grade and 1<sup>st</sup> Quarter 8<sup>th</sup> grade.
  - Mathematics, Science, English, History & World Language (only if taken for High School Credit)
  - Grades are unweighted

#### **Math Enrollment**

- Applicants must be enrolled in Algebra I or have a credit for Algebra I.
- Students in higher level classes or honors/AP/IB level class don't receive additional weight in selection process.

#### **Residency**

- Applicants must meet residency requirements by participating jurisdictions
- Applicants Residency will place student in specified pathway
- Pathways
  - Fairfax (350 seats) – regional seats are based on 8<sup>th</sup> grade student enrollment in schools based on region and are proportional representation
    - Region 1 (73 seats)
    - Region 2 (77 seats)
    - Region 3 (67 seats)
    - Region 4 (72 seats)
    - Region 5 (61 seats)
  - Participating Jurisdictions (150 seats) – participating jurisdiction seats are based on Fairfax and participating jurisdictions historical admissions numbers of offers and acceptance.
    - Arlington (18 seats)
    - Falls Church City (2 seats)
    - Loudoun (62 seats)
    - Prince William (68 seats)

**Teacher Recommendations (200 points)**

- Two Teacher Recommendations will be submitted.
  - Teachers will be from 6<sup>th</sup> (this year only due to Covid), 7<sup>th</sup> or 8<sup>th</sup> Grade
  - One teacher must be a STEM teacher (Math, Science, etc.)
  - The other teacher is applicant choice

**Student Information Sheet (200 points)**

- Questionnaire
  - Collaborator
  - Communicator
  - Creative & Critical Thinker
  - Ethical/Global Citizen
  - Goal-Directed & Resilient Individual
  - Innovator
  - Leader
  - Problem Solver

**Problem-Solving Essay (250 points)**

- Math or Science Based problem.
  - Multiple Variables
  - Student produces an answer
  - Student demonstrates ability to solve problem
  - Response in essay format

**Experience Factors (100 points)**

- Weighting will be calculated for students in multiple diversity categories.

<b>Socio-economic Factors</b>	0 or 15		<b>School Leadership</b>	0 to 12
Free/Reduced Meals			Response to Leadership	
<b>English Language Learner</b>	0 or 15		<b>STEM Skills</b>	0 to 6
Level 1-6			Top 3 Awards/Projects/Skills	
<b>Special Education</b>	0 or 15		<b>Hardship</b>	0 to 10
IEP			Homelessness, economic responsibility, Extenuating Circumstances, family/personal crisis, 504, etc.	
<b>Parental Education Level</b>	0 or 15			
HS Diploma, College Diploma or Beyond				
<b>Extracurricular</b>	0 to 6			
Listing of Experiences			<b>Total</b>	<b>0 to 100</b>
<b>Community Service</b>	0 to 6			
Listing of Experiences				

**Pathway Selection**

- Each pathway will select students based on a composite score after a holistic review. Applicants with the highest composite score in each pathway will be offered admissions (up to maximum number of offers per pathway).
- Each applicant is subject to an audit review of diversity factors.
  - Academic Integrity is Critical.
  - Audit may contain the following but is not limited too.
    - Documentation of all claims of parental education level, extracurricular activities, community service, STEM skills, hardship, etc.
  - A student who is found to be dishonest and provided responses that are of a deceptive nature will be removed from the application process and will not be eligible for an offer of admission.
  - A student who has been offered admissions and is found to be dishonest will have the offer of admissions rescinded.
- Rolling Admissions
  - Students offered admissions
  - Students have designated timeframe to accept or reject their offer
  - Rolling admissions are established to keep a class of 500
  - Each pathway will maintain a list of students not selected
  - Openings will be filled by the next eligible applicant on the list
  - Should a non-FCPS pathway exhaust its list of students, the next eligible candidate with the high composite score off the FCPS list will be chosen.

- As needed, additional applicants will be offered on the 1<sup>st</sup> and 15<sup>th</sup> of every month through end of 1<sup>st</sup> Quarter in order to maintain a class of 500.
- Any student who declines the offer of admission will be removed from eligibility.

#### **Appeals Process**

- An Appeal form must be submitted within 10 business days of admissions decisions announcement. The Appeal form will ask the parent and/or guardian to provide a written explanation of the exceptional circumstance that the Appeals Committee is to consider.
- The Appeal form must be submitted to the TJHSST Admissions Office. The TJHSST Admissions Office will ensure all appeal documents are submitted to the Appeals Committee. The parent and/or guardian is not allowed to submit additional credentials, documents or letters of recommendation.
- The Appeals Committee will review the appeal.
- The decision of the Appeals Committee will be communicated to the parent and/or guardian in writing and the Appeals Committee decision shall be final.



## Message

**From:** Shughart, Jeremy A [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=77ED93A9176E4058A2847967265E7289-SHUGHART, J]  
**Sent:** 9/28/2020 2:14:08 AM  
**To:** Hruda, Ludmila (Lidi) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=717d2cd6b4994ec7be716f560bdf6627-Hruda, Ludm]  
**CC:** Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]  
**Subject:** RE: TJ Admissions White Paper - Alternative

Lidi,

Thank you so much for the feedback. I agree that we need to consider how this will be considered and whether there was enough weighting involved. The maximum amount of points you would receive would only be around 14%, so it isn't impacting at a very high level. I wasn't sure if doubling the points would have been too much weight but your points are very valid in perspective that most students won't receive all points but a portion and for it to make an impact you would need to have an increased capacity.

Thanks again,  
 Jeremy

**Jeremy Shughart, EDS.**

Director of Admissions  
 Thomas Jefferson High School for Science and Technology  
 Fairfax County Public Schools  
 571-423-3770

**From:** Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>  
**Sent:** Sunday, September 27, 2020 9:46 PM  
**To:** Shughart, Jeremy A <jshughart@fcps.edu>  
**Cc:** Smith, Marty K. <mksmith@fcps.edu>  
**Subject:** RE: TJ Admissions White Paper - Alternative

Jeremy,

Thank you for sharing this with me. Attached are some comments embedded within the document. Not stated in the document is the answer to the question you asked. It is hard to know exactly what will level the playing field but my gut says that you may need to double all the points (and the total) so that applicants can receive up to 200 points overall for these experience factors.

My logic is the following: There are already 650 points accounted for in the other areas – teacher recommendations, SIS, and essay.

- Prior research on TJ admissions shows that historically underrepresented candidates receive less positive teacher recommendations than White and Asian candidates. This is older work but there is nothing more recent to indicate this has changed. This is likely true for other challenges like living in poverty and special ed – though the numbers weren't big enough to really examine this.
- The other two pieces, SIS and essay have also historically favored White and Asian candidates, I believe, who had broader experiences upon which to draw and often coaching on how to approach each piece.
- Thus, I think we can expect these three pieces to yield similar results to what we have seen with the testing as a part of the process, rather than vastly different results. Maybe not identical but not too far from where we currently stand with admissions.
- That leaves only the Experience Factors to help shift the landscape and bring more diversity into play and acceptance of historically underrepresented students. Since the experience factors include things that some

more privileged students are likely to get points on, as well as factors that less privileged students are likely to get points on, I think we can assume that the potential advantage from the Experience Factors is likely to be at most 50 points and more likely only 25 points for most students since they are not likely to get credit for all the experience factors. Not meaning that they get 25-50 points but they get maybe 50-75 points, while more privileged students are getting 25, netting a 25-50 point bump for those less privileged.

- Whether 25 or 50 points, that means the gap coming out of the first three pieces would need to be in that range to balance things. I think you will find that the gap is broader than that and that the bump up from the Experience Factors will be insufficient to make up for the difference.

Maybe I am being too pessimistic and, undoubtedly, some might argue that providing students with a 50 to 100 point advantage from the Experience Factors is inappropriate. Nonetheless my gut says the 25 to 50 point advantage a non-privileged student might gain from the Experience Factors will not level the field given the three other parts of the process.

Happy to discuss further.

Lidi

**Lidi Hruda**

Director

Office of Research and Strategic Improvement

Fairfax County Public Schools

Office: 571-423-1435

Mobile: 571-385-8165

**From:** Shughart, Jeremy A <jshughart@fcps.edu>

**Sent:** Sunday, September 27, 2020 4:51 PM

**To:** Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>

**Cc:** Smith, Marty K. <mksmith@fcps.edu>

**Subject:** TJ Admissions White Paper - Alternative

**Importance:** High

Lidi,

Good afternoon, I wanted to share a draft of our alternate white paper proposal for admissions. Could you look specifically at the table for "Experience Factors" and provide us a review of our current weighting and whether or not this would be enough to level the playing field for our historically underrepresented groups. **Attorney-Client Privilege**

**Attorney Client Privilege** Additionally, you can review the other weighting (similar to the old version of the points weighting of components).

The table is similar to the table we used with the previous white paper you reviewed this past spring. We are providing an alternative approach to the lottery proposal from a couple of weeks ago.

Note: I will be away from my computer for the next week hours. However, I will be back later this evening to answer any questions you may have. Please include Marty on the message as we have been working on this draft over the last few days and will be sharing with cabinet in the next day or so.

Thanks,  
Jeremy

**Jeremy Shughart, EDS.**

Director of Admissions

Thomas Jefferson High School for Science and Technology

Fairfax County Public Schools

571-423-3770

## **Appendix H**

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

COALITION FOR TJ,

Plaintiff,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant.

No. 1:21-cv-00296-CMH-JFA

**PLAINTIFF'S MEMORANDUM**  
**IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## STATEMENT OF UNDISPUTED MATERIAL FACTS

### A. Background and Parties

1. Thomas Jefferson High School for Science & Technology (TJ) is a high school in Fairfax County, Virginia. It is designated an academic-year Governor's School. ECF No. 95 (Stipulated Facts ¶ 1). It is the nation's best public high school according to US News & World Report. Answer ¶ 22. In 2020-21, the racial makeup of TJ's student body was 71.97% Asian American, 18.34% white, 3.05% Hispanic, and 1.77% Black. Wilcox Dec.<sup>1</sup> Ex. 57.<sup>2</sup>

2. TJ is part of Fairfax County Public Schools (FCPS). FCPS is operated by the Fairfax County School Board (Board), a public body comprised of twelve elected members. According to FCPS, the racial makeup of FCPS students is: 36.8% white, 27.1% Hispanic, 19.8% Asian American, and 10% Black. Ex. 58.

3. Throughout 2020, Board members were: Ricardy Anderson, Karen Keys-Gamarra, Karen Corbett Sanders, Megan McLaughlin, Melanie K. Meren, Karl Frisch, Elaine Tholen, Stella Petarsky, Tamara Derenak Kaufax, Abrar Omeish, Rachna Sizemore Heizer, and Laura Jane Cohen. Stipulated Facts ¶¶ 2, 4. FCPS' superintendent was Scott Brabrand, TJ's admissions director was Jeremy Shughart, and TJ's principal was Ann Bonitatibus. Ex. 43 (Brabrand Dep. 9:4-9); Ex. 44 (Shughart Dep. 9:11-13); Ex. 45 (Bonitatibus Dep. 8:13-18).

4. The Coalition for TJ has more than 200 members, including 17 members of its core team and ten members of its leadership team. Nomani Dec. ¶¶ 6, 8, 12, 13.

5. The Coalition was founded in August 2020 to oppose changes to admissions at TJ.

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<sup>1</sup> Non-confidential exhibits are attached to the declaration of Erin Wilcox and labeled by number. For the remainder of the brief, they will be cited simply by their Exhibit number.

<sup>2</sup>The Court may take judicial notice of data contained on government websites, as well as FCPS press releases, Board meeting minutes and other public documents. *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017); *Jones v. Shooshan*, 855 F. Supp. 2d 594, 604 (E.D. Va. 2012).

*Id.* ¶ 5. The Coalition was concerned that the admissions changes would discriminate against Asian-American students. *Id.* The leadership and core teams decided to pursue this case by unanimous consensus. *Id.* ¶ 47.

6. Coalition members include Asian-American parents with children who have applied to TJ or plan to do so in the near future. Among these are Dipika Gupta (whose son, A.G., is in eighth grade at Carson Middle School and has applied to TJ) and Ying McCaskill (whose daughter, S.M., is in seventh grade at Carson and plans to apply to TJ). Gupta Dec. ¶¶ 3, 9, 11; McCaskill Dec. ¶¶ 3, 6, 8. Another member is Harry Jackson, whose daughter, V.J., an eighth grader at Carson, identifies as Black but is half Asian American. Jackson Dec. ¶¶ 3, 5–6, 8.

#### **B. Fall 2020 TJ Admissions Changes**

7. Students must apply to TJ in order to be admitted. Students residing in five participating school divisions are eligible to apply to TJ: Fairfax County, Loudoun County, Prince William County, Arlington County, and Falls Church City. Stipulated Facts ¶¶ 5–6.

8. In the fall of 2020, the Board altered the TJ admissions process. *Id.* ¶¶ 9–14.

##### **1. Admissions process before the fall 2020 changes**

9. Before the Board’s fall 2020 changes, applicants to TJ were required to (a) reside in one of the five participating school divisions; (b) be enrolled in 8th grade; (c) have a minimum core 3.0 grade point average (GPA); (d) have completed or be enrolled in Algebra I; and (e) pay a \$100 application fee, which could be waived based on financial need. *Id.* ¶ 9.

10. Applicants who satisfied those criteria were administered three standardized tests—the Quant-Q, the ACT Inspire Reading, and the ACT Inspire Science. Those applicants who achieved certain minimum scores on the tests advanced to a “semifinalist” round. Students were selected for admission from the semifinalist pool based on a holistic review that considered GPA,

test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay. *Id.*

## 2. Admissions process after the fall 2020 changes

11. The Board’s fall 2020 changes to admission at TJ removed the exam requirement and altered the minimum requirements to apply. *Id.* ¶ 13. Following those changes, to be eligible for TJ, students must: (a) maintain a 3.5 GPA; (b) be enrolled in a full-year honors Algebra I course or higher; (c) be enrolled in an honors science course; and (d) be enrolled in at least one other honors course or the Young Scholars program. *Id.*

12. The Board also changed the evaluation process, moving from a multi-stage process to a one-round holistic evaluation that considers GPA, a Student Portrait Sheet, a Problem Solving Essay, and certain “Experience Factors,” which include an applicant’s (a) attendance at a middle school deemed historically underrepresented at TJ; (b) eligibility for free and reduced price meals; (c) status as an English language learner; and (d) status as a special education student. Ex. 56.

13. Applicants are scored using a rubric that assigns points for each part of the application: (a) up to 300 points for GPA; (b) up to 300 points for the Student Portrait Sheet; (c) up to 300 points for the Problem Solving Essay; and (d) additional points for each Experience Factor—90 points for free and reduced price lunch eligibility, 45 for attendance at an underrepresented middle school, 45 for status as an English language learner, and 45 for status as a special education student. Ex. N<sup>3</sup> (Shughart Dep. 162:1–165:15).

14. In addition to the changes to the eligibility criteria and the evaluation criteria, the new process guarantees seats for students at each public middle school in a participating school

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<sup>3</sup> Exhibits designated confidential by Defendant—and filed along with the motion to seal—are labeled by letter. For the remainder of the brief they are referenced by their letter label.

division equivalent to 1.5% of the school’s eighth grade class size, with seats offered in the first instance to the highest-evaluated applicants from each school. Stipulated Facts ¶ 14.

15. After the guaranteed seats are filled, about 100 unallocated seats remain for students who do not obtain an allocated seat. *Id.* The highest-evaluated remaining students are offered admission. *Id.* Private school and home school students may compete only for these unallocated seats. Ex N. (Shughart Dep. 177:10–178:19).

### **C. Impact of Admissions Changes**

16. For the Class of 2025—the first year under the new system—the admitted class size increased by 64 students. Nevertheless, TJ admitted 56 fewer Asian-American students than it had the prior year. Exs. 50 & 51.

17. For the previous five years, Asian-American students never made up less than 65% of the admitted class. Exs. 51–55. For the Class of 2024, Asian-American students earned about 73% of the seats. Ex. 51. Following the admissions changes, the proportion of Asian-American students admitted for the Class of 2025 fell to about 54%. Ex. 50.

18. For the Class of 2025, 48.59% of eligible applicants to TJ were Asian American. Stipulated Facts ¶ 20. But among FCPS middle schools designated as “underrepresented”—Glasgow, Holmes, Hughes, Key, Poe, Sandburg, South County, Stone, Twain, and Whitman, *see* Ex. 56—23.9% of the eligible applicants who did not withdraw their applications were Asian American. Ex. A.<sup>4</sup>

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<sup>4</sup> After the parties agreed to a protective order, the Board produced five years’ worth of individual data on TJ admissions including the Class of 2025 (application year 2020-21) and Class of 2024 (application year 2019-20), which is attached as Exhibit A to the motion to seal. The data presented here on applicants from FCPS underrepresented schools comes from the “20-21” individual data in this exhibit. Data is limited to FCPS schools because the individual data produced does not include attending middle school for non-FCPS applicants.

19. For the past five years, six FCPS middle schools have sent the most Asian-American students to TJ—Carson, Cooper, Frost, Kilmer, Longfellow, and Rocky Run. Ex. N. (Shughart Dep. 170:13–171:10, 181:1–182:8, & Dep. Ex. 16). For the Class of 2025, 66.3% of the eligible TJ applicants from those six schools who did not withdraw their application were Asian American. Ex. A.<sup>5</sup> Under the new admissions system, guaranteed admissions from these schools are capped at 1.5% of the class. Stipulated Facts ¶ 14. None of these schools are designated as underrepresented. Ex. 56. Asian-American students from these six schools received 102 offers for the Class of 2025, compared to 204 for the Class of 2024. Ex. A; Ex. N. (Dep. Ex. 16).<sup>6</sup>

#### **D. Facts Surrounding Admissions Changes**

20. In March 2020, the Virginia General Assembly enacted a requirement that Governor’s Schools develop diversity goals and submit a report to the Governor by October 1, 2020. 2020 Va. Acts ch. 1289, item 145.C.27(i).<sup>7</sup> The report must include the status of the school’s diversity goals, including a description of “admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students.” *Id.*

21. On May 25, 2020, George Floyd was murdered by a police officer in Minneapolis. Nationwide protests followed, including in Fairfax County and the greater metropolitan Washington D.C. area.<sup>8</sup>

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<sup>5</sup> The data was compiled from the “20-21” school year individual data in this exhibit.

<sup>6</sup> The Class of 2024 data here was compiled from Ex. N (Dep. Ex. 16). The Class of 2025 data comes from the “20-21” individual data in Exhibit A.

<sup>7</sup> The entire bill is available here: <https://budget.lis.virginia.gov/get/budget/4186/HB30/>. The relevant provision is located on page 183.

<sup>8</sup> Both national and local media documented the aftermath of the George Floyd murder. The Washington Post documented protests here: <https://www.washingtonpost.com/dc-md-va/2020/06/06/dc-protests-saturday-george-floyd/> (last visited Dec. 2, 2021). Local media noted

22. On June 1, 2020, the Class of 2024 TJ admissions statistics were made public, showing that the number of Black students admitted was too small to report. Ex. 51.

23. A few days later, Bonitatibus wrote in a June 7 message to the TJ community that “recent events in our nation with black citizens facing death and continued injustices remind us that we each have a responsibility to our community to speak up and take actions that counter racism and discrimination in our society.” Ex. 45 (Bonitatibus Dep. 40:2–12 & Dep. Ex. 2 at 1). She went on to comment that the TJ community did “not reflect the racial composition in FCPS” and that if TJ did reflect FCPS’s racial demographics, it “would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms.” *Id.* (Dep. Ex. 2 at 2).

24. In June emails, Corbett Sanders called the admissions results “unacceptable” and promised “intentful action.” Ex. O at 2; Ex. 32 at 1.<sup>9</sup> In an email to Brabrand, Corbett Sanders wrote that the Board and FCPS “needed to be explicit in how we are going to address the underrepresentation” of Black and Hispanic students. Ex. 36 at 3–4. And at a June 18 Board meeting, Keys-Gamarra said “in looking at what has happened to George Floyd, we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J.” Ex. 5 at 6.

25. In the summer of 2020, Keys-Gamarra, Brabrand, Bonitatibus, and Shughart all attended at least one meeting of a state-level task force on diversity, equity, and inclusion at

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protests in Fairfax County. *See* <https://patch.com/virginia/reston/hundreds-gather-outside-fairfax-police-hq-peaceful-protest> (last visited Dec. 2, 2021).

<sup>9</sup> This brief cites many communications between Board members, Board members and FCPS staff, and FCPS staff among themselves. Most of these are not offered for the truth of the matters asserted, but to show the intent or state of mind of relevant individuals. *See* Fed. R. Evid. 801(c)(2). In any event, communications of Board members and FCPS officials acting in their capacity as employees are not hearsay under Federal Rule of Evidence 801(d)(2)(D). *See Kitzmiller v. Dover Area Sch. Dist.*, No. 04CV2688, 2005 WL 4147867, at \*2 (M.D. Pa. Sept. 22, 2005).

Governor's Schools. Answer ¶ 39; Ex. 44 (Shughart Dep. 68:3–15). The task force discussed “solutions” for admissions to Virginia's Governor's Schools. Ex. 19 at 1. Among the solutions discussed was a potential state plan to require each school's diversity to be within 5% of the system it represents within four years. *Id.*

26. Brabrand testified that he “perceived that there was State-level dynamics, one, reflected by the October 1 report, and, two, by the Secretary of Education's task force that simple status quo, a report with just, we're just doing the same thing we've always done was not going to be received well.” Ex. 43 (Brabrand Dep. 55:6–56:9). Corbett Sanders and Omeish stressed the reporting deadline in emails. Ex. 16 at 1; Ex. 26 at 1.

27. FCPS staff developed a proposal for a “Merit Lottery” for TJ admissions, which they presented to the Board on September 15. Ex. 7. The proposal stated that TJ “should reflect the diversity of FCPS, the community and Northern Virginia.” *Id.* at 3.

28. The proposal discussed the use of “regional pathways” that would cap the number of offers each region in FCPS (and the other participating jurisdictions) could receive. *Id.* at 12–16. It included the results of Shughart's modeling, Ex. 44 (Shughart Dep. 109:5–21), which showed the projected racial effect of applying the lottery with regional pathways to three previous TJ classes, Ex. 7 at 18–20. Each of the three classes would have admitted far fewer Asian-American students under the proposed lottery system. *Id.*

29. At an October 6 Board work session, FCPS staff proposed using a holistic review to admit the top 100 applicants, but otherwise retain the lottery and regional pathways. Ex. 46 at 11–12. The presentation introduced consideration of “Experience Factors,” and the presentation noted as an “advantage” of the proposal that it “statistically should provide some increase in admittance for underrepresented groups.” *Id.* at 9, 12, 14.



30. The Board also took several votes, which it typically does not do during work sessions. Answer ¶ 33. One vote unanimously directed Brabrand to eliminate the TJ admissions examination. Another required that the diversity plan submitted to the state “shall state that the goal is to have TJ’s demographics represent the NOVA region.” Ex. 3 at 3. The public description of the work session did not provide notice that votes would be taken, Ex. 48, and no public comment was permitted before either vote. Answer ¶ 33.

31. During closed session on October 6, staff presented to the Board the details of the revised merit lottery proposal. This included a points system, with points for: GPA, a Student Portrait Sheet, a Problem Solving Essay, and various “Experience Factors,” including attendance at an “underrepresented” middle school. Ex. N (Shughart Dep. 150:4–152:12 & Dep. Ex. 12).

32. After the work session, Brabrand emailed Shughart stating that Board members sought modeling to determine whether points for experience factors would “change who got in.” *Id.* (Shughart Dep. at 156:1–17 & Dep. Ex. 13). FCPS staff thereafter discussed tweaks to the scoring system—particularly the weighting of the Experience Factors. Shughart sought a review of the weighting to determine whether it “would be enough to level the playing field for our historically underrepresented groups.” Asian-Americans are not among this group, while Black and Hispanic students are. Ex. N (Shughart Dep. 138:2–20; 146:2–5).

33. In response to Shughart, Lidi Hruda—director of FCPS’ Office of Research and Strategic Improvement, *see* Ex. N (Shughart Dep. 137:1–18)—wrote that certain parts of the application process had “historically favored White and Asian applicants,” so “only the Experience Factors” can “bring more diversity into play and acceptance of historically underrepresented students.” *Id.* (Shughart Dep. 136:11–137:9 & Dep. Ex. 11 at 6).

34. At the October 8 regular Board meeting, by a 6-6 vote, the Board rejected a motion

that would have directed Brabrand to “engage stakeholders regarding changes to TJ admissions for the 2021 freshman class prior to bringing the updated plan to the Board in December” and “allow for more thorough community input and dialogue on TJ admissions.” Ex. 4 at 4–5.

35. Consistent with this vote, multiple Board members expressed concern with the speed of the process and the adequacy of public engagement. Tholen wrote in her October newsletter to constituents that “the outreach to date has been one-sided and did not solicit input from all of our communities.” Ex. 29 at 7. Meren wrote in an October 6 email that she was “not okay with the rushed situation we are in.” Ex. 41 at 1. And Sizemore Heizer wrote on October 4 that “personally I think we need to wait to implement anything til [sic] next school year.” Ex. 28

36. Beginning in November, FCPS staff presented an entirely holistic plan for the Board to consider alongside the revised merit lottery. Exs. 2 & 6.

37. Board discussion of the new holistic plan was originally scheduled for November 17, but Corbett Sanders and Derenak Kaufax complained to Brabrand via email that they had only received the white paper containing analysis and modeling the night before. Ex. 25; Ex. 20 at 1. Accordingly, the discussion was postponed until December 7, when staff presented it to the Board alongside the revised merit lottery. Exs. 2 & 6. The holistic plan retained the use of regional pathways, which capped the number of offers from each region. Ex. 6 at 12–14.

38. Following the December 7 work session, Board members exchanged several draft motions in anticipation of the December 17 regular meeting. *See* Ex. 17 at 1, Exs. 12, 18. However, on December 16, Keys-Gamarra emailed Brabrand to express concern that there were “no posted motions for us to vote on.” Ex. 21. McLaughlin wrote that “it is unacceptable that no motions/amendments/follow-ons were posted (nor provided to the full Board) until 4:30pm, which

was 30 minutes before the Board went into Closed Session.”<sup>10</sup> Ex. 24.

39. At the December 17 meeting, the Board voted down the revised merit lottery proposal, 4-8. Ex. 1 at 4. The Board ultimately voted 10-1-1 (with McLaughlin abstaining and Anderson, who had supported the lottery, voting no) for a version of the proposed holistic plan. *Id.* at 4–5. The Board’s enacted plan rejected the proposed regional pathways in favor of guaranteed admission for 1.5% of each eighth grade class. *Id.* Because it was a variation on staff’s proposed holistic plan, the public did not see the 1.5% plan until motions were posted just before the Board meeting.

40. Board member communications show a consensus that, in their view, the racial makeup of TJ was problematic and should be changed. Ex. O at 2 & Ex. 32 at 1 (Corbett Sanders); Ex. 5 at 6 (Keys-Gamarra); Ex. 40 at 1 (Cohen); Ex. 49 at 1. Ex. 61 at 1 (Anderson); Ex. 30 at 6 (Tholen); Exs. 13 & 36 (Omeish); Ex. 37 (Sizemore Heizer); Ex. 15 (Petarsky); Ex. 30 (McLaughlin).

41. Board member text messages show that some members perceived anti-Asian American sentiment in the process to change admission. Exs. J & L. Some Board member communications expressly acknowledge that the admissions changes would discriminate against Asian-American students. Ex. J.

42. Some Board members also expressed the belief that the process of revising TJ admissions had been shoddy and rushed along—with McLaughlin writing in emails that “this is not how the Board should conduct its business” and “[i]n my 9 years, I cannot recall a messier execution of Board-level work.” Exs. 22 & 24. In an email after the final vote, she said she had

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<sup>10</sup> McLaughlin said much the same thing in the December 17 meeting. *See* [https://www.youtube.com/watch?v=1EjeA3EUzoY&ab\\_channel=FairfaxCountyPublicSchools](https://www.youtube.com/watch?v=1EjeA3EUzoY&ab_channel=FairfaxCountyPublicSchools) (at 2:17:02) (last visited Dec. 2, 2021).

abstained largely because of the substandard process. Ex. 24.

43. After the vote, several Board members were not sure whether the 1.5% guarantee would be based on the school a student actually attended or the one she was zoned to attend. Exs. 8, 9, 11. Brabrand insisted that the Board had voted for attending school, which produced the “geographic distribution the Board wanted.” Ex. 9 at 1.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment “is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *ACLU v. Mote*, 423 F.3d 438, 442 (4th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). “A genuine issue of material fact is one ‘that might affect the outcome of the suit under the governing law.’” *Metric/Kvaerner Fayetteville v. Fed. Ins. Co.*, 403 F.3d 188, 197 (4th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248).

### **ARGUMENT**

#### **I. The Coalition Has Standing To Represent Its Members**

An association may sue on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); *see also Md. Highways Contractors Ass’n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991). The Coalition satisfies these requirements.

The Coalition is a membership organization with more than 200 members. Nomani Dec. ¶¶ 6, 13. Its leadership and core teams chose to pursue this case by unanimous consensus. *Id.* ¶¶ 47. It

has members with children in seventh and eighth grade who have applied, or plan to apply, to TJ. Gupta Dec. ¶¶ 3, 9, 11; McCaskill Dec. ¶¶ 3, 6, 8; Jackson Dec. ¶¶ 3, 5–6, 8. These members would have standing to sue in their own right because the challenged policy renders their children unable to compete on a level playing field for a racial purpose. *See infra* Part I.B.1.; *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *Boyapati v. Loudoun Cty. Sch. Bd.*, No. 1:20-cv-01075, 2021 WL 943112, at \*6 (E.D. Va. Feb. 19, 2021).

The remaining *Hunt* factors are also not in dispute. The Coalition was formed precisely to oppose the Board’s effort to change admissions at TJ. Nomani Dec. ¶ 5. And because the Coalition seeks only prospective injunctive relief, individual participation of members as parties is not necessary. *United Food and Com. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996); *see also Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-CV-954, 2018 WL 4688388, at \*5–6 (M.D.N.C. Sept. 29, 2018). In short, there is no dispute of material fact on the Coalition’s standing to bring this action on behalf of its members.

## **II. The Board’s Undisputed Actions Violated the Equal Protection Clause**

Throughout this process, Board members and high-level FCPS officials were remarkably honest about their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school. The only way to accomplish their goal to achieve racial balance was to decrease enrollment of the only racial group “overrepresented” at TJ—Asian Americans. Rather than using an explicit racial quota, the Board employed proxies that disproportionately burden Asian-American students. It is no surprise that Asian Americans received far fewer offers to TJ after the Board’s overhaul.

A case like this is the reason strict scrutiny applies to 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 record leaves no doubt the Board harbored such a purpose. Strict scrutiny therefore applies, and the Board cannot show that its actions meet this most demanding standard of judicial scrutiny. Therefore, the Coalition is entitled to summary judgment on its equal protection claim.

#### **A. Standard of Decision**

Determining racial purpose “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Relevant factors include: (1) the “impact of the official action;” (2) the “historical background of the decision;” (3) the “specific sequence of events leading up to the challenged decision;” and (4) the “legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 266–68. Impermissible racial intent need only be a “motivating factor”—it need not be “the ‘dominant’ or ‘primary’ one.” *Id.* at 265–66. And the Board members need not harbor racial animus to act with discriminatory intent. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016). To trigger strict scrutiny, the Board need only pursue a policy “at least in part ‘because of,’ not merely ‘in spite of,’ [the policy’s] adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Once strict scrutiny applies, the burden shifts to the Board to prove that the changes are narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). “This most exacting standard ‘has proven automatically fatal’ in almost every case.” *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 316 (2013) (Scalia, J., concurring) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring)).

**B. The Board's Admissions Changes Were Motivated by a Racial Purpose**

Here, no dispute of material fact exists regarding any of the *Arlington Heights* factors—nor as to the ultimate question that the Board acted with discriminatory intent.

**1. The Board's actions have had—and will have—a significant disparate impact on Asian-American applicants to TJ**

Under *Arlington Heights*, disparate impact is the starting point for determining whether the Board acted with discriminatory intent. By any measure, the Board's overhaul of TJ admissions has had, and will have, a substantial disparate impact on Asian-American applicants to TJ.

**a. A before-and-after admissions data comparison demonstrates a clear impact against Asian-American students**

A simple comparison of publicly available data for the Class of 2025 with earlier classes tells much of the story. As depicted in the table below,<sup>11</sup> the number and proportion of Asian-American students offered admission to TJ plummeted following the challenged changes.

Class	Offers to Asian-American students	Asian American proportion of offers (rounded)
2025	299	54%
2024	355	73%
2023	360	73%
2022	316	65%
2021	367	75%
2020	335	69%

This is more than sufficient for the Court to weigh the first *Arlington Heights* factor in favor of finding of discriminatory intent. The proper method for determining the “impact of the official action,” 429 U.S. at 266, is a simple before-and-after comparison. *See McCrory*, 831 F.3d at 231

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<sup>11</sup> Source: Exs. 50–55.

(finding impact sufficient to support an inference of discriminatory intent where “African Americans disproportionately used each of the removed mechanisms” to vote); *see also Boyapati*, 2021 WL 943112, at \*8; *Ass’n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, No. 8:20-02540-PX, 2021 WL 4197458, at \*16 (D. Md. Sept. 15, 2021).

**b. The 1.5% middle school allocation disparately harms Asian-American students**

But there is much more evidence of disparate impact here. The undisputed evidence demonstrates precisely how the Board’s actions *caused*—and will continue to cause—such a substantial racial impact. Namely, the Board instituted a system that does not treat all applicants to TJ equally. *Cf. Ass’n for Educ. Fairness*, 2021 WL 4197458, at \*16–17 (noting that MCPS’ alleged use of “peer grouping” and “local norming” in magnet program admission disparately impacted higher-scoring Asian-American students).

As explained above, the new process sets aside seats for students at each middle school amounting to 1.5% of the school’s eighth-grade class. The highest-evaluated students at each school—so long as they meet the minimum admissions requirements—gain admission to TJ. Stipulated Facts ¶¶ 13–14. Those applicants who do not attain one of the allocated seats at their school are relegated to compete for about 100 total unallocated seats. Stipulated Facts ¶ 14. The set-aside plainly harms students who attend schools with proportionately more students interested in and eligible for TJ admissions. Ex. N (Shughart Dep. 170:13–176:17) (admitting that applicants from Carson, which had 400 eligible students and 286 TJ applicants (231 of whom were Asian American) for the Class of 2024, would have faced stiffer competition for the school’s allocated seats under the challenged plan than Whitman’s 19 applicants for its allocated seats). Not coincidentally, those schools are the ones disproportionately responsible for sending Asian-American students to TJ.



The 1.5% set-aside effectively targets students at the six schools previously most likely to send Asian-American students to TJ. *See supra* Undisputed Facts ¶ 19. Five of these six schools (all but Frost) had the highest proportions of students eligible to apply among FCPS middle schools. Ex. N (Shughart Dep. 173:21–174:10 & Dep. Ex. 17). The racial effect of the seat guarantee is clear—as the tables in the following section show, for both the Classes of 2024 and 2025, far more applicants from these schools were Asian American than the proportion of Asian Americans in the applicant pool. The set-aside disproportionately forces Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools.

**c. The holistic review system for the final unallocated seats exacerbates the disparate impact to Asian-American students**

Yet the set-aside is only part of the equation. When applicants outside the top 1.5% are thrown into the unallocated pool, students are again treated unequally. This became publicly known when FCPS announced consideration of Experience Factors in the holistic evaluation. One of these factors is whether a student attends a middle school deemed historically underrepresented at TJ. Unsurprisingly, none of the six major FCPS feeder schools qualify, so students at these schools are placed at a significant disadvantage in the unallocated pool compared to their peers at underrepresented schools.

Moreover, the Experience Factors are not merely ephemeral tiebreakers, but have discrete point values assigned as part of the holistic evaluation. *Compare Grutter v. Bollinger*, 539 U.S. 306, 337 (2003), with *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (noting the difference between a holistic review involving “individualized consideration to applicants of all races” and one that awarded points based on a “single characteristic” that “ensured a specific and identifiable contribution to a university’s diversity”). As Shughart testified, a student’s GPA is worth 300

points in the evaluation, with each GPA point being a quarter of that total. Ex. N (Shughart Dep. 162:1–163:6, 164:10–165:15).<sup>12</sup> Applicants may then earn a maximum of 300 points each for the Student Portrait Sheet and the Problem-Solving Essay, accounting for 600 additional base points. *Id.* (Shughart Dep. 162:11–163:20). The “Experience Factors” allow an applicant to earn up to 225 additional points—90 for a student who qualified for free or reduced-price lunch in the past three years, 45 for receiving English Language Learner services, 45 for special education students, and 45 for attending an underrepresented middle school. *Id.* (Shughart Dep. 163:7–164:6).<sup>13</sup> Thus, an otherwise similarly situated student with a 3.5 GPA who attends a school designated as “underrepresented” would actually receive more points than a student at a different middle school with a 4.0 GPA—all else being equal.<sup>14</sup> And as Shughart testified, each point makes a difference in a student’s chances for admission. Ex. N. (Shughart Dep. 159:5–11, 159:18–160:8).

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<sup>12</sup> Shughart’s testimony indicates that each GPA point is worth one quarter of the total points available. That is consistent with a version of the rubric Shughart considered in November, which explicitly noted that each GPA point was worth 50 admissions points. Ex. N (Dep. Ex. 14). Thus, under the 300-point maximum actually implemented, a student with a 4.0 GPA would receive 300 out of a possible 300 points, a student with a 3.0 GPA would—if he were eligible to apply—receive 225 points, and so on.

<sup>13</sup> The Board produced the scoring rubric Shughart testified to, but it appears to have been attached to a privileged document that was withheld. *See* Ex. B. Shughart confirmed the correct point weightings at his deposition, as noted above.

<sup>14</sup> The student with the 3.5 GPA would receive 37.5 fewer GPA points than the student with the 4.0 (263.5 versus 300), but would receive 45 “Experience Factor” points for attending an underrepresented school, resulting in 8.5 more total points.

The tables below<sup>15</sup> show the extent of the adverse impact on Asian-American students.

Class	Total offers extended	Asian-American offers from top six feeder schools	Total offers from top six feeder schools	Asian-American offers from underrepresented schools (FCPS only)	Total offers from underrepresented schools (FCPS only)
2025	550	102	132	29	80
2024	486	204	243	5	18

Class	Total applicants <sup>16</sup> from top six feeder schools	Asian-American applicants from top six feeder schools	Proportion of applicants from top six feeder schools who were Asian American	Proportion of all applicants who were Asian American
2025	912 (829)	596 (550)	65.4% (66.3%)	50.6% (48.6%)
2024	829 (808)	601 (594)	72.5% (73.5%)	56.0% (57.7%)

Class	Total applicants from underrepresented schools (FCPS only)	Asian-American applicants from underrepresented schools (FCPS only)	Proportion of applicants from underrepresented schools who were Asian American (FCPS only)	Proportion of all applicants who were Asian American
2025	572 (473)	128 (113)	22.4% (23.9%)	50.6% (48.6%)
2024	388 (366)	111 (108)	28.6% (29.5%)	56.0% (57.7%)

The first table shows that students from the six feeder schools received only *half* as many offers for the Class of 2025 as they had for the Class of 2024. And while slightly more Asian-American students from underrepresented FCPS middle schools received offers the latter year, the increase

<sup>15</sup> Sources: Individual data (Ex. A), Ex. N (Shughart Dep. Exs. 15 & 16), & Exs. 50 & 51.

<sup>16</sup> The numbers not in parentheses count all applicants, regardless of eligibility or later decision to withdraw. Those in parentheses count only the applicants who did not withdraw their application, and, for the Class of 2025, only those who were eligible to apply.

did not even put a dent in the drastic impact on the six feeder schools. The second and third tables show that applicants from the six feeder schools were disproportionately Asian American in both years, but Asian Americans were disproportionately *underrepresented* among applicants from FCPS middle schools receiving the 45-point underrepresented school bonus.

Any way one slices the admissions data, it is clear that Asian-American students are disproportionately harmed by the Board's decision to overhaul TJ admissions. And in the future, Asian-American applicants will be disproportionately deprived of a level playing field in competing for both allocated and unallocated seats. The first *Arlington Heights* factor weighs heavily in favor of a finding of discriminatory intent.

**2. The historical background leading up to the Board's decision shows the changes were motivated by an impermissible racial purpose**

Placing the Board's actions in historical context leaves little doubt that its decision to overhaul the TJ admissions process was racially motivated. In a November 2020 white paper presented to the Board, staff noted "over the past ten years, the admissions process has undergone a series of changes that were intended to impact issues of diversity and inclusion" but "these changes have not made a significant impact on the diversity of the applicants or admitted students." Ex. 42 at 4.<sup>17</sup> The supposed ineffectiveness of this decade-long tinkering provides the scaffolding for understanding how 2020 events jumpstarted the Board's drastic admissions changes.

There were two specific triggering events that accelerated the Board's process and timeline. *First*, the Virginia General Assembly passed a budget bill in March that required Governor's Schools to submit a report to the Governor on the existence of and progress towards diversity goals, including a description of "admission processes in place or under consideration that promote

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<sup>17</sup> Not all of these changes were made by the Board. Ex. 44 (Shughart Dep. 32:11–35:12); Ex. 42 at 4–5.

access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students.” *See supra* Undisputed Facts ¶ 20. And *second*, the murder of George Floyd in Minneapolis on May 25, 2020, was shortly followed by the release of the Class of 2024 admissions data on June 1, showing that the number of Black students admitted was too small to be reported. *See* Ex. 51.

The Board and FCPS reacted by jumpstarting TJ admissions changes. On June 7, Bonitatibus sent a statement to the TJ community that referenced the George Floyd murder and lamented that TJ does “not reflect the racial composition in FCPS,” specifically noting the number of Black and Hispanic students TJ would have if it so reflected. Ex. 45 (Dep. Ex. 2). Around the same time, Corbett Sanders in a series of emails stated that she was “angry and disappointed” about the TJ admissions results and expected “intentful action forthcoming,” Ex. 32 at 1, because “in seeing the numbers when they were released, we know that the current approach is unacceptable,” Ex. O at 2. She relayed a similar message to Brabrand, writing that the Board and FCPS “needed to be explicit in how we are going to address the under-representation” of Black and Hispanic students. Ex. 36 at 3–4. Cohen told a constituent that the number of Black students admitted was “completely unacceptable” and that the Board was “committed to examining and bettering” the admissions process. Ex. 40 at 1. And later that month, Keys-Gamarra said at a Board meeting “in looking at what has happened to George Floyd, we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J.” Ex. 5 at 6.

Over the summer of 2020, Keys-Gamarra, Brabrand, and Shughart participated in state-level task force meetings on admissions to Governor’s Schools, Complaint ¶ 39; Answer ¶ 39; Ex. 44 (Shughart Dep. 68:3–15), after which Brabrand told the Board there was talk about the state

creating a four-year timeline for diversity Governor’s schools to be within 5% of diversity in their local districts. Ex. 19 at 1. The looming specter of a Richmond takeover pushed the Board to act quickly to change TJ admissions with an explicit eye towards its racial composition. As Brabrand testified, he “believed this October 1 requirement to submit a report meant we needed to look at our admissions process at TJ.” Ex. 43 (Brabrand Dep. 46:10–15); *see also id.* (Brabrand Dep. 53:17–54:4) (there was no specific timeline to address TJ admissions before the reporting requirement). In August, he told Corbett Sanders via email that “whatever the board decides to do or not do in September will ultimately influence what the Governor and the Secretary of Education decide in January.” *Id.* (Dep. Ex. 3). By this, Brabrand meant potential state legislative or administrative action in 2021 if the Board failed to make adequate changes. *See id.* (Brabrand Dep. 55:6–56:9) (“State-level dynamics” meant that the “status quo . . . was not going to be received well”). Omeish summed it up best in a September email, writing that she had “come to understand that the Virginia Department of Education plans to intervene if we do not.” Ex. 26 at 1.

In short, the impetus to overhaul TJ admissions came from several sources, *all* of which confirm that the Board and high-level FCPS actors “set out to increase and (by necessity) decrease the representation of certain racial groups [at TJ] to align with districtwide enrollment data.” *Ass’n for Educ. Fairness*, 2021 WL 4197458, at \*17. Board members promised action on TJ admissions that would specifically address the school’s racial makeup. After the summer state task force, FCPS officials scrambled to meet a perceived deadline from Richmond to overhaul admissions with race in mind. The background of the decision weighs strongly in favor of a finding of a discriminatory motive.

**3. The sequence of events leading up to the Board’s decisions and its departure from typical procedure show the Board was acting for an explicit racial purpose**

*Arlington Heights* requires consideration of “the ‘specific sequence of events leading up to

the challenged decision.” *McCrory*, 831 F.3d at 227 (quoting *Arlington Heights*, 429 U.S. at 267). “In doing so, a court must consider ‘[d]epartures from the normal procedural sequence,’ which may demonstrate ‘that improper purposes are playing a role.’” *Id.* (quoting *Arlington Heights*, 429 U.S. at 267). Here, there are several indications that (1) the process for changing TJ admissions was unreasonably hurried and (2) there was a noticeable lack of public engagement and transparency—even among Board members. While the Board does not appear to have broken any procedural rules as such, the evidence shows that, for such a significant set of actions, the procedure was remarkably rushed and shoddy. All this suggests that the Board sought to move quickly because, as Board member Omeish put it in a November email, the Board was “currently incurring reputational/political risks” meaning that “now is better timing.” Ex. 14 at 3.

After they participated in the state task force, Brabrand, Shughart, and other staff developed a “Merit Lottery” proposal for TJ admissions. Brabrand presented the proposal at a Board work session on September 15, 2020. Ex. 7. The presentation detailed a proposal to select TJ students via a lottery with “regional pathways” for five separate FCPS regions and the remaining jurisdictions that TJ serves. *Id.* at 12–16. The presentation focused on the projected racial effect, presenting the results of modeling Shughart had run, *see* Ex. 44 (Shughart Dep. 109:5–21), to demonstrate the effect of applying the lottery to three previous TJ classes—namely, a drastic drop in Asian-American students at TJ, Ex. 7 at 18–20. Brabrand’s PowerPoint indicated that a final decision on implementing the lottery could be made as early as the October 8, 2020, regular Board meeting. *Id.* at 22.

The Board threw a wrench in these plans. Three days after the September 15 work session, Corbett Sanders told Brabrand in an email that “the plan released on Monday has caused confusion in the community because of the over-reliance on the term lottery vs. merit.” Ex. 16 at 2. The

confusion wasn't limited to the public—McLaughlin reported that even *she* did not receive the proposal until two hours before the work session and there was no prior stakeholder input. Exs. E, F, G. Once it became clear that most of the Board members were opposed to a lottery for various reasons, Brabrand told the Board on September 27 that staff would prepare and present an alternative admissions proposal. Ex. 16 at 7. Corbett Sanders expressed hope that, unlike with the first proposal, “[i]deally we will be able to look at the plan in advance of the meeting.” *Id.*

There was also the issue of the October state reporting deadline. Corbett Sanders emailed Brabrand on September 19 that “it is not the timing of the work session that is energizing the community. It is the timing of looking at TJ.” *Id.* at 1. She suggested that “we make it clear that we are responding to a statutory mandate.” *Id.* And in an earlier email to Brabrand, she suggested that he “[c]larify that we have a statutory requirement to submit a plan to the state by 9 October.”<sup>18</sup> Ex. 16 at 2. Yet other Board members questioned whether the Board had to overhaul admissions in such a short timeframe—McLaughlin told a constituent that “Brabrand has created a false urgency that FCPS must drastically overhaul the TJ Admissions process within a three week decision-making window.” Ex. 23 at 2; *see also* Ex. 27 (Tholen forwarded to Board colleague Pekarsky an email from a member of the community who said she had talked to the Virginia Department of Education and was told that the plan submitted to the state could be “aspirational” and “general” and there was “no mandate for Governor’s Schools to produce a more diverse population”); Ex. C (October 8 text from McLaughlin to Board member Rachna Sizemore Heizer said that Brabrand “incorrectly told the Board (and the public) that we needed to make a rushed/unvetted decision by October 12th”).

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<sup>18</sup> Brabrand wrote in an email that he sought and received from the Virginia Secretary of Education an extension of this deadline until October 9. Ex. 39 at 1.



Nevertheless, the Board pressed on. At an October 6 work session, the Board viewed a presentation from Brabrand that proposed a revised merit lottery—it would have set aside seats for the 100 highest-evaluated applicants and selected the remaining seats via lottery among the students who met the minimum requirements after holistic review.<sup>19</sup> Ex. 46 at 11–12. Yet the Board also took several votes at the work session, something it has acknowledged it does not typically do. *See* Answer ¶ 33. Among these, it unanimously voted to remove the longstanding admissions exam without any public notice that such a vote would occur. Ex. 3 at 2; Ex. 48.<sup>20</sup> Then, while some Board members were expressing concern at a process that was moving too fast, Ex. 28, the Board at its regular meeting two days later rejected a motion that would have directed Brabrand to engage stakeholders and allow for more community input before presenting a final plan. Ex. 4 at 4–5. Tholen lamented to her constituents that the motion had failed and that “the outreach to date has been one-sided and did not solicit input from all of our communities.” Ex. 29 at 7.

After the October 6 work session, with support for any sort of lottery waning,<sup>21</sup> the Board sought an entirely holistic proposal. Ex. 42 at 41 (listing as a “next step” for staff<sup>22</sup> to “[b]ring to

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<sup>19</sup> The Board received the details of the holistic scoring method proposed along with this “Hybrid Merit Lottery” proposal in closed session, before the main presentation was presented in public view. Ex. N (Shughart Dep. 149:17–150:13 & Dep. Ex. 12). The proposal included 50 bonus points for attendance at an underrepresented middle school in a system with 1,100 base points.

<sup>20</sup> Notably, in response to Coalition leader Asra Nomani’s later concern that adoption of a new admissions process might be voted on at a work session too, Board member Tholen said that the Board was trying to “move away” from work session votes and that she hoped there wouldn’t be such a vote. Ex. 47.

<sup>21</sup> A text message between Board members McLaughlin and Sizemore Heizer indicates that there never was a majority on the Board in favor of a lottery at any time. Ex. H As the next subsection describes, Board members had varying reasons for rejecting both presented forms of lottery admissions.

<sup>22</sup> Shughart explained that “next steps” were “questions that board members proposed to staff to follow up on.” Ex. 44 (Shughart Dep. 97:17–98:5).

the board a holistic admissions approach that does not contain a lottery as an option for the board to consider as an alternative plan”). On November 16, FCPS staff released a white paper detailing a holistic option alongside the hybrid merit lottery. Ex. 42. The white paper included voluminous racial modeling and discussion of efforts to obtain racial diversity at TJ. *Id.* at 4–5, 25–31. These plans were initially to be discussed at a November 17 work session, but multiple Board members protested that the white paper was posted far too late for proper consideration. Ex. 25; Ex. 20 at 1.

The TJ discussion was ultimately postponed until December 7, when Brabrand presented the hybrid merit lottery and the new holistic plan at another work session. Exs. 2 & 6. The holistic method involved consideration of GPA, the Student Portrait Sheet, the Problem Solving Essay, and the Experience Factors, including attendance at an underrepresented middle school, with regional caps as in the Merit Lottery. Ex. 6 at 12–14. Thereafter, Board member confusion persisted—members were exchanging draft motions almost right up until the Board met to make a final decision on December 17. *See* Ex. 17 at 1, Exs. 12, 18. In the early morning of December 16, Keys-Gamarra emailed Brabrand and expressed concern that there were “no posted motions for us to vote on.” Ex. 21. McLaughlin chastised the Board both during the December 17 meeting and afterward, noting the failure to post any motions to the public or for the full Board until a half hour before the closed session began. Ex. 24.

At the December 17 meeting, the Board voted down the hybrid merit lottery proposal by a vote of 4-8. Ex. 1 at 4. Then it voted on a motion to direct Brabrand to implement the holistic proposal, except replacing the regional pathways with guaranteed admission to “the top 1.5% of the 8th grade class at each public middle school who meet the minimum standards.” *Id.* at 4–5. The 1.5% plan had not been presented publicly in any meeting before it was voted on. The vote passed by a margin of 10-1-1, with Anderson (who had voted for the lottery) voting no and

McLaughlin abstaining. *Id.* at 5. McLaughlin later wrote that she abstained at least in part because of the problematic process—she later wrote that “this is not how the Board should conduct its business” and that she could not “recall a messier execution of Board-level work” in her nine years on the Board. Exs. 22 & 24.

Even after the vote, Board members were not sure whether the top 1.5% was to be selected by a student’s *base school* or *attending school*—a question with significant ramifications because some FCPS schools have Advanced Academic Program (AAP) Level IV centers that draw in students from other middle school zones to attend them. *See* Ex. 10; Ex. 43 (Brabrand Dep. 134:8–135:5). Multiple Board members questioned staff on this topic after the Board voted to implement the holistic plan. Exs. 8, 9, 11. But Brabrand insisted that the Board had voted for *attending school*, which “represented the geographic distribution the Board wanted.” Ex. 9 at 1.<sup>23</sup> In the rush to overhaul admissions, some Board members were confused about what they had done.

All in all, the evidence shows the process was rushed, not transparent, and more concerned with simply doing *something* to alter the racial balance at TJ than with public engagement. In weighing this factor in favor of discriminatory intent, the Fourth Circuit in *McCrary* specifically noted the testimony of “legislators” who “expressed dismay at the rushed process.” 831 F.3d at 228. “This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny.” *Id.* The panel made sure to note that “unusual procedures” can weigh in favor of a finding of discriminatory intent even when the legislative body breaks no rules. *Id.* Here, the decision to vote on eliminating the TJ admissions examination at a work session without public notice was one

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<sup>23</sup> Brabrand noted that if base schools were used, “some base schools [sic] kids would never have any kids who physically attend the school get in.” Ex. 9 at 1. An email from Shughart demonstrated this point using AAP center school Carson and non-center school Franklin, which saw many of its zoned students attend the Center at Carson. Ex. 11 at 1–2.

such “unusual” procedure. And the same can be said for the lack of public engagement—the Board held full public meetings on renaming Mosby Woods Elementary School and Lee High School, *see* Exs. 59 & 60, but the public did not even see the proposed plan that the Board actually adopted for TJ admissions until 30 minutes before the final meeting. Such a process supports an inference of improper motive and tilts this factor in favor of a finding of discriminatory intent.

**4. The legislative and administrative history—particularly the comments of Board members and high-level FCPS employees--demonstrate the changes were motivated by a racial purpose**

Finally, “the legislative history leading to a challenged provision ‘may be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.’” *McCrorry*, 831 F.3d at 229 (quoting *Arlington Heights*, 429 U.S. at 268). Here, emails and text messages between Board members and high-ranking FCPS officials leave no material dispute that—at least in part—the purpose of the Board’s overhaul of admissions was to change the racial makeup to TJ to the detriment of Asian-Americans.

Most obviously, the discussion of TJ admissions changes was infected with talk of racial balancing from its inception. This was apparent from the first proposal FCPS staff released after Brabrand attended the state task force and told the Board about a potential state plan to require demographic balance at Governor’s Schools. Ex. 19 at 1. The second slide of the initial merit lottery presentation, entitled “Leading with Equity at the Center,” declared that TJ “should reflect the diversity of FCPS, the community and Northern Virginia.” Ex. 7 at 3. The subsequent slides—comparing historical TJ admissions data by race with the racial makeup of FCPS and focusing on the racial effect of implementing a lottery—make clear that “diversity” primarily meant racial diversity. *Id.* at 4–5, 8–10, 18–20.<sup>24</sup>

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<sup>24</sup> *See also* Ex. 44 (Shughart Dep. 101:22–105:7) (acknowledging that “diversity” includes racial diversity and that TJ previously did not reflect the diversity of Northern Virginia).

While a majority of the Board did not support Brabrand's lottery proposal, the dissenters nonetheless *embraced* racial balancing. For example, McLaughlin, who vehemently opposed the lottery, proposed her own plan based on her experience as a university admissions officer. Ex. 30 at 1–3. Referencing that “[t]he Supreme Court has ruled that Diversity is a ‘compelling state interest,’” *id.* at 2, her proposal was designed to mimic those universities that use holistic admissions to “ensure their ACCEPTED Student Pools reflect both the demographic diversity and the high-achievement of their APPLICANT Pools.” *Id.* at 1. To “help the Acceptance Pool more closely reflect the Applicant Pool’s demographic diversity,” *id.* at 2–3, the proposal set aside seats for “[d]emographically diverse students.” *Id.* Tholen responded to McLaughlin’s plan with similar skepticism of a lottery, stating that a lottery “seems to leave too much to chance” and asking: “will chance give us the diversity we are after?” *Id.* at 6. In short, some Board members’ opposition to the lottery was at least in part due to a fear that a lottery *might not go far enough* to achieve racial balancing. *See* Ex. D. (McLaughlin text: “Using a lottery means random selection. How does that guarantee an increase in racial/SES diversity?”).

At the next work session on October 6, the Board adopted a resolution requiring that FCPS’ annual diversity report to the state “shall state that the goal is to have TJ’s demographics represent the NOVA region.” *Id.* It passed 11-0-1, with only Meren abstaining.<sup>25</sup> *Id.* This was more than an aspirational goal to be achieved by encouraging Black and Hispanic students to apply to TJ—Board members sought to use geography to obtain their desired racial outcome. Corbett Sanders

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<sup>25</sup> Brabrand’s public-facing email account responded to a parent email on October 8 saying that “[t]he Superintendent and the School Board believe that TJHSST should reflect the diversity of FCPS and our community. We recognize that the admissions process needs to be addressed in a comprehensive way.” Ex. 34 at 3. And although she had abstained from the vote, Meren favorably cited an email that said “[t]he merit lottery proposal is intended to make student body of TJHSST more representative of our county demographics.” Ex. 33.

advised Brabrand in late September that “it will be important to better communicate why a geographic distribution of students across the county will result in a change in demographics to include more students that are FRM [qualify for free or reduced-price meals], ELL [English language learners], black, Hispanic, or twice exceptional.” Ex. 30 at 4. The day before the work session, she emailed a constituent that she was “urging the superintendent to modify his plan to take into account geographic diversity as well as students on Free and Reduced Lunch which should result in greater diversity in the demographics.” Ex. 31 at 1; *see also* Ex. 15 (Corbett Sanders and Petarsky on October 6 saying all agree on the goal of diversity, and specifically that admissions should take into account “inclusion in under-represented populations”). And Sizemore Heizer wrote to Brabrand to suggest that he frame his plan as “increasing diversity through redefining merit.” Ex. 37. Omeish used more aggressive language, writing that she planned to “support the proposal towards greater *equity*, to be clearly distinguished from *equality*.” Ex. 38.<sup>26</sup>

The administrative history concurrent with the legislative history—here, the development of various proposals by FCPS staff—shows that staff did what the Board wanted, and that geographic diversity was understood to be a proxy for race. As early as May 27, 2020, staff sent the Board a proposal to revise TJ admissions to include three separate “pathways” with varying standards. Ex. N (Shughart Dep. 42:12–45:10 & Dep. Ex. 2). Pathway 1 would admit 350 students based on GPA and test scores, while Pathway 2 would admit 100 students based half on GPA and test scores and half on other factors, including the applicant’s zip code and whether he or she was eligible for free or reduced price meals. *Id.* at 6–7. Pathway 3 was designed to admit students

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<sup>26</sup> Omeish also agreed with an FCPS staff member that TJ did not “really have a pipeline issue because we have enough Black and Hispanic 8th grade Level 4 students (the most rigorous program we have in elementary and middle school) to fill an entire TJ class,” so “the best way to create more diversity is to change the admissions process and test specifically.” Ex. 13.

nominated from underrepresented middle schools who hadn't already gained admission. The proposal recommended evaluating these students under the metrics used to select Pathway 2 students because "[u]sing only Pathway 1 options would ensure regional diversity only and not racial/ethnic diversity." *Id.* at 9; *see also id.* (table noting that were three students selected from each underrepresented school using only the Pathway 1 statistics, 27 of those 30 students would have been white or Asian American).

Once the Board expressed dissatisfaction with the initial lottery plan, FCPS staff picked up where it had left off, developing a holistic proposal that uses "Experience Factors," including attendance at an underrepresented middle school. On September 27, Shughart asked Lidi Hruda to review the Experience Factors and "provide us a review of our current weighting and whether or not this would be enough to level the playing field for our historically underrepresented groups." *Id.* (Shughart Dep. 136:11–137:9 & Dep. Ex. 11 at 1). Hruda responded that "[i]t is hard to know what exactly will level the playing field but my gut says that you may need to double all the points (and the total) so the applicants can receive up to 200 points overall for these experience factors." *Id.* (Dep. Ex. 11 at 6).

They left no doubt that race was the primary factor. Hruda wrote that several portions of the TJ application had "historically favored White and Asian candidates," which leaves "only the Experience Factors to help shift the landscape and bring more diversity into play and acceptance of historically underrepresented students." *Id.* A scoring rubric including 200 points for Experience Factors—following Hruda's advice—was presented to the Board at the October 6 closed session before the vote to eliminate the admissions exam. *See id.* (Shughart Dep. 150:4–152:12 & Dep. Ex. 12). After that session, Brabrand emailed Shughart and FCPS Chief Operating Officer Marty

Smith asking “would 200 points change who got in – that is the modeling they<sup>27</sup> are asking about . . . [c]an we go back and look at points – would 200 points be a game changer[?]” *Id.* (Shughart Dep. at 156:1–17 & Dep. Ex. 13). Shughart said he would have to go back and look at old data, but noted that “200 points or 50 points would make a difference. I don’t know how that impacts our diversity.” *Id.* (Dep. Ex. 13 at 1). The undisputed evidence demonstrates that staff took the mandate from the Board and developed a procedure that was meant to disadvantage Asian-American students in service of racial balance.

Board member text messages reinforce the racial motive. In conversations with each other, Omeish and Petarsky recognized that Asian-Americans are “discriminated against in this process,” “there has been an anti [A]sian feel underlying some of this” and that Brabrand had “made it obvious” with “racist” and “demeaning” references to “pay to play,” referring to test prep for the TJ admissions exam. Exs. J & L; *see also* Ex. M (Brabrand “[c]ame right out of the gate blaming” Asian Americans); *Cf.* Complaint ¶ 50; Answer ¶ 50. Petarsky wrote that one of Brabrand’s proposals would “whiten our schools and kick our [sic] Asians. How is that achieving the goals of diversity?” Ex. J. Sizemore Heizer said in a text that Brabrand was “trying to be responsive to the times – BLM and a super progressive board.” Ex. I. Another Board member said in a text “the Asians hate us,” Ex. M, while two Board members acknowledged that Asian Americans are “discriminated against in this process,” Ex. J.

\* \* \*

All of this is far more than usually exists in an *Arlington Heights* record. The *McCrary*

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<sup>27</sup> Shughart “assume[d]” that “they” referred to the Board members. *Id.* (Shughart Dep. 159:7–160:17). That bolsters the obvious inference that the email referred to them, given that the email chain began at approximately 7:00 p.m. on October 6 and the closed session lasted from 5:00 p.m. until 7:15 p.m. *See* Ex. 3 at 1.



court did not consider *any* contemporary comments of legislators in determining whether North Carolina’s omnibus election bill was racially motivated. *See McCrory*, 831 F.3d at 229.<sup>28</sup> It weighed the fourth factor in favor of intent based solely on “the General Assembly’s requests for and use of race data in connection with” passing the law. *Id.* at 230. The Fourth Circuit reasoned that because the legislators sought racial data and then went ahead and enacted provisions that would disproportionately impact Black voters, but not those that would disproportionately impact white voters, the General Assembly acted with discriminatory intent. *See id.* Even aside from all the statements confirming that the Board’s goal was to bring about racial balance at TJ, the Board’s requests for and consideration of racial data would be enough to demonstrate discriminatory intent under *McCrory*. *See* Ex. N (Shughart Dep. Ex. 13 (Board members asking about modeling for holistic process); Ex. 42 at 25–31.

That does not mean “that any member of the [Board] harbored racial hatred or animosity toward [Asian Americans].” *McCrory*, 831 F.3d at 233. Discriminatory intent does not require racial animus. What matters is that the Board acted “at least in part ‘because of,’ not merely ‘in spite of,’ [the policy’s] adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279. That’s the case here—the Board’s policy was designed to increase Black and Hispanic enrollment, which would “(by necessity) decrease the representation” of Asian-Americans at TJ. *Ass’n for Educ. Fairness*, 2021 WL 4197458, at \*17; *see also Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 553 (3d Cir. 2011) (discriminatory intent exists when a facially neutral policy was “developed or selected because it would assign benefits or burdens on the basis of race”); *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) (“[t]o allow

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<sup>28</sup> In that case, the challengers were unable to obtain any communications between legislators or between legislators and staff due to legislative privilege. *N.C. State Conf. v. McCrory*, Nos. 1:13CV658, 1:13CV660, 1:13CV861, 2015 WL 12683665, at \*6 (M.D.N.C. Feb. 4, 2015).

a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because” it is facially race-neutral “is inconsistent with the Supreme Court’s holdings”). Therefore, strict scrutiny applies.

### **C. The Board’s Actions Do Not Satisfy Strict Scrutiny**

The burden then shifts to the Board to demonstrate that actions were narrowly tailored to further a compelling interest. *Adarand*, 515 U.S. at 227. Strict scrutiny applies to facially neutral actions “motivated by a racial purpose or object” in the same manner as when they contain “express racial classifications.” *Miller*, 515 U.S. at 913. For good reason, the Board has not yet argued its actions would satisfy strict scrutiny. They would not.

#### **1. The Board lacks a compelling interest for its race-based decisions**

The Supreme Court has recognized only two interests as sufficiently compelling to justify race-based action—remediating past intentional discrimination and obtaining the benefits of diversity in higher education. *Parents Involved*, 551 U.S. at 720–23. No remedial interest exists here. And in *Parents Involved*, the Court refused to extend the diversity rationale to K-12 schools, writing instead that *Grutter* had “relied upon considerations unique to institutions of higher education,” and that lower courts that had applied it “to uphold race-based assignments in elementary and secondary schools” had “largely disregarded” *Grutter*’s limited holding. *Id.* at 724–25.

The Board’s main problem is its focus on the goal to have TJ reflect the demographics of the surrounding area—described primarily in racial terms. Far from a compelling interest, racial balancing for its own sake is “patently unconstitutional.” *Fisher*, 570 U.S. at 311 (quoting *Grutter*, 539 U.S. at 330). The Board cannot transform racial balancing into a compelling interest “simply by relabeling it ‘racial diversity.’” *Id.* (quoting *Parents Involved*, 551 U.S. at 732 (plurality opinion)). The school districts in *Parents Involved* tried “various verbal formulations” to deflect

from their intent to racially balance schools through race-based transfers. *See* 551 U.S. at 725, 732 (plurality opinion). The Board here did not even bother with such “verbal formulations.” Board members and high-level FCPS actors did not disguise their desire for TJ to represent the racial demographics of Fairfax County or Northern Virginia as a whole. Whether accomplished overtly or via proxies, racial balancing is not a compelling interest.<sup>29</sup>

## **2. The Board’s actions are not narrowly tailored to further any interest other than racial balancing**

Even if the Board could identify a compelling interest that might justify its racially discriminatory changes to the TJ admissions process, it still must prove that the changed admissions policy is “necessary” to accomplish that interest. *Fisher*, 570 U.S. at 312 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)). The plan must be a “last resort” to accomplish the purportedly compelling interest. *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). Yet even Board members thought that perhaps more could be done to encourage racial diversity at TJ short of a discriminatory admissions policy.

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<sup>29</sup> Justice Kennedy’s *Parents Involved* concurrence, which discussed a possible diversity interest for K-12 schools, is (1) not binding and (2) unhelpful to the Board. It is not binding because, “[u]nder *Marks v. United States*, ‘[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Ass’n for Educ. Fairness*, 2021 WL 4197458, at \*18 (quoting *Marks*, 430 U.S. 188, 193 (1977)). “[C]learly the ‘narrowest grounds’ reached by the majority in *Parents Involved* were that the challenged policy had not been narrowly tailored to achieve its stated ends.” *Id.* So Justice Kennedy’s opinion on diversity as a compelling interest is not controlling. *See id.*

But even if it were, that opinion would not help the Board. Justice Kennedy’s opinion countenances generic race-conscious policies like “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” 551 U.S. at 789 (Kennedy J., concurring in part and concurring in the judgment). The Board’s use of a racial proxy to limit enrollment of one racial group at a competitive high school is different in kind. It veers from mere race consciousness or race awareness to the assignment of “benefits or burdens on the basis of race.” *Doe*, 665 F.3d at 553.

Texts between Board members Petarsky and Omeish show they believed that changing the process was secondary to improving outreach and awareness of TJ and implementing universal screening. Ex. K. Omeish said “[w]e could have even kept the tests,” while Petarsky lamented that “[w]e have an application problem. We haven’t bothered to ask why people don’t apply.” *Id.* These steps and others—like further increasing the size of TJ or providing free test prep—could have been implemented before the Board defaulted to a system that does not treat applicants equally in hopes of engineering a particular racial outcome. Since overhauling the process was not the “last resort” for the Board to accomplish its goals, the Board’s actions were not narrowly tailored.

### **III. The Proper Remedy Is Invalidation of the Board’s Actions**

The Fourth Circuit has repeated that “once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, . . . court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs.” *McCrory*, 831 F.3d at 239 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982)). More directly, “the proper remedy for a legal provision enacted with discriminatory intent is invalidation.” *Id.* In this case, that means the ultimate remedy must be an injunction prohibiting the Board and its agents from implementing the challenged actions—including the removal of the admissions exam and the overhaul of the process to include the 1.5% seat guarantee by middle school and consideration of Experience Factors in holistic review.

### **CONCLUSION**

For the reasons stated, the Coalition respectfully asks the Court to grant its motion for summary judgment, enter the declaratory and injunctive relief requested in the Complaint, and grant all other relief to which the Coalition may be entitled.

Dated: December 3, 2021.

Respectfully submitted,

ERIN E. WILCOX\*,  
Cal. Bar No. 337427  
CHRISTOPHER M. KIESER\*,  
Cal. Bar No. 298486  
Pacific Legal Foundation  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747  
EWilcox@pacificlegal.org  
CKieser@pacificlegal.org

*\*Pro Hac Vice*

s/ Alison E. Somin  
ALISON E. SOMIN, Va. Bar No. 79027  
Pacific Legal Foundation  
3100 Clarendon Blvd., Suite 610  
Arlington, Virginia 22201  
Telephone: (202) 557-0202  
Facsimile: (916) 419-7747  
ASomin@pacificlegal.org

GLENN E. ROPER\*,  
Colo. Bar No. 38723  
Pacific Legal Foundation  
1745 Shea Center Dr., Suite 400  
Highlands Ranch, Colorado 80129  
Telephone: (916) 503-9045  
Facsimile: (916) 419-7747  
GERoper@pacificlegal.org

*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the day of December 22, 2021, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendants are registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

s/ Alison E. Somin  
ALISON E. SOMIN, Va. Bar No. 79027  
Pacific Legal Foundation  
3100 Clarendon Blvd., Suite 610  
Arlington, Virginia 22201  
Telephone: (202) 557-0202  
Facsimile: (916) 419-7747  
ASomin@pacificlegal.org  
*Counsel for Plaintiff*

**PRODUCED IN NATIVE FORMAT**

To: Stella Pekarsky



I honestly don't think these plans are where the real problem is-- it's on the school level

It will whiten our schools and kick our Asians. How is that achieving the goals of diversity?



Like the tweaks are more impactful

That's fair

I mean there has been an anti asian feel underlying some of this, hate to say it lol

Of course it is. Which is why I always told people talking about TJ is a stupid waste of tome. It's about making a political point



They're discriminated against in this process too

I know, and Scott has made it obvious

Before he went down this path, I told him to stop it and never talk about "pay to play, etc". It's very demeaning.



And it's a cultural issue

He ignored me haha

Of course he did

I mean I get that-- and a lot of them can't afford it anyway

But they make choices

I remember one girl I worked with who was literally in public housing

But they also prioritize education. In fact, they make huge sacrifices



I guess they're just so few

Yes for sure

And we have to honor that. You go annoy make people feel like their kids will lose out because they work hard to prioritize education in their families



I don't think the others don't, but it may actually be a social issue of coming to recognize its importance



iMessage





**PRODUCED IN NATIVE FORMAT**

Talking about pay to play and  
crap. So racist

I told him repeatedly he was  
pathetically off base with the  
cultural aspect he was  
missing

Not everything is black and  
white

The immigrant perspective  
isn't the American black one  
or the American white one

Totally

That's how we get Mae  
Jemison or bust lol

So I'm kind of tired of this  
division. Everything is about  
American black and white

Exactly

Even though, on the website,  
Patsy Mink got many more  
votes. Mae got 2, I think

Woah really??!!!!

I wish I knew that

Karl lied to me on that yet  
again

I didn't know where to look

That's crazy Stella he lied



is should have known

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF VIRGINIA  
3                   ALEXANDRIA DIVISION  
4           -----x  
5   COALITION FOR TJ,                   :  
6                                   Plaintiff,   :  
7           v.                                   :   Civil Action No.:  
8   FAIRFAX COUNTY SCHOOL               : 1:21-cv-00296-CMH-JFA  
9   BOARD,                                   :  
10                                   Defendant.   :  
11   -----x

12  
13                   Deposition of JEREMY SHUGHART  
14                                   McLean, Virginia  
15                                   Thursday, October 14, 2021  
16                                   9:14 a.m.

17  
18                                   CONFIDENTIAL

19  
20   Job No.: 403754

21   Pages: 1 - 209

22   Reported by: Judith E. Bellinger, RPR, CRR

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

42

1                   There wasn't a ranking process, and  
2                   that was the reason why the 486 or the 491, I  
3                   think, you know, it depended on the year, but that  
4                   was -- and then it was that proportionality that  
5                   was then red flagged.

6                   Q     Okay. I want to move, now, to the  
7                   2020. I'm going to show you --

8                   A     Should I give this back to you?

9                   Q     You can leave it over there because  
10                  we'll probably refer back to it.

11                  A     Okay.

12                                 (Shughart Exhibit 2 marked for  
13                   identification and attached to the transcript.)

14                  Q     First, I want to ask you, before you  
15                  look at the document, when -- to the best of your  
16                  knowledge, in 2020, when was it first considered  
17                  that the admissions process at TJ might be  
18                  changed?

19                                 MS. REWARI: Objection. Vague. Lack  
20                  of foundation.

21                                 First question is by whom?

22                                 MR. KIESER: To the best of his

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

43

1 knowledge, when was it first considered among --  
2 in FCPS in general. By the board, by the  
3 superintendent, by anyone in his office.

4 MS. REWARI: Okay. Calls for  
5 speculation.

6 Q To the best of your knowledge, you can  
7 answer.

8 A I honestly, I don't -- I don't know  
9 when the first was.

10 Q Okay. Can you take a moment to just  
11 review -- well, actually, you can -- the emails  
12 are just for context on the first three pages. So  
13 if you want to just quickly review that and then  
14 review the attachments.

15 A (The witness complies.)

16 Q Do you recognize the attachments?

17 A I do.

18 Q What are those documents? I don't  
19 believe you were on the email, so...

20 A I was cc'd on one of them.

21 This particular document was created  
22 and shared with the board in regards to an

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

44

1 alternative admissions process.

2 Q Actually, I believe the cover email  
3 says it was shared on a May 27th closed session.

4 Is that correct, as far as you know?

5 A That -- I don't know the exact date.  
6 Not off the top of my head.

7 Q But it was in 2020?

8 A Yes.

9 Q Were you involved in drafting any of  
10 these documents?

11 MS. REWARI: Objection. Vague.

12 Q Did you contribute to any of these  
13 documents?

14 MS. REWARI: Which document?

15 Q There's the -- there's the white paper  
16 itself, and then there's the executive summary at  
17 the bottom. So I guess there's only -- there's  
18 only one -- there's really only two documents;  
19 there's the pathway admissions process white paper  
20 and then the executive summary.

21 Were you involved with preparing either  
22 of these?

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

45

1 A Yes.

2 Q So it would be accurate to say that the  
3 document that is labeled "TJ Admissions Pathway  
4 Admissions Process," that describes the potential  
5 admissions process that the board was presented  
6 with?

7 A Say that one more time.

8 Q That describes the potential admissions  
9 process to TJ that the board was presented with?

10 A Yes.

11 Q Can you explain what the three pathways  
12 were, in general terms?

13 A So on -- these aren't numbered?

14 Q Yeah, the page numbers got cut off;  
15 sorry.

16 A That's okay. So, on the first  
17 document, Pathway 1, this admissions -- this  
18 particular admissions pathway, as it's proposed  
19 here on -- as it's proposed in this admissions  
20 process, was consistent of using applicants -- let  
21 me take a step back.

22 So Pathway 1 was using our current

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 developing any alternative plans?

2 A Yes.

3 (Shughart Exhibit 10 marked for  
4 identification and attached to the transcript.)

5 Q Take your time to review this.

6 THE WITNESS: Sorry. In your  
7 microphone coughing.

8 Q I believe I have cough drops.

9 A No. It's a tickle in my throat.  
10 Eventually the water will hit the right spot.

11 MR. KIESER: Do you want Bates numbers  
12 for this?

13 MS. REWARI: I'll take it.

14 MR. KIESER: I'll figure it out. It is  
15 21736, is the first page.

16 MS. REWARI: Okay.

17 (Shughart Exhibit 11 marked for  
18 identification and attached to the transcript.)

19 A Okay.

20 Q Okay. Do you recognize the email on  
21 the first page of this document?

22 A Yes.



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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1           Q     Who is the person that you sent this  
2     to?

3           A     I sent this to Lidi -- well, she goes  
4     by Lidi -- Lidi Hruda, as well as with a cc to  
5     Marty Smith.

6           Q     And who is Lidi?

7           A     Lidi is the director in the Office of  
8     Research and Strategic -- oh, shoot, I forget what  
9     the I is -- intervention.

10          Q     Is that the office that worked with you  
11     on the white paper?

12          A     Yes.

13          Q     The white paper?

14          A     Yes. Improvement. Strategic  
15     Improvement.

16          Q     Okay. So she's the director of that  
17     office, you said?

18          A     She is the director.

19          Q     And would I be correct to say that this  
20     is an email where you attached a draft of an  
21     alternative white paper proposal for TJ  
22     admissions?

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1 A Yes, it appears to be.

2 Q Can you read the highlighted portion of  
3 the email, please.

4 A Sure. "Could you look specifically at  
5 the table for 'Experience Factors' and provide us  
6 a review of our current weighting and whether or  
7 not this would be enough to level the playing  
8 field for historically underrepresented groups."

9 Q By "historically underrepresented  
10 groups," did you mean racial groups that were  
11 underrepresented at TJHSST?

12 A Racial groups would have been included,  
13 but it would not have been limited to racial  
14 groups, it would have also included our -- my  
15 memory would be our ELL students, it would have  
16 been, potentially, special ed, certainly FRM.

17 Q Which racial groups, specifically, did  
18 you consider to be underrepresented?

19 A Our -- the students that were lower  
20 would have been Black and Hispanic students.

21 Q Did that include white students?

22 A No.

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 sit here, that would be my understanding of it.

2 Q Would your understanding, then, have  
3 been that White and Asian candidates are not  
4 historically underrepresented?

5 A Yes.

6 Q That bullet point 4, can you read the  
7 highlighted portion.

8 A Okay. "That leaves only the Experience  
9 Factors to help shift the landscape and bring more  
10 diversity into play and acceptance of historically  
11 underrepresented students. Since the Experience  
12 Factors include things that some more privileged  
13 students are likely to get points on, as well as  
14 factors that less privileged students are likely  
15 to get points on, I think we can assume that the  
16 potential advantage from the Experience Factors is  
17 likely to be, at most, 50 points and more likely  
18 only 25 points for most students, since they are  
19 not likely to get credit for all the Experience  
20 Factors."

21 Do you need me to read --

22 Q No --

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

149

1 Q Can you read the highlighted part?

2 A Sure. "I agree that we need to  
3 consider how this will be considered and whether  
4 there was enough weighting involved. The maximum  
5 amount of points you would receive would only be  
6 around 14%, so it isn't impacting at a high  
7 level."

8 Q When you say "impacting," did you mean  
9 in terms of the diversity of students who get out?

10 A No. I meant as an overall percent of  
11 the entire application process.

12 So it would have been looking at the  
13 experience factors, but it was also in  
14 consideration of, perhaps, information sheet and  
15 problem-solving essay. That was my -- from what I  
16 remember, that was my intent here.

17 Q I want to move on to this exhibit here.  
18 (Shughart Exhibit 12 marked for  
19 identification and attached to the transcript.)

20 Q And now this --

21 MR. KIESER: I'll give you a Bates  
22 number. It is 21212, the first page.

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1           Q     Take a while to familiarize yourself  
2     with that.

3           A     Okay.

4           Q     Do you recognize this document?

5           A     I think so, yes.

6           Q     Were you involved in preparing it?

7           A     I would say, yes.

8           Q     Was it presented to the board in a  
9     closed session on October 6th?

10          A     It appears to be, yes.

11          Q     And this -- am I correct to say that  
12     this is a proposal for a hybrid merit lottery?

13          A     It looks that way, yes.

14          Q     Can you read the highlighted portion of  
15     the first page, the first paragraph?

16          A     Sure. "This approach ensures that the  
17     students with the strongest applications are  
18     admitted into TJHSST, while allowing for the  
19     advantages of the Merit Lottery approach: a higher  
20     probability of traditionally disadvantaged  
21     students gaining admittance along with the  
22     concomitant increase in applications anticipated

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

151

1 by this approach."

2 Q When it say "higher probability of  
3 traditional disadvantaged students gaining  
4 admittance," that includes based on race, correct?

5 MS. REWARI: Objection.

6 Q To the extent that he knows.

7 A It wouldn't have just been a racial.

8 Q But that's a component of it, correct?

9 A Well, sure, that is. But it's not  
10 limited to race.

11 Q Can we go -- flip down to the  
12 Evaluation Elements.

13 Is this a proposed scoring system for  
14 holistic review?

15 A That wouldn't have been just for the  
16 holistic review.

17 Q It would have also been applied to  
18 students who were put into the lottery pool?

19 A Correct. It would have been there  
20 for -- this was a proposed way to evaluate all the  
21 students. The top performing students, as  
22 suggested here, the top 100 students would have

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1     been offered admissions, and then students that  
2     met the minimum would have been placed into a  
3     lottery to move forward.

4           Q     Okay. Under "Experience Factors" on  
5     the second page, could you read off which four --  
6     the four experience factors.

7           A     So the four experience factors listed  
8     here were English language learners, 0 or 50  
9     points; economically disadvantaged, 0 or 50  
10    points; special education, 0 or 50 points; and  
11    historically underrepresented school, 0 or 50  
12    points, FCPS only.

13          Q     So on the previous exhibit, we went  
14    through the experience factors. It looks like on  
15    this proposal, there's only four; whereas, on the  
16    previous exhibit, there were several others. And  
17    you -- and then this proposal had the historically  
18    underrepresented school that was not present on  
19    the other one; is that correct?

20          A     Historically underrepresented school is  
21    not represented here.

22          Q     And then on the October 6th

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 MR. KIESER: Back on the record.

2 (Shughart Exhibit 13 marked for  
3 identification and attached to the transcript.)

4 MR. KIESER: And the Bates number on  
5 this one is 21813.

6 BY MR. KIESER:

7 Q Let me start with, do you recognize  
8 this document?

9 A I do.

10 Q Is it an email exchange between you  
11 and, I believe, Superintendent Brabrand and Marty  
12 Smith and, I believe, John Foster is copied on  
13 that?

14 A Correct. It was an email that Scott --  
15 the superintendent sent to myself, Marty, and  
16 John, and then kind of short back-and-forth  
17 between the group.

18 Q Can you read the email that  
19 Superintendent Brabrand sent on the second page?  
20 You may have to undo the --

21 A The email -- do you want me to read it  
22 out loud?



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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1           A     Sure. "I would need to look at old  
2     data files. 200 points or 50 points would make a  
3     difference. I don't know how that impacts our  
4     diversity."

5           Q     When you say "would make a difference,"  
6     are you referring to the composition -- in  
7     general, the composition of TJ's admitted class?

8           A     So from the points standpoint, what I'm  
9     referring to there is, is that the overall points,  
10    it would make a difference. One point would make  
11    a difference, no matter how you did it.

12                   This is talking about old data files.  
13    This is actually talking about years ago and  
14    previous -- prior to me even being there.

15           Q     So, at some point, there was a point  
16    system, but that predates you?

17           A     That predates me.

18           Q     So when you say "make a difference,"  
19    you just mean that -- you would just mean that  
20    someone who received the points would have a  
21    better chance of getting in?

22           A     And that could be any individual

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

160

1 student, regardless of how they classify  
2 themselves. That doesn't matter. A single point  
3 for one student would -- could. It might not, but  
4 it could make a difference for that. When you're  
5 talking about 3,000 applicants, if a student got  
6 one more point, that may have been the difference  
7 between receiving an offer, being placed in the  
8 wait pool, and not receiving an offer.

9 Q When you say "I don't know how that  
10 impacts our diversity," did you ever look at that?

11 A I did not.

12 Q Was there any way to look at that?

13 A So let me clarify that. I don't  
14 remember going back and pulling old data from  
15 years before I was even there.

16 Q And when you say "old data," you're  
17 referring to when there used to be a point system?

18 A Correct.

19 Q So did you ever model the racial impact  
20 of an entirely holistic system with points, as  
21 you're talking about here?

22 A From an old system?

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

162

1 MR. KIESER: This is Bates number --  
2 give me a second -- 20994.

3 A Okay.

4 Q Do you recognize the email chain on the  
5 first page?

6 A Yes.

7 Q It's a group of emails between you and,  
8 likes looks, Julie Fowler and Lidi.

9 A Yes.

10 Q What is the attachment?

11 A The attachment looks to be the TJHSST  
12 scoring rubric.

13 Q Is this the rubric that you used to  
14 evaluate students for the Class of 2025?

15 A No.

16 Q Is this similar to that one?

17 MS. REWARI: Objection. Vague.

18 A It's similar.

19 Q Are the points -- are the points  
20 assigned on this rubric the points used to  
21 evaluate students in 2025?

22 A No.

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 Q How are they different?

2 A The current -- the process that was  
3 used was that GPA, student portrait sheet, and  
4 problem-solving essay were 300 points.

5 Q 300 points each?

6 A Yeah.

7 Q And how many points were the experience  
8 factors each?

9 A My memory is, is that the economic  
10 disadvantage was 90, English language learner,  
11 special ed, and underrepresented schools was 45.

12 Q Okay.

13 A Each, not combined.

14 Q They were 45 each. So the total for  
15 the evaluation of the GPA student portrait sheet  
16 and problem-solving essay was 900 --

17 A Yes.

18 Q -- as opposed to a thousand on the  
19 year?

20 A Yes.

21 Q And the total experience factors would  
22 have been 225?

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1 A Yes.

2 Q Okay. As opposed to the 250 on here?

3 A Yes.

4 Q Okay.

5 A I'm re-adding in my head just to be  
6 sure.

7 Q I believe there is a copy of that  
8 rubric in the production, as well, but I thought  
9 this was the one.

10 In any event, so if a -- if GPA is 300  
11 points, would I be correct to say that 1 GPA  
12 point, out of 4, would be worth 75 points?

13 MS. REWARI: Objection. Vague. And  
14 mischaracterizes the document.

15 Q Well, this current rubric says core GPA  
16 times 50 is 200.

17 So is that same framework used in the  
18 other?

19 A So the maximum would have been 300.

20 Q 300. And you just divide that by --  
21 you would divide that by 4 to get how much each  
22 GPA point is worth, correct?

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1           A     Well, sort of. The minimum GPA was  
2     3.5. So we never went for a full scale from a 4  
3     to a 3. And we used four places beyond the  
4     decimal point to calculate what their GPA was.

5           Q     So under the rubric you applied in  
6     2025, if a student had a 3.5 GPA, what would their  
7     points be under the GPA?

8           A     If I had a calculator, I could  
9     calculate it out. I mean, a 4 would have been  
10    equivalent of 300 points. So 4 into 3, 300, is  
11    that 65?

12                   I would have to calculate it. I mean,  
13    physically, without having a calculator in front  
14    of me, I don't want to mischaracterize what it  
15    would be.

16           Q     Okay.

17           A     There's a formula, and all of the  
18    students in it would be down to that decimal  
19    point, I mean, to the point that it's four  
20    character places beyond the decimal, potentially.  
21    It's unweighted GPA. So meaning there's no  
22    students that can have above a 4.0.

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

170

1 So which are you referring to?

2 Q So the first process that was approved  
3 by the board, right, is the 1.5 percent allocation  
4 for each middle school.

5 A Uh-huh.

6 Q So is that -- am I correct to say that  
7 in that stage, the students only compete with the  
8 students from their own school?

9 A Correct. From a -- from a public  
10 school standpoint.

11 Q Yeah. So, actually, let me -- let me  
12 get to that too.

13 I'm going to show you two charts.  
14 Here's the first. And here's the second one.

15 MS. REWARI: Are those separate exhibit  
16 numbers?

17 MR. KIESER: Yes.

18 ( Exhibit  
19 # marked for identification and  
20 attached re  
21 tained}).)

22 MR. KIESER: And the Bates stamp for

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1 the one that's got all the redactions is 21441. I  
2 believe the number is the other one.

3 MS. REWARI: Yes, it is.

4 Q Have you seen these before?

5 A Yes.

6 Q Can you tell me what the chart that  
7 doesn't have any redactions shows?

8 A What this looks to be is the number of  
9 students that were admitted by each middle school  
10 in Fairfax County.

11 Q Fairfax County?

12 A Along with the applicant and  
13 semifinalist students.

14 Q Okay. So this -- so when we're talking  
15 about the 1.5 percent plan, is it fair to say that  
16 the students that had significantly more people  
17 apply, it's more difficult for students from those  
18 schools to get the allocated seats from their  
19 school?

20 MS. REWARI: Objection. Vague.

21 A Yeah.

22 Q Compared to -- compared to a school



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Conducted on October 14, 2021

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1 that has more people apply, would it be easier, or  
2 more difficult, for a student -- well, I'm sorry,  
3 strike that.

4 If a school has more applicants and  
5 more eligible students, in general, would that  
6 make it more difficult for any one of those  
7 students to earn one of the allocated seats?

8 A I'm not sure I would cat -- you know,  
9 say that, necessarily. That for an individual  
10 student, I mean, there's a lot of factors that  
11 would go into that.

12 To say that it would be more difficult  
13 for a single student, it may or may not be more  
14 difficult.

15 Q Would the admissions percentage for --  
16 just based on the allocated seats, would the --  
17 the percentage of students who can get an  
18 allocated seat would be fewer at the schools with  
19 more proportional applications, right?

20 MS. REWARI: Objection. Vague.

21 MR. KIESER: He can answer, at least,  
22 if he understands.

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1           A     I'm trying to understand what you're --  
2     I'm trying to understand what you're saying. So  
3     can you be more -- can you give me, like, either  
4     an example or be more specific?

5           Q     So, for instance, look at the top of  
6     the chart, Rachel Carson had 286 applicants in  
7     2024.

8           A     Yep.

9           Q     Compared to, say, a school like at the  
10    bottom, Whitman --

11          A     Okay.

12          Q     -- had 19 applicants.

13          A     Okay.

14          Q     Now under the 1.5 percent plan, I  
15    believe that -- well, actually, I'm also going to  
16    show you this exhibit, which -- because it might  
17    provide some content.

18                   (Shughart Exhibits 15 and 16 marked for  
19    identification and attached to the transcript.)

20          A     Okay.

21          Q     Do you recognize this document?

22          A     I do.

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1 Q And what is that chart on the second  
2 page?

3 A So my recollection of this chart on the  
4 second page is to identify the total number of  
5 students that were in eighth grade in FCPS  
6 schools, so that would be column B. Column C  
7 would be eligibility based upon GPA and enrolled  
8 in, minimally, in Algebra 1.

9 And then, the third column is the  
10 percent of each.

11 Q Okay. So what I was getting at here,  
12 is -- let's stick to the same two middle schools,  
13 Rachel Carson and Whitman.

14 A Okay.

15 Q So, Rachel Carson, on the exhibit I  
16 just showed you --

17 A This one?

18 Q -- what's the percentage of eligible  
19 students?

20 A So the percent of eligible students is  
21 55.6.

22 Q And the number of eligible students?

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Transcript of Jeremy Shughart

Conducted on October 14, 2021

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1 A 400.

2 Q And then, for Whitman, at the bottom,  
3 what's the percentage of eligible students?

4 A 9.5 percent.

5 Q And the number of eligible students?

6 A 43.

7 Q So just considering those two schools  
8 sort of at an extreme, to obtain the 1.5 percent  
9 allocated seats, would a student at Rachel Carson  
10 have to compete against more students to get one  
11 of those 1.5 percent seats than a student at  
12 Whitman?

13 MS. REWARI: Objection. Calls for a  
14 lay opinion. Calls for speculation.

15 MR. KIESER: He can answer.

16 A So it would be dependent on whether  
17 they applied or not.

18 This isn't -- this isn't application  
19 numbers.

20 Q Sure. And then we can reference  
21 compared to the Class of 2024. The application  
22 numbers in 2025 are different.

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Conducted on October 14, 2021

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1 But in 2024, as you are looking another  
2 that --

3 A Okay.

4 Q -- how many students applied from  
5 Rachel Carson?

6 A For the Class of '24?

7 Q Yeah.

8 A 296.

9 Q And how many at Whitman?

10 A 19.

11 Q So those 19 students -- and I recognize  
12 the applications went up in 2025 -- they would be  
13 competing for -- hypothetically -- for those --  
14 for the allocated seats at Whitman; whereas, the  
15 286 students at Carson would be competing for  
16 Carson's allocated seats, correct?

17 A Correct. But the one piece is also  
18 about the unlocated seats.

19 So it wasn't a limiting factor -- it  
20 was -- the allocated seats provided seats for each  
21 of those schools. But then there was also  
22 unallocated seats that were made available to

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 the -- for all other eligible students.

2 So using these numbers, you're just  
3 talking about the applications. That doesn't even  
4 make them -- may have meant that they were -- they  
5 didn't meet the eligibility requirements either,  
6 so.

7 But there is the additional factor of  
8 unallocated seats along with any open weight pool  
9 seats that become available as all.

10 Q Could the private school and homeschool  
11 students get the allocated seats?

12 A They were not available for allocated  
13 seats.

14 Q So the students who -- is it fair to  
15 say that the students who didn't receive an  
16 allocated seat from their FCPS middle school, then  
17 were -- had to compete for the remaining  
18 unallocated seats with private school and  
19 homeschool students?

20 A Say that one more time. So I'm clear  
21 with what you're saying.

22 Q The students who didn't receive an

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Transcript of Jeremy Shughart  
Conducted on October 14, 2021

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1 allocated seat under the 1.5 percent allocation,  
2 then they could compete for the unallocated seats,  
3 correct?

4 A Correct. So any student that met  
5 minimum -- kind of that minimal standing -- if  
6 they were a public school student and did not  
7 receive an allocated offering were also in  
8 consideration for unallocated seats.

9 Q And the same is true for private school  
10 and homeschool students --

11 A So --

12 Q -- they were in consideration for the  
13 unallocated seats?

14 A Only unallocated seats.

15 Q So those unallocated seats were  
16 between -- the students who compete for the FCPS  
17 unallocated seats are the FCPS public schools  
18 student who didn't get an allocated seat --

19 A Uh-huh.

20 Q -- and private school and homeschool  
21 students who live in Fairfax County?

22 MS. REWARI: Objection. Misstates the

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Conducted on October 14, 2021

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1 Can you look at the redacted chart now?

2 A Okay.

3 Q Can you tell me what this represents?

4 A Again, this is similar to the  
5 unredacted charts, although the numbers are  
6 slightly different.

7 Q Look at the underattending school in  
8 the corner. Do you see its number of Asian  
9 students?

10 A Okay, I'm sorry. That's would explain  
11 why. That's why I was trying to figure out why  
12 they looked the same.

13 Q This is the number of Asian students?

14 A Who had applied for semifinalist and  
15 offered.

16 Q Can you read off the names of the six  
17 schools who had enough Asian -- well, first of  
18 all, the redaction policy is for any number less  
19 than ten, right?

20 A Ten and under.

21 Q Ten and under.

22 A So ten would have been redacted as



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Conducted on October 14, 2021

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1 well.

2 Q Can you read off the six schools that  
3 had enough Asian students admitted in the Class of  
4 2024 not to be redacted.

5 A You want me read them off?

6 Q Yeah.

7 A Carson, Cooper, Frost, Kilmer,  
8 Longfellow, Rocky Run.

9 Q Were any of those schools listed as  
10 underrepresented schools that would get the  
11 45-point bonus?

12 A From the ones you just read, I don't  
13 think so.

14 Was Kilmer one of the ones you read?

15 Q No.

16 A Okay.

17 MR. KIESER: Can we take, like, a  
18 five-minute break?

19 MS. REWARI: Do you know how much  
20 longer you have?

21 MR. KIESER: Not very much. Probably  
22 less than a half hour. Less than 20 minutes.

Message

**Sent:** 6/15/2020 2:47:32 PM  
**To:** Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]; Foster, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f6418d04f260417f9e7297654432577e-Foster, Joh]  
**Subject:** RE: middle schools / TJHSST  
**Attachments:** Admissions\_White\_Paper\_version8.pdf; Admissions\_White\_Paper\_Executive Summary.pdf

Marty,  
At the May 27 closed session, these two documents were shared.

---

**From:** Skahen, Tracey  
**Sent:** Monday, June 15, 2020 10:19 AM  
**To:** Foster, John <jefoster@fcps.edu>; Muhlberg, Ilene <idmuhlberg@fcps.edu>  
**Subject:** FW: middle schools / TJHSST

Good morning, Dr. Anderson is asking for a list of middle schools who have students who were accepted into the THSST Class of 2024. Has this information been shared yet if not, do we have a date of when? We thought it might be shared in a JFBB or in a closed session.

Hope all is well.

Thanks!

---

**From:** Anderson, Ricardy J (School Board Member) <rjanderson@fcps.edu>  
**Sent:** Monday, June 15, 2020 10:11 AM  
**To:** Smith, Marty K. <mksmith@fcps.edu>  
**Subject:** RE: middle schools / TJHSST

Thank you.

**Ricardy Anderson, Ed.D.**  
Mason District Representative  
Fairfax County School Board

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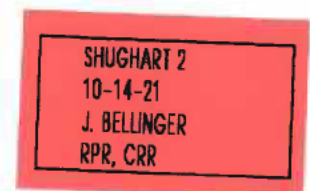
---

**From:** Smith, Marty K. <mksmith@fcps.edu>  
**Sent:** Friday, June 12, 2020 6:36 PM  
**To:** Anderson, Ricardy J (School Board Member) <rjanderson@fcps.edu>  
**Subject:** RE: middle schools / TJHSST

Hello!

I will check with John Foster and Ilene. The data may have already been posted to the secure part of Blackboard.

Marty



---

**From:** Anderson, Ricardy J (School Board Member) <[rjanderson@fcps.edu](mailto:rjanderson@fcps.edu)>  
**Sent:** Friday, June 12, 2020 4:18 PM  
**To:** Smith, Marty K. <[mksmith@fcps.edu](mailto:mksmith@fcps.edu)>  
**Subject:** FW: middle schools / TJHSST

Marty,

Is there any way that I can be provided with date when this can be expected? Thanks.

**Ricardy Anderson, Ed.D.**  
Mason District Representative  
Fairfax County School Board

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---

**From:** Coffey, Cristy <[cmcoffey@fcps.edu](mailto:cmcoffey@fcps.edu)>  
**Sent:** Wednesday, June 10, 2020 2:20 PM  
**To:** Anderson, Ricardy J (School Board Member) <[rjanderson@fcps.edu](mailto:rjanderson@fcps.edu)>  
**Subject:** FW: middle schools / TJHSST

Please see Marty's response below.

Cristy

---

**From:** Smith, Marty K. <[mksmith@fcps.edu](mailto:mksmith@fcps.edu)>  
**Sent:** Wednesday, June 10, 2020 2:18 PM  
**To:** Coffey, Cristy <[cmcoffey@fcps.edu](mailto:cmcoffey@fcps.edu)>  
**Cc:** Skahen, Tracey <[tlskahen@fcps.edu](mailto:tlskahen@fcps.edu)>; Shughart, Jeremy A <[jshughart@fcps.edu](mailto:jshughart@fcps.edu)>  
**Subject:** Re: middle schools / TJHSST

Hi Christy,

We will share his information with the SB through the JFBB. I'm not sure about the date, but it usually happens after we select for the summer round.

Marty

Marty

Sent from my iPad

On Jun 10, 2020, at 2:15 PM, Coffey, Cristy <[cmcoffey@fcps.edu](mailto:cmcoffey@fcps.edu)> wrote:

Dear Marty,

Ricardy Anderson has asked me to track down "a list of middle schools who have students who were accepted into TJ for next year." Now that Francisco is gone, I'm not sure who to ask about this. Will you please direct me to the appropriate person to assist with her question?

Thank you,  
Cristy

*Cristy Coffey*

Executive Administrative Assistant to:

**Ricardy Anderson - Mason District**

**Megan McLaughlin - Braddock District**

Fairfax County School Board Office

Phone: 571-423-1064

Fax: 571-423-1067

**TJHSST Admissions: Pathway Admission Process**

**Statement of Purpose**

Since it was established in 1985, Thomas Jefferson High School for Science and Technology (TJHSST) has been a leader in providing science, technology, engineering, and mathematics (STEM) education. Fairfax County Public Schools (FCPS) is committed to providing a high-quality, specialized high school program for students with an interest in STEM who reside in Fairfax County and other school districts and cities served by TJHSST (i.e., Arlington, Loudoun, and Prince William counties, as well as the cities of Fairfax and Falls Church). Since its inception, business and industry leaders have provided vital support to TJHSST, and TJHSST alumni have become leaders in business and industry, among other fields. TJHSST is best able to serve its community and alumni when those alumni are prepared—through development of fundamental knowledge, leadership and interpersonal skills—to learn, work, and live in an ever-changing and increasingly diverse global society.

From time to time, FCPS leaders and TJHSST staff review the school's policies and procedures considering its Mission Statement and Beliefs. (See FCPS, About TJHSST.) The goal of this exercise is to identify policies and procedures that may require clarification or updating to best serve the needs and goals of the TJHSST community. As a result of this process, in the past decade, TJHSST has at times revised in some ways various policies and procedures, including its approach to student admissions.

Following an extended period of analysis and careful consideration by district- and school-level leaders, FCPS proposes to adopt certain revisions to the process for admission to TJHSST effective for ninth grade in the 2022-2023 school year. The revised admissions process will:

- Continue to “provide students with a challenging learning environment focused on math, science, and technology”, consistent with the school’s mission. All students who attend TJHSST will continue to receive the same rigorous classroom instruction and the same opportunities to participate in varied and enriching extracurricular activities.
- Continue to be supported by evidence and best practice. The process will not eliminate the use of standardized tests to assess applicants’ performance in math, reading, and science. Rather, the process will utilize an applicant’s test scores as one of several components that inform evaluation of a student’s application.
- Continue to be fair and equitable, and to be administered consistent with applicable law. Admissions decisions will continue to be based on an individualized assessment of each applicant’s qualifications. No individual who is otherwise eligible based on residency and satisfaction of minimum academic requirements will be denied an opportunity to apply for admission to TJHSST based on a particular characteristic, nor will any individual be guaranteed admission. There will be no “quotas” or other limits on the number of individual students who share a particular characteristic who can be accepted under the revised process.
- Continue to promote diversity in many forms. FCPS believes that the learning environment at TJHSST will be enhanced by a student body that is increasingly diverse across a variety of attributes. TJHSST’s core beliefs emphasize the importance of critical thinking and problem-solving skills; global interdependence and understanding; creativity and curiosity; communication; and leadership and interpersonal skills—all of which are “vital to addressing the complex societal and ethical issues of our time.” Research shows that a diverse student

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body provides additional opportunities for students to be exposed to widely diverse people, cultures, ideas, and viewpoints and to work collaboratively—in the classroom, in laboratories, on the stage, and on athletic fields—as they ask questions, develop ideas, and propose solutions to challenging problems. Research also shows that a diverse student body promotes understanding, helps to break down stereotypes, and promotes learning outcomes. And research shows that diversity in school better prepares students for their participation in an increasingly diverse workforce and society.

- Continue to select students for admission only if they demonstrate evidence of readiness for TJHSST's academic rigor and an ability to contribute to the learning environment at TJHSST. Every year, many more students who are interested in math and science and who could be successful at TJHSST apply for admission than can be accepted; the revised process would offer prospective students' admission through three different pathways.

The revised admissions process will allow TJHSST to identify students who are interested in math and science and who have demonstrated a pattern of achievement, while providing fair and equitable access to all students who have the potential to succeed at TJHSST. FCPS expects that as a result of the changes, the student population at TJHSST will reflect more closely the diverse population in the jurisdictions from which students are eligible to apply for admission. Talented students enrolled in each middle school have traits important to the mission and goals of TJHSST and could contribute to the school's learning environment. These changes more directly account for the fact that many students who want to enroll in a specialized school focused on math and science and who could be successful at TJHSST may have different academic, extracurricular, and personal experiences and differing arrays of strengths and interests. The revised admission process will provide all eligible students an opportunity to demonstrate their own interests and qualifications through individualized assessment of their academic accomplishments and other factors.

FCPS and TJHSST will continue to work with parents, students, and middle schools in participating jurisdictions to provide information on the admissions process and to ensure that all middle school students who have the potential to be successful at TJHSST and who are interested in math, science, and technology have the same opportunity to access the specialized program at TJHSST.



**TJHSST Admissions: Pathway Admission Process****Pathway 1 (approximately 350 students)**

TJHSST Admissions will select students using three different processes (Pathways). Pathway 1 is based on the top performing students on a combination of test scores and GPA. A point system will be used to identify the strongest amount of points available for students. The maximum amount of points available in this Pathway is 400 combined points. Below is the breakdown of Pathway 1. A student's GPA will consist of the core academic courses for 7<sup>th</sup> grade and the 1<sup>st</sup> and 2<sup>nd</sup> Quarter of 8<sup>th</sup> Grade. The Math, Reading & Science test results will be based on the national percentile rank.

- GPA - \*25 (100 max), Math - \*1 (100 max), Reading - \*1 (100 max), Science - \*1 (100 max)

**Results****2018-2019**

350 students

GPA – Range: 4.0-3.5905

Math – Range: 99-83

Reading – Range: 100-82

Science – Range: 100-90

- Race/Ethnicity
  - 264 Asian
  - 2 Black
  - 8 Hispanic
  - 9 Other (Two or More)
  - 67 White
- Gender
  - 234 Male
  - 116 Female
- Free/Reduced
  - 3 FRM
- Math Class
  - 7 Algebra I
  - 208 Geometry
  - 112 Algebra II/Trig
  - 7 Pre-Calc.
  - 16 Other
- County
  - 10 Arlington
  - 1 Falls Church City
  - 245 Fairfax County
  - 87 Loudoun
  - 7 Prince William

**2017-2018**

350 students

GPA – Range: 4.0-3.5048

Math – Range: 99-83

Reading – Range: 100-85

Science – Range: 100-90

- Race/Ethnicity
  - 257 Asian
  - 3 Black
  - 8 Hispanic
  - 15 Other (Two or more)
  - 67 White
- Gender
  - 220 Male
  - 130 Female
- Free/Reduced
  - 4 FRM
- Math Class
  - 13 Algebra I
  - 206 Geometry
  - 118 Algebra II/Trig
  - 8 Pre-Calc.
  - 1 Calculus
  - 4 Other
- County
  - 14 Arlington
  - 1 Falls Church City
  - 261 Fairfax
  - 59 Loudoun
  - 15 Prince William

**TJHSST Admissions: Pathway Admission Process****Pathway 2 (approximately 100 students)**

Application Evaluation process (still need minimum test scores/GPA). Points will be associated with each component below. The combination of GPA/test scores and points from components will determine students in this group.

To be considered for Pathway 2, student must meet;

- **50% of evaluation**
- Minimum GPA of 3.0 (core academic areas from 7<sup>th</sup> Grade Final Marks and 8<sup>th</sup> Grade 1<sup>st</sup> & 2<sup>nd</sup> Quarter)
- A minimum; (current semi-finalist minimums)
  - Math – 50%tile
  - Reading – 75%tile
  - Science – 75%tile

The Pathway is based on GPA/Test and score of Pathway 2 evaluations listed below.

- **50% of evaluation**

<b>Socio-economic Factors</b>	0 or 7		<b>School Leadership</b>	0 to 8
Free/Reduced Meals			"O" Factor* – CCTDI Assessment	
<b>Regional Data</b>	0 or 7		<b>STEM Skills</b>	0 to 3
Zip Code			Top 3 Awards/Projects/Skills	
<b>English Language Learner</b>	0 or 7		<b>Hardship</b>	0 to 5
not including Dismissed			Homelessness, economic responsibility, Extenuating Circumstances, family/personal crisis, 504, etc.	
<b>Special Education</b>	0 or 7			
IEP				
<b>Extracurricular</b>	0 or 3			
School Based				
<b>Community Service</b>	0 or 3		<b>Total</b>	<b>0 to 50</b>

Note: "O" Factor – refers to students with exceptional talents in organizing others, i.e.;

- Leading is influencing people to willfully attempt together, what they would not or could not as individuals.
- Leadership is the overall term for this social process.
- Leaders are those who lead, not just occupy a position or claim a title.

Certain categories will be loaded based on registration data. Other fields would be provided by the student through the application process. In some cases, the students will need to provide documentation to support the information provided in the field.



**TJHSST Admissions: Pathway Admission Process**

**Pathway 3 (approximately 50 students)**

**Nomination Process**

FCPS Public Schools that are underrepresented will have an opportunity to nominate students for admission to TJHSST. The school will nominate up to 10 students based on students meeting minimum criteria. A minimum of 3 students from each FCPS school will be offered throughout all the Pathway options. If no student from a school has been selected in the Pathway 1 or 2, that school will be guaranteed minimum student offers. So, all FCPS schools will have representation at TJHSST. Fairfax County private and homeschooled students are not included in this portion of the selection process.

- Schools – with 3 or less students offered over last 3 years (preliminary identification)
  - Franklin MS
  - Hayfield MS
  - Herndon MS
  - Holmes MS
  - Irving MS
  - Key MS
  - Lanier MS
  - Poe MS
  - Stone MS
  - Whitman MS

A nomination committee will review possible students. Committee members consist of Principal or Designee, Director of Student Services or Designee, Liaison Counselor, 8<sup>th</sup> Grade Math, and 8<sup>th</sup> Grade Science teacher. The committee would review the merits of each student nominee; teacher/school recommendations and possibly an in-person interview of student (video?). The TJHSST Admission office will assist in the process by identifying students who would be possible candidates; Math Subject, SOL Scores (7<sup>th</sup> Grade Math), CogAT/NNAT, Universal Screener Assessment, etc.

- Nominated students must sit for the admission exam and meet Pathway 2 requirements
  - This ensures the students will be able to handle the level of academic rigor at the school

**Selection Process**

Students nominated will apply to TJHSST through the same application process. These students will be eligible to be selected through Pathway 1 and Pathway 2. In the event the student is not selected in either Pathway 1 or 2, he/she will be evaluated in Pathway 3. Pathway 3 consists of the same process as Pathway 2 only for students remaining in the nomination pool. Evaluations will take place for these students and the strongest remaining students will be offered admission.

**TJHSST Admissions: Pathway Admission Process**

	Franklin	Hayfield	Herndon	Holmes	Irving	Key	Lanier	Poe	Stone	Whitman	Total
Asian	1	1	1	2	1	1	2	1	2	0	12
Black	0	0	0	0	0	0	0	0	0	0	0
Hispanic	0	0	0	0	0	0	0	1	1	1	3
White	2	2	2	1	2	2	1	1	0	2	15
Other	0	0	0	0	0	0	0	0	0	0	0

Note: The students represented in the table are based on the 2017-2018 Applicant year and only using statistics from Pathway 1. Using only Pathway 1 options would ensure regional diversity only and not racial/ethnic diversity. The table further supports employing the Pathway 2 process for these students.

**Non –FCPS school divisions**

Participating school divisions will be encouraged to nominate students using a similar process. The number available per division will be based on the same formula used to create Caps per school division (as long as maximum offers would not have been filled through Pathways 1 & 2). The TJHSST Admissions office will coordinate efforts of identification with these divisions to provide high quality nominations.

Note: Participating school division caps are based on the Class of 2022 Admissions Cap (these numbers are for planning purposes only and would be calculated each year).

- Prince William County Cap – 12
- Loudoun County – 11
- Arlington County – 3
- Falls Church City - 1

**Conclusion**

There are a number of adjustments which could be made to this new process. This approach maintains a high level of rigor for the students to achieve in Pathway 1. This allows for a large group of students to demonstrate academic strength on a series of rigorous assessments. Pathway 2 provides for intentional diversity. Diversity could be described in a broad swath that encompasses more than just ethnic/racial diversity. Pathway 2 intentionally targets students with varied background and still maintains a strong level of academic strength. Pathway 3 takes a further step in identifying areas in our region that have been historically under represented at TJHSST. These nominees will be selected using the same criterion as the students in Pathway 2.

**TJHSST Admissions: Pathway Admission Process**

Possible Alternative Consideration – Historically low representation (consider non-center schools ONLY), diversity of school; racial/ethnic, ELL population, SES population, etc. Identification of schools will remain flexible each year to provide consistent representation of all schools and geographic regions in participating school divisions.

**TJHSST Admissions: Pathway Admission Process**

**Implementation Timeline (Expected for the 2022-2023 Application Year)**

This is an estimated timeline to implement the changes in the proposal above. Many factors would come into play as we look at each element and work on implementing the changes for a future admissions cycle. First, any changes would be implemented to begin with the Winter Freshman Round (this round begins in late August/early September) with the application window. The application system will need to be ready for delivery in July of the year of implementation.

**TJHSST Admissions Application Committee – December 2020-October 2021 (8 – 11 Months)**

Once the white paper is approved a working group would need to be established to decide on the final elements on each Pathway for the application process. The working group could be comprised of members of various interests groups, including but not limited too; Admissions personnel, TJHSST School Leadership & staff, Instructional Services personnel (Math, Science & Advanced Academics), Out-of-County Leadership (Arlington, Loudoun, Prince William Counties & the City of Falls Church), Fairfax County Association of the Gift (FCAG), Advanced Academics Programs (AAPAC), Minority Student Assessment Oversight Committee (MSAOC), etc. The working group's stated goal would be to evaluate the white paper and develop the final Pathway elements. This work would be estimated to take a few months to finalize the recommendations. Additionally, a school board closed session may be needed to provide high level information from the white paper in terms of the newly-proposed admissions process. **December 2020-April 2021 (4 – 5 months)**

# Attorney Client Privilege

**Application Development & Marketing of New Process – November 2021-July 2022 (6 – 8 months)**

Once the new process has been approved to move forward work with the application system will need to begin. The online application system will need to be redesigned to include the new information that now needs to be collected. The application system will need to be tested thoroughly to ensure it would be successfully implemented. Additionally, internal database systems will need to be updated to capture the new data being collected from the online application system. These two systems will need to be integrated. **November 2021-July 2022 (6 – 8 months)**

A campaign of public awareness for the new admissions process will need to be underway immediately following school board presentations. The presentations will provide information on the new process applicants will undergo for the selection process. This information will begin at the middle school level in FCPS and participating jurisdictions. Additional information will be provided to the Pathway 3 Schools identified. The presentations can happen concurrently with the application development. **January 2022-July 2022 (3 – 6 months)**

## **TJHSST Admissions: Pathway Admission Process**

### **Executive Summary**

FCPS leaders and TJHSST Admissions staff review TJHSST's admissions policies and procedures considering its Mission Statement and Beliefs. The goal of this exercise is to identify policies and procedures that may require clarification or updating to best serve the needs and goals of the TJHSST community. As a result of this process, in the past decade, TJHSST has at times revised in some ways various policies and procedures, including its approach to student admissions.

Following an extended period of analysis and careful consideration by district- and school-level leaders, FCPS proposes to adopt certain revisions to the process for admission to TJHSST effective for ninth grade in the 2022-2023 school year.

The revised admissions process will allow TJHSST to identify students who are interested in math and science and have demonstrated a pattern of achievement, while providing fair and equitable access to all students who have the potential to succeed at TJHSST. FCPS expects as a result of the changes, the student population at TJHSST will reflect more closely the diverse population in the jurisdictions from which students are eligible to apply for admission. Talented students enrolled in each middle school have traits important to the mission and goals of TJHSST and could contribute to the school's learning environment. These changes more directly account for the fact that many students who want to enroll in a specialized school focused on math and science and who could be successful at TJHSST may have different academic, extracurricular, and personal experiences and differing arrays of strengths and interests. The revised admission process will provide all eligible students an opportunity to demonstrate their own interests and qualifications through individualized assessment of their academic accomplishments and other factors.

### **Pathways to TJHSST**

The new admissions process will consist of 3 pathways for students to attend TJHSST. This process is a change from the current process but maintains key elements that are already in place. Pathway 1 will select the students who are top performers on a combination of test scores and GPA. This process is similar to the current semifinalist process and would select the top performing students for admissions. Pathway 2 will select students using elements from Pathway 1 (50%) and the remaining portion will be based on specific diversity factors. Pathway 3 will select students using the same process as pathway 2. However, Pathway 3 is for specifically identified under-represented schools. Additionally, under-represented schools will nominate students for admissions.

This approach maintains a high level of rigor for the students to achieve in Pathway 1. This allows for a large group of students to demonstrate academic strength on a series of rigorous assessments. Pathway 2 provides for intentional diversity. Diversity could be described in a broad swath that encompasses more than just ethnic/racial diversity. Pathway 2 intentionally targets students with varied background

**TJHSST Admissions: Pathway Admission Process**

and still maintains a strong level of academic strength. Pathway 3 takes a further step in identifying areas in our region that have been historically under-represented at TJHSST.

**Implementation Timeline (Expected for the 2022-2023 Application Year)**

There are many elements that will need to be completed to be able to effectively transition to a new application approach. It will take 8-11 months for a working group to finalize the elements of each pathway. This timeframe includes creating a working group to formalize the final product and make final recommendations to school leadership, legal counsel, and the school board. This will be followed by an additional 6-8 months of application redevelopment and marketing of the new process. The entire process must be finalized and completed in July 2022 to be implemented for the 2022-2023 application year. The application process starts in August/September each year. The entire approach will take 14-19 months to complete.

**Next Steps**

The next step is to get an approval to move forward with this approach. For this admissions approach to be completed for the 2022-2023. Application year a decision will need to be made no later than December 2020. This will allow the Admissions Office to organize a working group to implement each of the phases and complete the process for a new application process.

**Other Factors to Consider**

Cost - redevelopment of our current application system to meet the new process. This could be a process of modifying our current application system to meet the new demands.

OR

RFP Process – possibly need to consider a RFP for the application system.



**Experience Factors (100 points)**

- Weighting will be calculated for students in multiple diversity categories.

<b>Socio-economic Factors</b>	0 or 15		<b>School Leadership</b>	0 to 12
Free/Reduced Meals			Response to Leadership	
<b>English Language Learner</b>	0 or 15		<b>STEM Skills</b>	0 to 6
Level 1-6			Top 3 Awards/Projects/Skills	
<b>Special Education</b>	0 or 15		<b>Hardship</b>	0 to 10
IEP			Homelessness, economic responsibility, Extenuating Circumstances, family/personal crisis, 504, etc.	
<b>Parental Education Level</b>	0 or 15			
HS Diploma, College Diploma or Beyond				
<b>Extracurricular</b>	0 to 6			
Listing of Experiences			<b>Total</b>	<b>0 to 100</b>
<b>Community Service</b>	0 to 6			
Listing of Experiences				

**Pathway Selection**

- Each pathway will select students based on a composite score after a holistic review. Applicants with the highest composite score in each pathway will be offered admissions (up to maximum number of offers per pathway).
- Each applicant is subject to an audit review of diversity factors.
  - Academic Integrity is Critical.
  - Audit may contain the following but is not limited too.
    - Documentation of all claims of parental education level, extracurricular activities, community service, STEM skills, hardship, etc.
  - A student who is found to be dishonest and provided responses that are of a deceptive nature will be removed from the application process and will not be eligible for an offer of admission.
  - A student who has been offered admissions and is found to be dishonest will have the offer of admissions rescinded.
- Rolling Admissions
  - Students offered admissions
  - Students have designated timeframe to accept or reject their offer
  - Rolling admissions are established to keep a class of 500
  - Each pathway will maintain a list of students not selected
  - Openings will be filled by the next eligible applicant on the list
  - Should a non-FCPS pathway exhaust its list of students, the next eligible candidate with the high composite score off the FCPS list will be chosen.

- As needed, additional applicants will be offered on the 1<sup>st</sup> and 15<sup>th</sup> of every month through end of 1<sup>st</sup> Quarter in order to maintain a class of 500.
- Any student who declines the offer of admission will be removed from eligibility.

#### **Appeals Process**

- An Appeal form must be submitted within 10 business days of admissions decisions announcement. The Appeal form will ask the parent and/or guardian to provide a written explanation of the exceptional circumstance that the Appeals Committee is to consider.
- The Appeal form must be submitted to the TJHSST Admissions Office. The TJHSST Admissions Office will ensure all appeal documents are submitted to the Appeals Committee. The parent and/or guardian is not allowed to submit additional credentials, documents or letters of recommendation.
- The Appeals Committee will review the appeal.
- The decision of the Appeals Committee will be communicated to the parent and/or guardian in writing and the Appeals Committee decision shall be final.



## Message

**From:** Shughart, Jeremy A [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=77ED93A9176E4058A2847967265E7289-SHUGHART, J]  
**Sent:** 9/28/2020 2:14:08 AM  
**To:** Hruda, Ludmila (Lidi) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=717d2cd6b4994ec7be716f560bdf6627-Hruda, Ludm]  
**CC:** Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]  
**Subject:** RE: TJ Admissions White Paper - Alternative

Lidi,

Thank you so much for the feedback. I agree that we need to consider how this will be considered and whether there was enough weighting involved. The maximum amount of points you would receive would only be around 14%, so it isn't impacting at a very high level. I wasn't sure if doubling the points would have been too much weight but your points are very valid in perspective that most students won't receive all points but a portion and for it to make an impact you would need to have an increased capacity.

Thanks again,  
 Jeremy

**Jeremy Shughart, EDS.**

Director of Admissions  
 Thomas Jefferson High School for Science and Technology  
 Fairfax County Public Schools  
 571-423-3770

**From:** Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>  
**Sent:** Sunday, September 27, 2020 9:46 PM  
**To:** Shughart, Jeremy A <jshughart@fcps.edu>  
**Cc:** Smith, Marty K. <mksmith@fcps.edu>  
**Subject:** RE: TJ Admissions White Paper - Alternative

Jeremy,

Thank you for sharing this with me. Attached are some comments embedded within the document. Not stated in the document is the answer to the question you asked. It is hard to know exactly what will level the playing field but my gut says that you may need to double all the points (and the total) so that applicants can receive up to 200 points overall for these experience factors.

My logic is the following: There are already 650 points accounted for in the other areas – teacher recommendations, SIS, and essay.

- Prior research on TJ admissions shows that historically underrepresented candidates receive less positive teacher recommendations than White and Asian candidates. This is older work but there is nothing more recent to indicate this has changed. This is likely true for other challenges like living in poverty and special ed – though the numbers weren't big enough to really examine this.
- The other two pieces, SIS and essay have also historically favored White and Asian candidates, I believe, who had broader experiences upon which to draw and often coaching on how to approach each piece.
- Thus, I think we can expect these three pieces to yield similar results to what we have seen with the testing as a part of the process, rather than vastly different results. Maybe not identical but not too far from where we currently stand with admissions.
- That leaves only the Experience Factors to help shift the landscape and bring more diversity into play and acceptance of historically underrepresented students. Since the experience factors include things that some

more privileged students are likely to get points on, as well as factors that less privileged students are likely to get points on, I think we can assume that the potential advantage from the Experience Factors is likely to be at most 50 points and more likely only 25 points for most students since they are not likely to get credit for all the experience factors. Not meaning that they get 25-50 points but they get maybe 50-75 points, while more privileged students are getting 25, netting a 25-50 point bump for those less privileged.

- Whether 25 or 50 points, that means the gap coming out of the first three pieces would need to be in that range to balance things. I think you will find that the gap is broader than that and that the bump up from the Experience Factors will be insufficient to make up for the difference.

Maybe I am being too pessimistic and, undoubtedly, some might argue that providing students with a 50 to 100 point advantage from the Experience Factors is inappropriate. Nonetheless my gut says the 25 to 50 point advantage a non-privileged student might gain from the Experience Factors will not level the field given the three other parts of the process.

Happy to discuss further.

Lidi

**Lidi Hruda**  
Director  
Office of Research and Strategic Improvement  
Fairfax County Public Schools  
Office: 571-423-1435  
Mobile: 571-385-8165

**From:** Shughart, Jeremy A <jshughart@fcps.edu>  
**Sent:** Sunday, September 27, 2020 4:51 PM  
**To:** Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>  
**Cc:** Smith, Marty K. <mksmith@fcps.edu>  
**Subject:** TJ Admissions White Paper - Alternative  
**Importance:** High

Lidi,

Good afternoon, I wanted to share a draft of our alternate white paper proposal for admissions. Could you look specifically at the table for "Experience Factors" and provide us a review of our current weighting and whether or not this would be enough to level the playing field for our historically underrepresented groups. **Attorney-Client Privilege**

**Attorney Client Privilege** Additionally, you can review the other weighting (similar to the old version of the points weighting of components).

The table is similar to the table we used with the previous white paper you reviewed this past spring. We are providing an alternative approach to the lottery proposal from a couple of weeks ago.

Note: I will be away from my computer for the next week hours. However, I will be back later this evening to answer any questions you may have. Please include Marty on the message as we have been working on this draft over the last few days and will be sharing with cabinet in the next day or so.

Thanks,  
Jeremy

**Jeremy Shughart, EDS.**  
Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770

### Overview

The Hybrid Merit Lottery Approach for Thomas Jefferson High School for Science and Technology (TJHSST) admissions will identify the highest-evaluated 100 students in the application pool and automatically offer those students admission. The remaining students will be identified by random selection based on the available seats in a student's identified pathway.

This approach ensures that the students with the strongest applications are admitted into TJHSST while allowing for the advantages of the Merit Lottery approach: a higher probability of traditionally disadvantaged students gaining admittance along with the concomitant increase in applications anticipated by this approach.

### Eligibility Requirements

To be considered for acceptance, applicants must meet the following minimum requirements: 3.5 unweighted core grade point average (GPA) or higher, enrollment in Algebra I or a higher math, and residency in participating jurisdictions.

Unweighted grades are the most equitable measure of a student's school performance: not all jurisdictions weight GPA in the same manner and not all middle schools offer courses that qualify for a weighted GPA. The core GPA includes grades from mathematics, science, English, history, and world language (if taken for high school credit).

### Evaluation elements

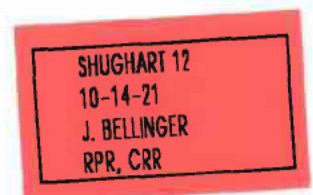
Each application will be reviewed by two evaluators. The two evaluator scores will be added together to determine the final points. Points will be assigned for each element with the highest possible score of 1100 points.

#### ➤ Core GPA: 200 points

#### ➤ Student Portrait Sheet (formerly Student Information Sheet): 400 points

The Student Portrait Sheet contains Likert-scale and short-answer questions that are designed to evaluate students' qualities as they relate to Portrait of a Graduate and 21<sup>st</sup> Century Skills:

- Collaborator
- Communicator
- Creative & Critical Thinker
- Ethical/Global Citizen
- Goal-Directed & Resilient Individual
- Innovator
- Leader
- Problem-Solver



CONFIDENTIAL DOCUMENT

Hybrid Merit Lottery  
Closed School Board Work Session  
October 6, 2020

Evaluators will holistically score the Student Portrait Sheet according to the following rubric:

- 5 – Exceptional
- 4 – Above Average
- 3 – Typical
- 2 – Marginal
- 1 – Inadequate

➤ **Problem-Solving Essay: 500 points**

The problem-solving essay is designed to allow applicants to demonstrate how they approach a multi-variable math or science problem. The problem is intended to be answerable with knowledge gained through the first/second quarter of Algebra I or 8th grade Science, aligned with qualification minimums.

Evaluators will holistically score the problem-solving essay according to the following rubric:

- 5 – Exceptional
- 4 – Above Average
- 3 – Typical
- 2 – Marginal
- 1 – Inadequate

➤ **Experience Factors: 200 points for FCPS/150 for participating jurisdictions**

Four experience factors will be considered and scored:

- English Language Learner: 0 or 50 points
- Economically Disadvantaged: 0 or 50 points
- Special Education: 0 or 50 points
- Historically underrepresented school: 0 or 50 points (FCPS ONLY)

Experience Factors will be considered bonus points in the evaluation process. To account for the difference between the FCPS and all other applicants, a ratio of points/points possible will calculate to the total points. This will be done so as not to penalize non-FCPS students in the evaluation process.

Historically underrepresented schools are school that admitted three or fewer students over the last three years. The preliminary list of historically underrepresented schools is:

- |               |              |
|---------------|--------------|
| • Franklin MS | • Key MS     |
| • Hayfield MS | • Liberty MS |
| • Herndon MS  | • Poe MS     |
| • Holmes MS   | • Stone MS   |
| • Irving MS   | • Whitman MS |

CONFIDENTIAL DOCUMENT

Hybrid Merit Lottery  
Closed School Board Work Session  
October 6, 2020**Scoring**

All applications will be evaluated using the Composite score: combined GPA, Student Profile Sheet, Problem Solving Essay and any Experience Factor (Bonus) points. The highest-evaluated 100 students will be offered admissions.

- GPA: 200 points
- SPS: 400 points
- Essay: 500 points
- Maximum Points: 1100
- Experience Factors: 200 total (Bonus)
  - English Language Learner: 50 points
  - Economically Disadvantaged: 50 points
  - Special Education: 50 points
  - Underrepresented Schools: 50 points

**Sample Scoring****Student A**Application Elements

GPA 4.0

Student Profile Sheet, Evaluator #1 3

Student Profile Sheet, Evaluator #2 2

Essay, Evaluator #1 2

Essay, Evaluator #2 3

**Subtotal: 650 points (not Lottery Student)**Bonus Elements

English Language Learner

Underrepresented School

**Total: 750 points (Lottery Student)****Student B**Application Elements

GPA 3.98

Student Profile Sheet, Evaluator #1 3

Student Profile Sheet, Evaluator #2 3

Essay, Evaluator #1 3

Essay, Evaluator #2 4

**Subtotal: 789 points (Lottery Student)**Bonus Elements

None

**Total: 789 points (Lottery Student)**



Message

**From:** Shughart, Jeremy A [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=77ED93A9176E4058A2847967265E7289-SHUGHART, J]  
**Sent:** 10/6/2020 11:06:28 PM  
**To:** Brabrand, Scott S [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f83e4830b34f424397d87919f381f30c-Brabrand, S]; Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]; Foster, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f6418d04f260417f9e7297654432577e-Foster, Joh]  
**Subject:** RE: Modeling and experience factors

I would need to look at old data files. 200 points or 50 points would make a difference. I don't know how that impacts our diversity.

Jeremy

**Jeremy Shughart, EDS.**  
Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770

**From:** Brabrand, Scott S <ssbrabrand@fcps.edu>  
**Sent:** Tuesday, October 6, 2020 7:03 PM  
**To:** Shughart, Jeremy A <jshughart@fcps.edu>; Smith, Marty K. <mksmith@fcps.edu>; Foster, John <jefoster@fcps.edu>  
**Subject:** Re: Modeling and experience factors

How hard would that be to do?

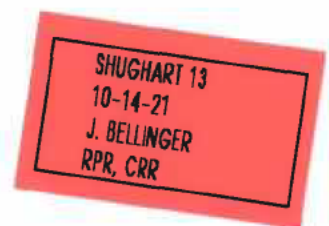
Sent from my iPhone

**From:** Shughart, Jeremy A <jshughart@fcps.edu>  
**Sent:** Tuesday, October 6, 2020 7:01:58 PM  
**To:** Brabrand, Scott S <ssbrabrand@fcps.edu>; Smith, Marty K. <mksmith@fcps.edu>; Foster, John <jefoster@fcps.edu>  
**Subject:** RE: Modeling and experience factors

We don't currently use any points in the process. I would have to go back to the previous process (over 8 years ago) to see how it would impact.

Jeremy

**Jeremy Shughart, EDS.**  
Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770



**From:** Brabrand, Scott S <ssbrabrand@fcps.edu>  
**Sent:** Tuesday, October 6, 2020 7:00 PM  
**To:** Shughart, Jeremy A <jshughart@fcps.edu>; Smith, Marty K. <mksmith@fcps.edu>; Foster, John <jefoster@fcps.edu>  
**Subject:** Modeling and experience factors

Marty in old days with points - would 200 points change who got in- that is the modeling that they are asking about

Can we go back and look at points - would 200 points be a game changer

Sent from my iPhone

Message

**From:** Fowler, Julie P. [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DBA8F0FE44024C57B820F95BCF36B15A-FOWLER, JUL]  
**Sent:** 11/13/2020 3:56:00 PM  
**To:** Shughart, Jeremy A [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77ed93a9176e4058a2847967265e7289-Shughart, J]; Hruda, Ludmila (Lidi) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=717d2cd6b4994ec7be716f560bdf6627-Hruda, Ludm]  
**Subject:** RE: Rubric  
**Attachments:** Scoring Rubric v2.docx

Can't say I understand the difference but how's this?

Julie Fowler  
Manager of Business Operations  
Chief Operating Office  
571-279-1264

**From:** Shughart, Jeremy A <jshughart@fcps.edu>  
**Sent:** Friday, November 13, 2020 10:18 AM  
**To:** Fowler, Julie P. <JPFowler1@fcps.edu>; Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>  
**Subject:** RE: Rubric

Yes, but the total points will be 1,000 as the experience factors are treated as bonus.

Jeremy

**Jeremy Shughart, EDS.**  
Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770

**From:** Fowler, Julie P. <JPFowler1@fcps.edu>  
**Sent:** Friday, November 13, 2020 10:17 AM  
**To:** Shughart, Jeremy A <jshughart@fcps.edu>; Hruda, Ludmila (Lidi) <LZHruda@fcps.edu>  
**Subject:** Rubric

Please see the attached. Work?

Julie Fowler  
Manager of Business Operations  
Chief Operating Office  
571-279-1264

SHUGHART 14  
10-14-21  
J. BELLINGER  
RPR, CRR



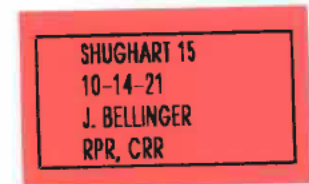
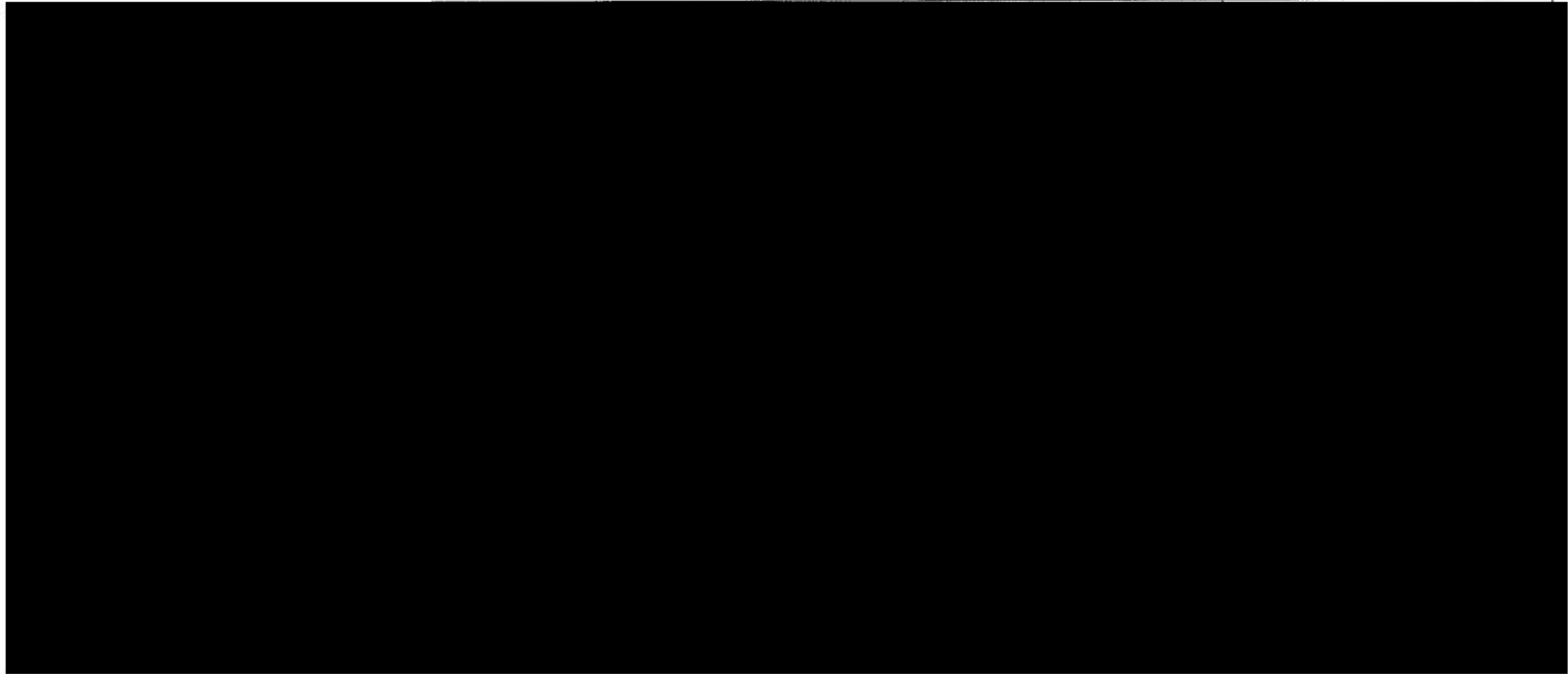
## TJHSST Scoring Rubric

Application Elements			
Element	Details	Scoring	Maximum Points
GPA	<p>Grade point average is calculated based on a student's core GPA using end of the year marks in 7<sup>th</sup> grade and the first quarter of 8<sup>th</sup> grade.</p> <p>Core GPA includes mathematics, science, English, history &amp; world language (only if taken for High School Credit)</p> <p>Grades are unweighted</p>	Core GPA x 50	200
Student Portrait Sheet	<p>Student demonstrates Portrait of a Graduate and 21<sup>st</sup> Century skills</p> <ul style="list-style-type: none"> <li>• Collaborator</li> <li>• Communicator</li> <li>• Creative &amp; Critical Thinker</li> <li>• Ethical/Global Citizen</li> <li>• Goal-Directed &amp; Resilient Individual</li> <li>• Innovator</li> <li>• Leader</li> <li>• Problem-Solver</li> </ul> <p>Two evaluators score on a rubric:</p> <p>5 – Exceptional 4 – Above Average 3 – Typical 2 – Marginal 1 – Inadequate</p>	<p>(Evaluator 1 Score x 40) + (Evaluator 2 Score x 40)</p>	400
Problem-Solving Essay	<p>Student answers a math or science question with multiple variables. The essay contains the answer (if found) and the method the student used to solve for the answer.</p> <p>Evaluation</p> <ul style="list-style-type: none"> <li>• Ability to solve problem</li> <li>• Description of solution</li> <li>• Essay Format</li> </ul> <p>Two evaluators score on a rubric:</p> <p>5 – Exceptional 4 – Above Average 3 – Typical 2 – Marginal 1 – Inadequate</p>	<p>(Evaluator 1 Score x 40) + (Evaluator 2 Score x 40)</p>	400
Total			1,000

## TJHSST Scoring Rubric

Experience Factors (bonus points)			
Factor	Details	Scoring	Maximum Points
Economically Disadvantaged	Students who have qualified for free and reduced price meals in any one of the last three years will qualify.	0 or 100	100
English Language Learner	Students receiving ELL services Level 1-6 will qualify.	0 or 50	50
Special Education	Students with a current IEP will qualify.	0 or 50	50
Underrepresented Schools	<p>FCPS and sending jurisdictions will qualify under the following condition:  Average maximum across the last five years (44) minus three times the average standard deviation over the last five years (<math>3 \times 13 = 39</math>), yielding 5 or fewer students admitted on average over the last five years.</p> <p>Will be calculated annually.</p>	0 or 50	50
Total			250

## **TJ Admissions Statistics by FCPS Middle Schools Class of 2021 - 2024**



Test Change with Class of 2022

## Class of 2015 - 2024

Attending School	Region	Class of 2024			Class of 2023			Class of 2022			Class of 2021			Class of 2020		
		Applicants	Total Semi-finalists	Total Admitted	Applicants	Total Semi-finalists	Total Admitted	Applicants	Total Semi-finalists	Total Admitted	Applicants	Total Semi-finalists	Total Admitted	Applicants	Total Semi-finalists	Total Admitted
Asian Students																
Carson*	1	231	119	73	216	104	65	285	133	65	228	178	73	218	169	91
Cooper*	1	60	40	25	60	45	30	16			14			13		
Franklin	5	28			18			24			30	12		30		
Frost*	5	56	27	14	51	25	15	63	32	16	50	39		56	39	14
Glasgow*	2	18			12			29			16			16		
Hayfield	3							12								
Herndon	1	13												23		
Holmes	2										19					
Hughes*	1	14			15			18			19	13		17		
Irving	4	17			17			20						18		
Jackson*	2	36	12		43	22	14	51	25	11	47	36	11	50	21	
Key	3	18			15						18			20		
Kilmer*	2	35	20	16	48	19		63	37	25	78	60	28	77	52	21
Lake Braddock*	4	45	15		42	15		55	32	11	46	31		46	27	
Lanier	5							18			12			25		
Liberty	4							17			28	11		35	13	
Longfellow*	2	96	69	45	88	55	36	134	93	46	103	91	52	94	76	32
Poe	2													12		
Robinson	4													15		
Rocky Run*	5	123	64	31	130	68	34	139	77	32	143	122	34	126	98	34
Sandburg*	3				12											
South County*	4	13			20			15			15	11		21		
Stone	5													12		
Thoreau	1	22			17			16			13			13		
Twain*	3	20			24			40	11		24	14		25		
Whitman	3															

Note: Schools with asterisks indicates a Level IV Center.

SHUGHART 16  
10-14-21  
J. BELLINGER  
RPR, CRR

Message

**From:** Shughart, Jeremy A [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=77ED93A9176E4058A2847967265E7289-SHUGHART, J]  
**Sent:** 12/17/2020 8:42:25 PM  
**To:** Cohen, Laura Jane H (School Board Member) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8c7afd9475a741d880e2accf9e7edeec-Cohen, Laur]  
**CC:** Smith, Marty K. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9b3c2c491ce64b00ae90e8b694fa324a-Smith, Mart]  
**Subject:** Student Enrollment  
**Attachments:** Eligible Students by school.xlsx

Laura Jane,

Good afternoon, I wanted share the eligible students from each school. Marty had asked for this information to be sent to you. Sorry for the delay.

Thanks,  
Jeremy

**Jeremy Shughart, EDS.**

Director of Admissions  
Thomas Jefferson High School for Science and Technology  
Fairfax County Public Schools  
571-423-3770

SHUGHART 17  
10-14-21  
J. BELLINGER  
RPR, CRR

	A	B	C	D
1	Middle School	Total 8th Grade Students	Eligible Students	% Eligible
2	ALC AT MONTROSE	3	0	0.0%
3	BURKE SCHOOL MIDDLE	21	0	0.0%
4	CARSON MIDDLE	720	400	55.6%
5	COOPER MIDDLE	483	190	39.3%
6	FRANKLIN MIDDLE	436	127	29.1%
7	FROST MIDDLE	597	220	36.9%
8	GLASGOW MIDDLE	636	169	26.6%
9	HAYFIELD MIDDLE	489	104	21.3%
10	HERNDON MIDDLE	582	164	28.2%
11	HOLMES MIDDLE	341	52	15.2%
12	HUGHES MIDDLE	527	160	30.4%
13	INTERAGENCY ALTERNATIVE	3	0	0.0%
14	IRVING MIDDLE	556	180	32.4%
15	JACKSON MIDDLE	528	128	24.2%
16	KEY CENTER	2	0	0.0%
17	KEY MIDDLE	416	50	12.0%
18	KILMER CENTER	4	0	0.0%
19	KILMER MIDDLE	560	241	43.0%
20	LAKE BRADDOCK MIDDLE	770	284	36.9%
21	LANIER MIDDLE	527	192	36.4%
22	LIBERTY MIDDLE	557	110	19.7%
23	LONGFELLOW MIDDLE	672	283	42.1%
24	MULTI-AGENCY SERVICES	27	0	0.0%
25	POE MIDDLE	353	47	13.3%
26	PRIVATE SCHOOL SPECIAL	2	0	0.0%
27	ROBINSON MIDDLE	559	137	24.5%
28	ROCKY RUN MIDDLE	514	243	47.3%
29	SANDBURG MIDDLE	761	175	23.0%
30	SOUTH COUNTY MIDDLE	543	137	25.2%
31	STONE MIDDLE	370	74	20.0%
32	THOREAU MIDDLE	627	239	38.1%
33	TWAIN MIDDLE	560	208	37.1%
34	WHITMAN MIDDLE	452	43	9.5%
35	<b>Grand Total</b>	<b>14198</b>	<b>4357</b>	<b>30.7%</b>

## **Appendix I**





A P P E A R A N C E S

FOR THE PLAINTIFF:

PACIFIC LEGAL FOUNDATION  
By: MR. CHRISTOPHER M. KIESER  
MS. ERIN E. WILCOX  
930 G Street  
Sacramento, California 95814  
916.419.7111  
ckieser@pacificlegal.org  
ewilcox@pacificlegal.org

PACIFIC LEGAL FOUNDATION  
By: MS. ALISON E. SOMIN  
3100 Clarendon Blvd.  
Suite 610  
Arlington, Virginia 22201  
202.557.0202  
asomin@pacificlegal.org

PACIFIC LEGAL FOUNDATION  
By: MR. GLENN E. ROPER  
1745 Shea Center Drive  
Suite 400  
Highlands Ranch, Colorado 80129  
720.344.4881  
geroper@pacificlegal.org

FOR THE DEFENDANTS:

HUNTON ANDREWS KURTH LLP  
By: MS. SONA REWARI  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
202.955.1974  
srewari@huntonak.com

HUNTON ANDREWS KURTH LLP  
By: MR. DANIEL R. STEFANY  
951 East Byrd Street  
Riverfront Plaza - East Tower  
Richmond, Virginia 23219  
804.788.8200  
dstefany@hunton.com

A P P E A R A N C E S

ALSO PRESENT:

MR. JEREMY SHUGHART, Director of Admissions  
Fairfax County School Board  
Thomas Jefferson High School for Science and Technology

OFFICIAL U.S. COURT REPORTER:

MS. JULIE A. GOODWIN, CSR, RPR  
United States District Court  
401 Courthouse Square  
Eighth Floor  
Alexandria, Virginia 22314  
512.689.7587

1 (SEPTEMBER 17, 2021, 10:03 A.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: Civil Action Number 21-CV-296,  
3 *Coalition for TJ versus Fairfax County School Board, et al.*

4 Counsel, please note your appearances for the  
5 record.

6 MR. KIESER: Christopher Kieser for plaintiffs --  
7 plaintiff.

8 MS. REWARI: Good morning, Your Honor. Sona Rewari  
9 from Hunton Andrews Kurth for the defendant, and with me is  
10 Daniel Stefany, also from my firm, and Mr. Jeremy Shughart from  
11 the Fairfax County Public Schools. Mr. Shughart has provided a  
12 declaration in this case, and he is here to address any  
13 questions the Court may have.

14 THE COURT: All right.

15 MS. REWARI: Thank you.

16 MR. KIESER: And with me is Erin Wilcox, Alison Somin,  
17 and Glenn Roper, also for plaintiff.

18 THE COURT: All right.

19 This comes on on your motion.

20 MR. KIESER: Yes. Good morning, Your Honor, and I'll  
21 be brief. Chris Kieser for the Coalition for TJ.

22 When we were here in May with much the same body of  
23 evidence, this Court recognized the school board's overhaul of  
24 the admissions criteria for Thomas Jefferson High School was  
25 designed to effect the racial composition of the school. Since

1 that hearing, and the denial of the first preliminary junction  
2 motion, we learned an important new data point. The first year  
3 under the challenge plan, the Asian-American proportion of the  
4 admitted class at TJ fell by more than a quarter.  
5 Asian-Americans received almost 60 fewer seats at TJ, even  
6 though FCPS doled out 60 additional offers.

7           The new data confirmed that not only was the plan  
8 designed to effect the racial composition of the school, it  
9 succeeded in doing so to the great detriment of atrium --  
10 Asian-American students. That purpose and effect means the  
11 Coalition is likely to succeed on the merits of its equal  
12 protection claim.

13           The Court declined to issue a preliminary  
14 injunction last time, as far as we understand, because it -- it  
15 was confident that -- Your Honor was confident we could reach a  
16 final decision in this case before an injunction would be  
17 necessary for the class of 2026. But with the admissions  
18 process scheduled to go into effect just -- begin in just over  
19 a month, on October 25th, a preliminary injunction is necessary  
20 now to preserve the status quo, the last uncontested status  
21 between the parties. It's far from guaranteed that a final  
22 decision on the merits would come early enough to provide  
23 effective relief for RA and the class of 2026, as the Coalition  
24 recognizes that the board's interest in not disrupting the  
25 established admissions process increase once the process

1 begins.

2 Preliminary relief now would avoid that problem.

3 And the --

4 THE COURT: Now, I understand your concern, but  
5 this -- the final pretrial conference is set for the end of  
6 October. I can give you a January trial date, so we can have  
7 this decided in January.

8 MR. KIESER: Your Honor, that -- that would be, of  
9 course -- I mean, we would not object to that, of course, but I  
10 think even then at that point by January the board's interest  
11 in -- in not overhauling the -- the entire admissions process  
12 that started in October would perhaps make it difficult for the  
13 Court to issue an order, a prohibitory injunction enjoining the  
14 board's actions from last fall and essentially requiring the  
15 board to go back to the 2024 -- the class of 2024 admissions  
16 process when the current process had already started. And  
17 the -- and I would note that the current process has different  
18 eligibility requirements, so there are some people who would be  
19 eligible to apply under the old process who are not eligible.

20 THE COURT: But if some decision is made in January,  
21 that gives plenty of time for the process to be straightened  
22 out, doesn't it?

23 MR. KIESER: I mean, I -- I would recog -- I would  
24 just note that as time goes on it makes -- it's very -- much  
25 more difficult --

1 THE COURT: Well, I'm sure they're going to argue  
2 that, but I -- it seems to me in the posture we're in that kind  
3 of falls on deaf ears. I -- this is going to come up very  
4 quickly. And if it's determined that this process has been  
5 discriminatory, it seems to me there's plenty of time to change  
6 it.

7 MR. KIESER: Well, Your Honor, we would submit that  
8 the best time to change the process, at least for the class of  
9 2026, would be before the process begins, and that is within  
10 the next five weeks. If we were to do it in January, the  
11 logistical issues that the board mentions in their brief would  
12 only increase, and the likelihood that the Court could order  
13 effective relief by the end of January would be much less.  
14 So I --

15 THE COURT: But the board's on notice. They  
16 understand that we're trying this case, and we don't know what  
17 the outcome is going to be yet, so they've got to be prepared  
18 for that, don't they?

19 MR. KIESER: I'm -- that's certainly true, Your Honor,  
20 but that's -- the same situation has been -- the same situation  
21 has existed since Your Honor denied the motion to dismiss in  
22 May, and yet even with this preliminary injunction motion, they  
23 make the same arguments about overhauling the admissions  
24 process at a late date. So I think those arguments continue  
25 even though I think the board's been on notice --

1           THE COURT: Well, those arguments are always going to  
2 be there, but it seems like that I'm in a -- in the same  
3 position that I am -- that I was before. I mean, what kind of  
4 disruption is it going to cause for me to give a preliminary  
5 injunction now? I've been in the same position I was before,  
6 it seems to me.

7           MR. KIESER: Well, I would submit, Your Honor, that a  
8 preliminary injunction now for the class of the 2026 process  
9 that is yet to begin is much less disruptive than say had you  
10 ordered a preliminary injunction in May for the old admissions  
11 process -- for the admissions process from last year, which was  
12 almost complete.

13           At this point, you could issue an order and --  
14 and -- and there would be ample time to prepare to change the  
15 process for anything you might order. Whereas if you do it in  
16 January, that might not be the case. And if -- I think if the  
17 Court -- as you recognized in May, that disruption increases as  
18 time goes on.

19           So, we would submit that a preliminary injunction  
20 now would minimize the disruption and allow the Court to order  
21 a prohibitory injunction that goes into effect five weeks  
22 before the -- the admissions process begins. And that's --  
23 that's our position on that. I mean, I understand if that's --

24           THE COURT: I understand your position.

25           MR. KIESER: And I guess, you know, as far as the --

1 the remaining factors, I mean, we think that -- we demonstrated  
2 that at least one Coalition member will suffer irreparable harm  
3 because if the Coalition is likely to succeed on the merits,  
4 then the -- the Coalition member's child will have to compete  
5 on an unequal playing field, and that isn't -- is the equal  
6 protection injury under *Parents Involved* and *Northeastern*  
7 *Florida*, so that's sufficient to satisfy the irreparable harm  
8 argument.

9           And then as far as the public interest and the  
10 balance of the equities, this case is against the government  
11 defendants, so those -- those -- and it's a constitutional  
12 case, so those factors merge. And generally speaking, the  
13 Fourth Circuit in *Legend Night Club* and in *Newsome* has waived  
14 the public interest in enforcing constitutional rights  
15 significantly more than government arguments to -- that they  
16 will be subject to hardship due to an injunction.

17           So we would submit that a preliminary injunction  
18 is -- all four *Winter* factors are satisfied and the preliminary  
19 injunction is -- is appropriate.

20           THE COURT: All right.

21           MR. KIESER: Thank you.

22           MS. REWARI: Good morning.

23           Your Honor, as you've recognized, you expressly  
24 ruled on this issue back in May, and there are really no  
25 grounds for reconsideration that are presented in the papers.



1 There's a suggestion that the Court miscalculated the timetable  
2 for this case. And when we were here in May, there wasn't even  
3 a scheduling order, so no one could have expected that this  
4 case would be decided by October.

5 And the schedule even back in May was known because  
6 Mr. Shughart supplied a similar declaration in May that  
7 explained that historically the old process would start in  
8 early September in order to be able to be completed in six  
9 months. And of course, then Your Honor issued a scheduling  
10 order in early June, and it showed the discovery cutoff was  
11 going to be October 15th. The parties submitted a joint  
12 discovery plan in which they sequenced discovery to be  
13 completed by October 15th. There was no request for expedited  
14 discovery or, you know, request to change the schedule at that  
15 time.

16 And we are now a month from the close of discovery,  
17 and we don't have any new evidence here that would warrant  
18 reconsideration other than the outcome of the last admission  
19 cycle, which I'll address because it doesn't show a  
20 disproportionate impact. But that -- that is the only ground  
21 that they have stated.

22 So, there's no way that anybody could have thought  
23 this was going to be decided by October, even when we were here  
24 in May. And the -- the rationale that we have the admissions  
25 results of the current process also doesn't support a

1 consideration. The last time we were here the Coalition argued  
2 for an injunction based on its own gloomy prediction that  
3 Asian-American students would comprise only 31 percent of the  
4 class of 2025, and that prediction came nowhere close to  
5 reality.

6 The results are in, and the proportion of  
7 Asian-American students in the class of 2025 is almost double  
8 that prediction. It was 54 percent, even though their  
9 proportion of the applicant pool was lower than it was the year  
10 before. They're still the majority of students, and  
11 Asian-American students have a larger share of the admitted  
12 class than their share of the applicant pool. So they have an  
13 even weaker argument now than they did back in May as to why  
14 the preliminary injunction would be warranted.

15 And last time the Coalition offered two  
16 declarations from two parents: One who had a child who was  
17 applying as an 8th grader, and one who had a child that was a  
18 7th grader. And they have the same two parents' declarations  
19 again.

20 Now, tellingly, the parent who had the 8th grader  
21 is not saying that 8th grader didn't get in. That parent is  
22 now saying, I'm worried about my 7th grader a year from now not  
23 getting in. That child is not even eligible to apply for this  
24 and so wouldn't be affected by an injunction.

25 The second parent, the one who had a 7th grader

1 last year, is now saying, well, my 8th grader is going to  
2 apply. But -- and he talks about the high qualifications of  
3 his 8th grader, but there's no showing that that child is  
4 unlikely to get in absent an injunction. In fact, the school  
5 attended by that child had the highest number of students  
6 admitted in -- in the class of 2025, and so there is no changed  
7 circumstance that would warrant reconsideration here.

8 And, you know, we are talking as if it would be  
9 possible to completely revert to the 2019 process now. And as  
10 we pointed in our papers, and there's no dispute here, that the  
11 old process was based on three standardized tests, two of which  
12 are no longer available from the vendor. No one can get them.  
13 They're not being offered for 8th graders at all this year.

14 And so if the Court were to order a preliminary  
15 injunction, someone would have to figure out what is the  
16 process going to look like because we cannot use the 2019  
17 process. Are there going to be standardized tests? What tests  
18 will those be? What scores will matter? How will we use those  
19 scores? All of that is -- are matters of educational policy.  
20 There's no expert to advise the Court on how to pick those. Is  
21 the board on an injunction supposed to now make those decisions  
22 in spring, this news on thousands upon thousands of  
23 unsuspecting 8th graders who are expecting for the Court -- for  
24 the board to follow the old process?

25 Mr. Shughart's declaration explains that last time

1 the School Board went through this three years ago when they  
2 had to switch tests because the tests they were using was  
3 discontinued by the vendor. The process took over a year.  
4 There was significant, significant community engagement: Lots  
5 of committees, lots of groups, lots of parent input. Lots of  
6 school administrator, school teacher input.

7           And so the idea that we could have an injunction  
8 today that would say, go pick some new tests, spring it on  
9 students who haven't been preparing, who had no idea that a  
10 standardized test could be coming, who are looking at the  
11 regulation that's been on the books to the public for months  
12 now saying that this is going to be the process, would be in a  
13 public interest, I think strains credulity, Your Honor, because  
14 this is not -- you know, they've said the balance of hardships  
15 and public interests merge when the government is a defendant,  
16 but in -- in many of those cases in terms of balancing the  
17 hardships, you're looking at is this an action that affects one  
18 person, the plaintiff, or the plaintiff's group, or are you  
19 enjoining something that could have consequences for students  
20 or for, you know, citizens beyond the people who are suing, and  
21 this would have significant adverse consequences for the  
22 children in Northern Virginia.

23           Fairfax County Public Schools is the defendant in  
24 this case, but the school that we're talking about is a school  
25 that is attended by students from five localities. The

1 counties of Loudoun, Arlington, Prince William, the City of  
2 Falls Church all send their students, and then we also have  
3 private schools.

4 Mr. Shughart 's declaration noted that last year  
5 we had 130 students from 130 schools apply to TJ admission, and  
6 so this impact would impact all of those students who are  
7 relying on the process that -- that is in the regulation.

8 And, you know, I understand that, as Your Honor  
9 pointed out, if the Court were to find discrimination and enter  
10 an injunction, all of these questions would have to be sorted  
11 out. But what is the sense in deciding them now and then  
12 re-deciding them if there's a different conclusion a few months  
13 from now?

14 You know, plaintiffs have read a lot into Your  
15 Honor's comments from the bench. Last time the same sentence  
16 from your -- from the transcript is quoted five times in two  
17 briefs. And, you know, I've looked carefully at what Your  
18 Honor said, and it's clear to me from the transcript that you  
19 were addressing the allegations of -- of what is alleged in the  
20 case and not making a pronouncement from the bench on a motion  
21 to dismiss that -- that this is a --

22 THE COURT: Well, you're correct about that. I've  
23 made no findings of fact in this case at all, other than the  
24 findings that I made in regard to the temporary restraining  
25 order that I looked at initially.

1 MS. REWARI: Yes, and that's how I read your remarks,  
2 and that's how we received your remarks. And so we expect that  
3 there will be a full decision on the merits in this case, and  
4 if the -- Your Honor is able to take us in January, we're --  
5 we're -- you know, we're happy to have it tried in January, but  
6 creating two rounds of uncertainty for students thousands upon  
7 thousands of students who are impacted by this.

8 And -- and I would also note that this is a process  
9 that has lots of components. Right? There's elimination of  
10 the hundred dollar application fee. There's no -- there's  
11 nothing about that that is racially discriminatory on its face.  
12 There's no evidence that's -- that was intended to advantage or  
13 disadvantage any group.

14 You have to be very cynical to say that that is a  
15 proxy for race. There's no evidence that that's a proxy for  
16 race. So you could have a process that -- that -- you know,  
17 even if the Court were to rule adversely against the School  
18 Board in January that says, you can keep that elimination of  
19 the fee, there's nothing wrong with that, and that has a huge  
20 impact. This year's class has 25 percent of economically  
21 disadvantage students, a number that's never been seen at TJ  
22 which has been historically very, very low, and nothing like  
23 the student population that you see in Northern Virginia.

24 So this has had a huge impact on the students who  
25 are eligible. And for the Court to now enjoin it would --

1 would have terrible consequences.

2           There's -- you know, there's another part of the  
3 plan. For example, there's also the lack of -- you know, the  
4 absence of teacher recommendations. Again, is that a proxy for  
5 race? There's no argument how that's a proxy for race.

6           There's a one -- there's -- the board chose a plan  
7 that is guaranteed to provide seats for eligible candidates  
8 from each middle school in Fairfax County. For the first time  
9 in at least 15 years, the TJ class of 2025 has students from  
10 every single middle -- public middle school in Fairfax County,  
11 26 of them.

12           Again, there's no argument, there's no evidence  
13 that that is a proxy for race. But in Mr. Dec --  
14 Mr. Shughart's declaration shows that historically the lion's  
15 share, more than 87 percent of the seats went to 8 out of 26  
16 middle schools. And while the plaintiffs have argued -- or  
17 plaintiff has argued, well, Asian-American students are  
18 clustered in just a few -- a few schools, we've provided  
19 evidence in our papers that's not true. The number of the  
20 schools they pick look a lot like other schools in terms of the  
21 number of Asian-American students, the proportion of  
22 Asian-American students in the population that have  
23 historically sent few, if any, students to TJ.

24           And, Your Honor, you received a brief from a number  
25 of amici that echo this point, and, in fact, show that there

1 are large segments of the Asian-American, to the extent you're  
2 going to call Asian-Americans a single community, there are  
3 segments of that community or sub-groups within the  
4 Asian-American community that have benefitted from these  
5 changes, and they would support these changes. So the idea  
6 that the -- the plaintiff here represents the interest of  
7 Asian-American students is one that we would not agree with.

8           There's -- there's also -- you know, we disagree on  
9 the likelihood of success on the merits. And I'm happy to  
10 address it if the Court wants to, but, you know, failure to  
11 meet any of the elements under *Winter* requires denial of the  
12 injunction. And I think the balance of hardships and the  
13 public interest here strongly disfavor an injunction.

14           THE COURT: All right.

15           MS. REWARI: Thank you.

16           THE COURT: Anything you want to respond to?

17           MR. KIESER: Your Honor, I would make it just a couple  
18 of points because I think on -- oh, sorry with the mask.

19           I think on the balance of equities and -- and the  
20 public interest, we've -- we've sort of covered those points.  
21 And -- and our position is still that, you know, in January  
22 there may not be any way to -- to award effective relief for  
23 the class of 2026 at TJ because of the fact that the process  
24 will have gone all the way through at that point, or almost all  
25 the way through.



1           And, you know, my friend on the other side talks  
2 about, you know, the fact that they would have to find these  
3 two new tests, but that -- that's going to be an issue in  
4 January too, so -- and maybe even more difficult to do that in  
5 January when you need to tell people by June whether they got  
6 into TJ, so an injunction now would at least make the process a  
7 little more smooth. And at least -- I mean, as we've talked  
8 about, they've been on notice since May, so it's been what now,  
9 six months that there's been a possibility that this might be  
10 enjoined at some point? An injunction now would at least, you  
11 know, give some clarity for the students who are applying  
12 before the application process begins.

13           I just want to also address the disparate impact  
14 point because I think under their -- their theory that the drop  
15 from 73 percent to 54 percent isn't a disparate impact. It is  
16 essentially saying that you can benchmark a racial -- racially  
17 balanced class and say, well, as long as they're still  
18 performing above that, that racial balance, whether it be the  
19 proportion of students in Fairfax County Public Schools as a  
20 whole or the applicant pool, then -- then the process or the  
21 board's actions were not discriminatory. But as the --  
22 especially as the order that we submitted as Exhibit 2 to the  
23 reply brief, the *AFEF versus Montgomery County Board of*  
24 *Education* explains, that's not the proper standard for  
25 disparate impact under a -- in an *Arlington Heights* case. It's

1 the effect of the actual decision.

2           So, here we have, you know, six years in a row  
3 where there's only one year where the Asian-American proportion  
4 of students at TJ was below 70 percent, and now it's 54  
5 percent. That's a significant drop regardless of previous  
6 projections. I mean, I think everyone would acknowledge that  
7 it's very -- it was very difficult to project the outcome of  
8 what would happen here because of the holistic factors that go  
9 into evaluation, and so the 54 percent, which is in line with  
10 the superintendent's prediction for his Merit Lottery Proposal  
11 still represents a more than a quarter decline in the --  
12 compared to the previous two years, class of 2024 and the class  
13 of 2023. And any -- and their -- under their theory,  
14 essentially as long as Asian-Americans were doing better than  
15 the -- than the racial balance of the applicant pool, then  
16 there could be no discriminatory intent. And I don't think  
17 that that's the proper reading of *Arlington Heights*, *Feeney*,  
18 and *McCrary*.

19           But if this comes down to the -- the balance of the  
20 equities, I think our position is essentially the same as  
21 before that, that effective relief has to happen now, and in  
22 January there's no guarantee that there could be effective  
23 relief for this -- this class. I mean, the Court could order  
24 relief for the -- for the subsequent classes at that point  
25 and -- and we would certainly hope that the Court could order

1 relief for 2026 of that -- the class of 2026 at that time, but  
2 we would just submit that it would be more difficult to do so.  
3 And so then an injunction now would solve that problem.

4 Thank you, Your Honor.

5 THE COURT: All right. I understand your position,  
6 but I believe I'm in the same position that I am before. I  
7 believe that the -- my entering of a preliminary injunction at  
8 this time may cause more harm than good and might cause more  
9 harm than leaving things alone. It certainly looks like it  
10 would to me.

11 I mean, we can try this case in January and get a  
12 decision. It seems to me that that's plenty of time to get  
13 corrected whatever needs to be corrected, if that's warranted  
14 from the findings after the trial of the case.

15 So your motion for a preliminary injunction will be  
16 denied.

17 All right.

18 MR. KIESER: Your Honor, we did want to talk quickly  
19 about the pretrial, about the date for the pretrial conference.

20 THE COURT: Go ahead.

21 MR. KIESER: We have a conflict for the current date,  
22 and I think we've -- we talked about October 28th as a possible  
23 change for that. Would that be possible to move it back to  
24 October 28th?

25 THE COURT: Well, I'll do it on a Friday for you.

1 What's the date of the conflict?

2 MR. KIESER: It's currently the 21st. We can move it  
3 to the -- yeah, we can move it to the --

4 MS. REWARI: Your Honor, excuse me. I'm sorry. I'm  
5 scheduled to attend the Boyd-Graves Conference in Virginia on  
6 the 29th, so I wouldn't be able to do the 29th.

7 THE COURT: Well, let me look here just a minute.  
8 Maybe we can -- does that include the 28th too?

9 MS. REWARI: No, it does not, Your Honor.

10 THE COURT: What about October -- are you available on  
11 the 22nd, Friday the 22nd?

12 MR. KIESER: No, ours is the 20th through the 22nd.  
13 We're -- we have a firm-wide retreat that we all have to be  
14 there.

15 THE COURT: Oh.

16 MR. KIESER: So it's the 20th through the 22nd.

17 THE COURT: Well, I can do it for you -- well, you  
18 can't do it on the 28th though. You want to do it the 25th or  
19 the 26th?

20 MR. KIESER: We can do the 28th.

21 MS. REWARI: Yes, Your Honor, I can do the 28th as  
22 well. I just can't do the 29th.

23 THE COURT: Oh, you can do the 28th too. Okay.

24 MS. REWARI: Yes, yes, I can do the 28th.

25 THE COURT: All right. We'll move it to the 28th --

1 MR. KIESER: Okay. Thank you.

2 THE COURT: -- at 10:00 o'clock.

3 MR. KIESER: Thank you, Your Honor.

4 MS. REWARI: Thank you.

5 THE COURT: All right. Anything else?

6 MR. KIESER: Not at this time, no.

7 THE COURT: All right. Thank you.

8 We'll adjourn until Monday morning at 10:00  
9 o'clock.

10 THE LAW CLERK: All rise.

11 (PROCEEDINGS CONCLUDED AT 10:31 A.M.)

12 -oOo-

13

14 UNITED STATES DISTRICT COURT )  
15 EASTERN DISTRICT OF VIRGINIA )

16 I, JULIE A. GOODWIN, Official Court Reporter for  
17 the United States District Court, Eastern District of Virginia,  
18 do hereby certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above matter, to the best  
20 of my ability.

21 I further certify that I am neither counsel for,  
22 related to, nor employed by any of the parties to the action in  
23 which this proceeding was taken, and further that I am not  
24 financially nor otherwise interested in the outcome of the  
25 action.

Certified to by me this 5TH day of OCTOBER, 2021.

21

22

23

24

25

/s/  
JULIE A. GOODWIN, RPR  
Official U.S. Court Reporter  
401 Courthouse Square  
Eighth Floor  
Alexandria, Virginia 22314