

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

COALITION FOR TJ,

Plaintiff,

v.

FAIRFAX COUNTY SCHOOL BOARD,  
and DR. SCOTT BRABRAND, in his official  
capacity as Superintendent of the Fairfax County  
School Board,

Defendants.

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

**[PROPOSED] BRIEF OF AMICI CURIAE  
TJ ALUMNI FOR RACIAL JUSTICE,  
NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM  
VIRGINIA,  
VIRGINIA STATE CONFERENCE OF THE NAACP,  
CASA VIRGINIA,  
AND HISPANIC FEDERATION**

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## INTEREST OF AMICI CURIAE

Amici TJ Alumni for Racial Justice, National Korean American Service & Education Consortium Virginia, Virginia State Conference of the NAACP, CASA Virginia, and Hispanic Federation are community-based nonprofit organizations that promote equality of opportunity for all, including in education. Amici each have an interest in supporting equal access to Thomas Jefferson High School for Science and Technology (“TJHSST”), and in offering the perspective of allied communities of color that appropriate efforts to equalize opportunities and foster diversity are beneficial. Amici file this brief to highlight the historical barriers to equitable access at TJHSST and to explain how these barriers inform the consideration of TJHSST’s revised admissions policy; to underscore the proper standard of review for such types of policies; and to illustrate that, contrary to Plaintiff’s allegations, many members of the Asian American community and other communities of color—including Amici—embrace equality of educational opportunity for *all*.<sup>1</sup> A complete description of Amici Curiae can be found in the Motion for Leave to File Brief as Amici Curiae and is incorporated herein by reference.

## INTRODUCTION

As courts and public school systems have long recognized, barriers to equal educational opportunity often prevent students and educational institutions from enjoying the benefits of a racially and socioeconomically diverse student body. TJHSST is no exception. Consequently, the Supreme Court has approved efforts by schools to devise measures that address both the persisting legacy of racial discrimination and the effects of *de facto* racial segregation, including facially race-neutral measures crafted to remove barriers to equal access for students spanning a range of

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<sup>1</sup> 2020 ASIAN AMERICAN VOTER SURVEY (AAVS), <https://aapidata.com/2020-survey/> (last visited May 6, 2021) (noting that over 70% of Asian Americans polled as part of the 2020 Asian American Voter Survey supported programs designed to help Black and other minority communities obtain greater access to higher education).

racial, socioeconomic, and geographic backgrounds. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782, 783 (2007) (Kennedy, J., concurring in part and concurring in judgment); *see infra* Part II.A. After all, “[g]overnment is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995).

Plaintiff ignores the systemic barriers many students of color face, and settled precedent, by arguing that TJHSST’s new admissions policy is motivated by racial animus against Asian Americans; that the policy aims to achieve a “preferred racial balance” at TJHSST, Mem. in Support of Mot. for Prelim. Inj. (ECF No. 16) at 12; and that Defendants must prove that the new policy satisfies strict scrutiny by being narrowly tailored to further a compelling governmental interest. As Amici explain, TJHSST’s admissions policy must be viewed in the context of the history and persisting effects of segregation and inequity, which underscore the ongoing need to remove barriers to educational opportunity for all students. Further, contrary to Plaintiff’s mistaken assertion, strict scrutiny does not apply to TJHSST’s plan, given that Fairfax County Public Schools’ (“FCPS”) measures to improve educational access for all students are race-neutral. And even assuming strict scrutiny could apply (it cannot), that standard permits TJHSST to engage in good-faith consideration of measures needed to satisfy the compelling governmental interests in the educational benefits of diversity and compliance with state and federal anti-discrimination laws.

To be clear, at this early stage of the litigation, Amici lack the information necessary to determine whether TJHSST’s plan is sufficient to satisfy anti-discrimination laws and obtain the benefits of diversity. What is clear is that Plaintiff’s efforts to prevent TJHSST from taking even

this modest step are factually and legally unsound. For these reasons, and those explained more fully below, Amici urge this Court to deny Plaintiff's Motion for Preliminary Injunction and grant Defendants' Motion to Dismiss.

## ARGUMENT

### I. **History illustrates the ongoing need to remove barriers to educational opportunity in FCPS, including TJHSST.**

The history of racial segregation and persistent inequities in FCPS, and FCPS' past attempts and failures to equalize access to TJHSST, provide important context as to the need for FCPS to promote educational opportunities for all students. TJHSST's eligibility and admissions criteria reflect, at least in part, these persisting inequities, unjustifiably denying some students an equal opportunity to attend TJHSST. In an attempt to address this issue, TJHSST has over the past three decades pursued a variety of admissions programs, all of which it eventually abandoned. The most recent test-based admissions policy that TJHSST implemented prior to the plan at issue now failed to equalize access; it instead compounded a pipeline problem that begins in *elementary school*—and thereby presented a seemingly insurmountable series of hurdles for many otherwise eligible students.

#### A. FCPS' history of discrimination against Black and Latinx students provides necessary context for reform.

Thomas Jefferson—the third President in honor of whom TJHSST is named—once declared Black people “inferior to whites in the endowments both of body and mind.”<sup>2</sup> This Court recently recognized “the Commonwealth of Virginia[‘s] long official history of racial segregation in education which has had severe impact[s] on [students of color, particularly Black students].”<sup>3</sup>

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<sup>2</sup> See Thirteen/WNET New York, *Acts against the education of slaves: South Carolina, 1740 and Virginia, 1819*, Slavery and the Making of America (2004), <https://www.thirteen.org/wnet/slavery/experience/education/docs1.html>.

<sup>3</sup> *Holloway v. City of Virginia Beach*, 2021 WL 1226554, at \*46 (E.D. Va. 2021).

FCPS is no exception. Plaintiff's facile reference to FCPS' racial past grossly understates the historical and contemporary record.<sup>4</sup>

FCPS was established in 1870, when Virginia rejoined the union under a constitution that required provision of a system of free public schools, and was, as required by law, segregated by race.<sup>5</sup> And FCPS remained segregated for years after *Brown v. Board of Education*, 347 U.S. 483 (1954) outlawed racially segregated schools.<sup>6</sup>

In 1959, for example, the Fairfax County School Board's ("FCSB") desegregation plan called for admitting a handful of students, one grade per year, until all twelve grades were integrated. Frustrated by FCSB's foot-dragging, a group of Black students successfully challenged the plan in *Blackwell v. Fairfax County School Board*.<sup>7</sup> There, this Court rejected FCSB's "laggard" plan, but also found the FCSB's test requirement applicable only to Black students impermissible.<sup>8</sup> Soon after *Blackwell*, another challenge was mounted against a FCSB policy that automatically assigned Black students to exclusively Black schools, and then required them to apply for transfer to white schools.<sup>9</sup> Though the court initially concluded that the FCSB was not maintaining a dual or segregated school system,<sup>10</sup> the Fourth Circuit reversed, concluding that "the

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<sup>4</sup> See Pl.'s Mem. in Support of Mot. for Preliminary Inj., ECF Doc. 16, at 24.

<sup>5</sup> See *Green v. County School Bd. of New Kent County Va.*, 391 U.S. 430, 432 (1968) ("segregated [school] system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education"); OUR HISTORY, <https://www.fcps.edu/about-fcps/history> (last visited May 8, 2021).

<sup>6</sup> See FCPS, *Desegregation: In the News*, available at <https://www.fcps.edu/about-fcps/history/records/desegregation/newspapers> (last visited May 8, 2021).

<sup>7</sup> 5 Race. Rel. 1056 (E.D. Va. 1960).

<sup>8</sup> *Id.* at 1057, 1059.

<sup>9</sup> See *Blakeney v. Fairfax County School Board*, 226 F. Supp. 713 (E.D. Va. 1964).

<sup>10</sup> *Id.* at 715.

injunction sought by plaintiffs to prohibit a system of segregated schools . . . should have been granted.”<sup>11</sup>

But even four decades after *Blakeney*, “the typical white student in Fairfax County attended a school with 8.9% [B]lack students and 9.9% Latino students.”<sup>12</sup> Indeed, more than two hundred years after Jefferson’s musing about the presumed “inferior” intellectual capacity of Black people, the legacy of discrimination endures. In 2012, the Coalition of the Silence and the Fairfax County Branch of the NAACP—a branch of the Virginia State Conference of the NAACP, an amicus on this brief—filed a complaint with the U.S. Department of Education, Office for Civil Rights on behalf of Black and Latinx students, alleging discriminatory exclusion from TJHSST.<sup>13</sup> The gravamen of the complaint was the FCSB’s institution of a “test score dominated process,”<sup>14</sup> which drastically diminished the number of Black and Latinx students accepted at TJHSST. As the complaint noted, such dependence on test scores would result in a failure to capture all indicators

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<sup>11</sup> *Blakeney v. Fairfax County School Board*, 334 F.2d 239, 240 (4th Cir. 1964).

<sup>12</sup> See Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, Harvard University Civil Rights Project, 14 (2002). Segregation and exclusion of Latinx students from educational opportunities have played out mostly in the Southwest. See, e.g., *Plyer v. Doe*, 457 U.S. 202 (1982) (undocumented Mexican school-age children successfully challenged Texas’ segregative laws); *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 214 (1973) (Latinx students successfully challenged *de facto* segregation in Colorado). With the growth of Latinx students in the South, they, frequently, attend public schools segregated by ethnicity, poverty and language. See e.g. Genevieve Segel-Hawley, *Miles to Go: A Report on School Segregation in Virginia, 1989-2010*, The UCLA Civil Rights Project, 53, 57, 63 (2013) (“Northern Virginia is the only region in the state reporting a pattern of more intense concentration of Latino students in segregated minority settings than [B]lack students.”).

<sup>13</sup> OCR Complaint No. 11-12-1503 (July 23, 2012), [http://mlkcommission.dls.virginia.gov/meetings/2012/OCR\\_FCPS\\_COTS\\_fairfax\\_complaint\\_NAACP\\_TJHSST\\_admissions\\_etc\\_7-23-12.pdf](http://mlkcommission.dls.virginia.gov/meetings/2012/OCR_FCPS_COTS_fairfax_complaint_NAACP_TJHSST_admissions_etc_7-23-12.pdf). By letter dated September 25, 2012, OCR dismissed allegations asserted on behalf of students with disabilities, but retained jurisdiction over complainants’ race-based allegations. Letter from Department of Education, Office for Civil Rights to Coalition of the Silence and NAACP-Fairfax, (Sept. 25, 2012), <https://coalitionofthesilence.files.wordpress.com/2012/10/cp-tj-notif-letter-pdf.pdf>.

<sup>14</sup> *Id.* at 5.

of a student’s potential for “future success,”<sup>15</sup> while also giving a significant advantage to students who are able to access test preparation courses. These issues would, in turn, further contribute to disparity in admissions. The complaint further highlighted the paucity of challenging courses at many FCPS middle schools with significant numbers of Black and Latinx students, thereby undermining their competitiveness.<sup>16</sup> And it also noted that Black and Latinx students comprised **4.2%** of TJHSST’s student population.<sup>17</sup> As further discussed below, these disparities persist to this day. This longstanding discrimination provides critical context in reviewing Defendants’ actions.

**B. FCPS’ past attempts to increase access have been deficient.**

Historically, the eligibility and admissions criteria for TJHSST, albeit facially race neutral, have had a disproportionately adverse effect on Black, Latinx, economically disadvantaged, and English Language Learner (“ELL”) students. Residents of five racially, socioeconomically, and linguistically diverse Virginia counties are eligible to attend TJHSST: Arlington County, Fairfax County (including the City of Fairfax), Falls Church City, Loudoun County, and Prince William County.<sup>18</sup> The Asian American community of these counties includes Filipino Americans, Indian Americans, Chinese Americans, Pakistani Americans, Korean Americans, and Vietnamese Americans,<sup>19</sup> while nearly half (48%) of Fairfax County elementary school students speak a

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<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 2 (emphasis added).

<sup>18</sup> TJHSST ELIGIBILITY REQUIREMENTS, <https://www.fcps.edu/registration/thomas-jefferson-admissions/eligibility-requirements> (last visited May 6, 2021).

<sup>19</sup> *See, e.g.*, U.S. Census Bureau, 2019 ACS 5-Year Estimates, Table B02015, Asian Alone by Selected Groups (Fairfax County, Virginia) <https://data.census.gov/cedsci/table?q=fairfax%20county%20%2B%20%20asian%20%2B%20language%20%2B%20race&tid=ACS5Y2019.B02015&hidePreview=false>.

language other than English at home, encompassing 182 different languages or dialects.<sup>20</sup>

However, this rich diversity is not reflected at TJHSST; for example, in the last admissions cycle (for the class of 2024):

- Though 8% of Asian American eighth graders in the school divisions participating in TJHSST were ELLs last year, only 0.6% of the semifinalists for the 2024 class were ELLs, and there are less than 10 Asian American ELL students in TJHSST's class of 2024 today.<sup>21</sup>
- Black students were 12% of eighth graders in the school divisions TJHSST serves, but only 6% of applicants and just  $\leq 2\%$  of those admitted.<sup>22</sup>
- Latinx students were 26% of eighth graders in the school divisions TJHSST serves, but just 8% of the applicants and only 3% of those admitted.<sup>23</sup>
- Economically disadvantaged students were 30% of eighth graders in the school divisions TJHSST serves, but just 7% of applicants and only 1.4% of the semifinalists.<sup>24</sup>
- ELL students were 10% of eighth graders in the school divisions TJHSST serves, but just 3% of applicants, and only 0.6% of semifinalists.<sup>25</sup>
- White eighth graders were nearly twice as likely to apply to TJHSST than Latinx eighth graders, while Asian American eighth graders were seven times as likely to apply to TJHSST than Black eighth graders and more than nine times as likely to apply as Latinx eighth graders.<sup>26</sup>
- White applicants were more than twice as likely to be admitted as Black applicants and nearly twice as likely to be admitted as Latinx applicants, while Asian American

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<sup>20</sup> See, e.g., FAIRFAX COUNTY, VIRGINIA, LANGUAGES SPOKEN AT HOME BY FAIRFAX COUNTY ELEMENTARY STUDENTS, <https://www.fairfaxcounty.gov/demographics/languages-spoken-home-fairfax-county-elementary-students> (last visited May 8, 2021).

<sup>21</sup> TJ Admissions Merit Lottery Proposal, School Board Work Session, Fairfax County Public Schools (Sept. 15, 2020) [https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BTGKX652F413/\\$file/TJHSST%20Admissions%20Merit%20Lottery%20Proposal.pdf](https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BTGKX652F413/$file/TJHSST%20Admissions%20Merit%20Lottery%20Proposal.pdf); *infra* note 22.

<sup>22</sup> Compl. at 9 n.10 (citing Press Release, FCPS, TJHSST Offers Admission to 486 Students (June 1, 2020), <https://www.fcps.edu/news/tjhsst-offers-admission-486-students>); VA Dep't of Educ., 2019-20 Fall Membership Reports, <https://p1pe.doe.virginia.gov/buildatable/fallmembership>. Note that, due to suppression of data in categories containing less than 10 students, some of these figures are approximate.

<sup>23</sup> *Supra* note 22

<sup>24</sup> *Supra* note 22

<sup>25</sup> *Supra* note 22.

<sup>26</sup> *Supra* note 22

applicants were four times as likely to be admitted than Black applicants and more than three times as likely to be admitted than Latinx applicants.<sup>27</sup>

	8 <sup>th</sup> graders <sup>29</sup>	Applicants	Admitted
Asian American	5,167 (17%)	1,423 (56%)	355 (73%)
Black	3,702 (12%)	160 (6%)	≤10 (≤2%)
Latinx	7,991 (26%)	208 (8%)	16 (3%)
White	11,594 (38%)	595 (23%)	86 (18%)
Total	30,247	2,539	486

TJHSST has for decades attempted, and failed, to address this issue. Its greatest years of success appeared to be in the 1990s, at which time FCPS had two programs in place designed to promote access for Black and Latinx students. First, in 1992, FCPS instituted the Visions Program, a two-year math and science enrichment program for Black and Latinx students. The program also included preparation for the TJHSST entrance exam.<sup>30</sup>

During that same period, TJHSST also employed an “unofficial” program that was neither widely publicized nor discussed,<sup>31</sup> specifically implemented as “a remedial step to promote

<sup>27</sup> *Supra* note 22

<sup>28</sup> *Supra* note 22

<sup>29</sup> This column shows the number of Asian American eighth graders in Arlington County, Fairfax County, Falls Church City, Loudoun County, and Prince William County during the 2019-20 school year. This column also shows the corresponding figures for Black students, Latinx students, and white students as well as the total number of eighth graders across these school divisions.

<sup>30</sup> See Pamela Varley, *Values in Conflict: The Furor over Admissions Policy at a Popular Virginia Magnet School* (2006) (Harvard Kennedy School of Government Case Program Study), 10.

<sup>31</sup> See *id.*; see also Bui & Kim, *infra* note 32 at 8.

diversity.”<sup>32</sup> Under the program:

African American and Hispanic applicants to Jefferson would take the entrance exam, like all other applicants, but those who did not qualify for the 800-pool would receive a second look from the oversight committee. This committee would seek information from each minority applicant’s middle school principal and counselor, in an effort to see whether there were indications of academic promise not captured by the applicant’s grades and test scores. On this basis, an additional number of African American and Hispanic students would be added to the semifinalist pool. The admissions committees would then review all student applications to select the 400 finalists, as before.<sup>33</sup>

As a result of both the Visions Program and the affirmative action program, “between 1991 and 1998, the proportion of African American and Latinx students accepted for the ninth grade class ranged from 8.5 to 12.3 percent.”<sup>34</sup> These numbers were “a historic high” for the school that have not been repeated since.<sup>35</sup> Today, TJHSST’s student body is only 1.72% Black and 2.6% Latinx, with admissions of Black and Latinx students over the past fifteen years never clearing 2.5% or 4%, respectively. *See* Appendix 1, included at the end of this brief.<sup>36</sup>

However, in 1997, FPCS terminated the affirmative action program, in response to affirmative action cases in the district, citing fear of impending lawsuits.<sup>37</sup> Shortly thereafter, in or around 1999, FCPS chose to end the Visions Program because it did not want to use public money to fund the program after unrelated federal court rulings on affirmative action and school

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<sup>32</sup> Justin C. Bui & Joseph Kim, *Resolving Systemic Disparity at TJHSST: A Study on the History of Admissions at TJHSST and How to Fix Them*, 8.

<sup>33</sup> Varley, *supra* note 30, at 10.

<sup>34</sup> *Id.* at 11.

<sup>35</sup> Bui & Kim, *supra* note 32, at 8.

<sup>36</sup> *See* SCHOOL PROFILE FOR THOMAS JEFFERSON HIGH SCHOOL FOR SCIENCE AND TECHNOLOGY, [http://schoolprofiles.fcps.edu/schlprfl/f?p=108:13::NO::P0\\_CURRENT\\_SCHOOL\\_ID,P0\\_EDS L:300,0](http://schoolprofiles.fcps.edu/schlprfl/f?p=108:13::NO::P0_CURRENT_SCHOOL_ID,P0_EDS L:300,0) (last visited May 6, 2021).

<sup>37</sup> *See id.* at 12.

desegregation.<sup>38</sup> A separate, privately-funded minority enrichment program named Quest was later created without funding from FCPS, but was subsequently terminated.<sup>39</sup>

C. FCPS’ prior test-based admissions policy failed to address—and instead perpetuated—barriers to educational opportunity.

After abandoning these programs from the 1990s, TJHSST developed an admissions process that relied heavily upon standardized testing results. That policy—which required students to have completed or be enrolled in Algebra I; have a core GPA of at least 3.0; pay a \$100 application fee; and used standardized test scores as the sole determinant of which applicants became semifinalists—created an admissions pipeline that, for many students, began well before the eighth grade and eventually encompassed extensive and costly extracurriculars and testing preparation.

For many students, the path to potential admission under the former policy was long and littered with barriers of inequity. Admissions did not begin and end with the test; rather, in reality, students began their preparation for TJHSST as early as the second grade, when students are first accepted to FCPS’s gifted and talented program, Advanced Academic Program (“AAP”).<sup>40</sup> From there, a number of factors further affect whether a student is likely to be accepted to TJHSST, including whether the student attends a “feeder” middle school, whether the student has taken the required prerequisite courses before applying, in which extracurricular activities the student participates, and which test preparation services the student uses. Black and Latinx students face unequal access to each of these factors.

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<sup>38</sup> See Liz Seymour, *Minority Scarcity Alarms Jefferson*, WASH. POST, (Sept. 27, 2001), <https://www.washingtonpost.com/archive/local/2001/09/27/minority-scarcity-alarms-jefferson/07324e37-3faa-4ec3-abd8-d3b2209f8b3a/>.

<sup>39</sup> See *id.*

<sup>40</sup> See ADVANCED ACADEMIC PROGRAMS (AAP), [https://www.fcps.edu/academics/academic-overview/advanced-academic-programs\\_\(last visited May 7, 2021\)](https://www.fcps.edu/academics/academic-overview/advanced-academic-programs_(last%20visited%20May%207,%202021)).

1. Access to AAP is not equal.

Beginning as early as second grade, access to gifted and talented education, which increases a student's likelihood of acceptance to TJHSST, is not equal.<sup>41</sup> Furthermore, admissions efforts and services surrounding acceptance to the highest level of AAP resources (Level IV AAP) are *themselves* extensive and advanced.<sup>42</sup>

But admissions to the AAP program is essential if a student wishes to attend TJHSST.<sup>43</sup> For the TJHSST Classes of 2017-2021, *only* Level IV AAP Centers sent ten or more students to

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<sup>41</sup> See, e.g., Final Determination of the VA Office of Attorney General Division of Human Rights in DHR Case No.: 19-2652, *NAACP Loudoun Branch v. Loudoun County Public Schools* (Nov. 18, 2020) (discussing the “significant underrepresentation of Black/African-American and Latinx/Hispanic students enrolled in the gifted and talented middle school program for the past three years,” citing “witness statements from Black/ African-American LCPS students and parents alleging barriers to accessing academically rigorous curricula,” and noting “resistance from teachers in supporting student enrollment in more rigorous academic programming on the basis of race; failure to inform parents and students of opportunities for more rigorous academic programs and courses on the basis of race; limited opportunity for parent input; and lack of teacher support and mentorship in supporting Black/African-American students’ sense of academic identity”),

<https://bloximages.newyork1.vip.townnews.com/loudountimes.com/content/tncms/assets/v3/editorial/3/da/3da84c10-2b4b-11eb-8ce2-ebe347b0bd65/5fb7eb5fe16b2.pdf>.

<sup>42</sup> See Kathleen Murray, *Time to Rethink Fairfax’s ‘Gifted’ Program*, WASH. POST (June 21, 2013), [https://www.washingtonpost.com/opinions/time-to-rethink-fairfaxs-gifted-program/2013/06/21/bb5baf58-d9e6-11e2-9df4-895344c13c30\\_story.html](https://www.washingtonpost.com/opinions/time-to-rethink-fairfaxs-gifted-program/2013/06/21/bb5baf58-d9e6-11e2-9df4-895344c13c30_story.html) (“These days, there are tips online on everything from how to prep your 7-year-old for AAP screening tests and the best psychologists for appealing a rejection to what kind of reference letters (hint: they’re not from soccer coaches) and work samples are most impressive. At one elementary school, a group of enterprising moms tried to game the system the old-fashioned way: figuring out which second-grade class historically sent the most students to AAP, so they could request that teacher for their kids.”); see also Matthew Barakat, *School system’s appeals process leaves some minorities out*, ASSOC. PRESS (Feb. 3, 2019), <https://apnews.com/article/56c2db12f53d443f85ec0a4a56f290f1> (noting that not all families are aware of the appeals process, and that for parents who are, many spend “hundreds of dollars” for a second placement test to include in their child’s appeal).

<sup>43</sup> Only 12 (16%) of the 73 public middle schools whose students can become eligible to apply to TJ had five or more students admitted to the TJHSST class of 2022. See *TJ Admissions Statistics by FCPS Middle Schools*, <http://www.fcag.org/documents/TJHSST%20All%20Middle%20Schools%20Class%20of%202022.pdf>.

TJHSST.<sup>44</sup> The top middle schools that contributed to the TJHSST Class of 2022<sup>45</sup> were Rachel Carson (26.7% of applicants admitted) and Longfellow (33.5% of applicants admitted),<sup>46</sup> both of which are Level IV AAP Centers serving only AAP students.<sup>47</sup> Indeed, nearly half of TJHSST's Class of 2022, came from just five Level IV AAP Centers: Rachel Carson, Longfellow, Kilmer, Rocky Run, and Jackson.<sup>48</sup> For the other recent admissions classes—the Classes of 2017, 2018, 2019, 2020, and 2021—Rachel Carson, Longfellow, and Rocky Run consistently sent the largest number of students to TJHSST, with their students making up approximately one-third of the TJHSST classes for those years.<sup>49</sup> As a result, many parents have tried to ensure their students can attend Rachel Carson, specifically because it is a “pipeline” to TJHSST with resources tailored to create the perfect “formula” for acceptance to TJHSST.<sup>50</sup> During the 2019-2020 school year, only 6.83% and 10.15% of Rachel Carson students were Black and Latinx, respectively.<sup>51</sup>

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<sup>44</sup> See *Fairfax County Public Schools Thomas Jefferson High School for Science and Technology Middle School Students*, <http://www.fcag.org/documents/TJadmitbyMS.Classes2017to2021.pdf>.

<sup>45</sup> TJHSST's Class of 2022 is the most recent year for which TJHSST has released middle school statistics. See TJHSST ADMISSIONS STATISTICS, <http://www.fcag.org/tjstatistics.shtml> (last visited May 11, 2021).

<sup>46</sup> *Id.*

<sup>47</sup> See ADVANCED ACADEMIC LEVEL IV SCHOOL ASSIGNMENTS, <https://www.fcps.edu/academics/elementary-school-academics-k-6/advanced-academics/advanced-academic-level-iv-school> (last visited May 7, 2021).

<sup>48</sup> See Bui & Kim, *supra* note 32, at 10.

<sup>49</sup> See *Fairfax County Public Schools*, *supra* note 44.

<sup>50</sup> See Lowkell, *As People Across America Protest Racial Inequity, #1 Public High School in the Country (“TJ” in Fairfax, VA) Just Admitted ZERO African Americans [UPDATED]* (June 7, 2020), <https://bluevirginia.us/2020/06/as-people-across-america-protest-racial-inequity-1-public-high-school-in-the-country-tj-in-fairfax-va-just-admitted-zero-african-americans> (noting parents' efforts to help their children gain admission to TJHSST, including gaining access to the Carson “pipeline”; facilitating auditions for the Science Olympiad; paying for extra classes; and starting admissions test prepping in the third grade).

<sup>51</sup> See CARSON MIDDLE SCHOOL, [http://schoolprofiles.fcps.edu/schlprfl/f?p=108:13:::NO::P0\\_CURRENT\\_SCHOOL\\_ID,P0\\_EDS L:171,0](http://schoolprofiles.fcps.edu/schlprfl/f?p=108:13:::NO::P0_CURRENT_SCHOOL_ID,P0_EDS L:171,0) (last visited May 11, 2021) (navigate to Demographics tab).

2. Access to prerequisites for TJHSST application is not equal.

Under the prior admissions system, an applicant was required to complete Algebra I prior to ninth grade.<sup>52</sup> During that same timeframe, access to Algebra I was not even available in all FCPS middle schools.<sup>53</sup> And during the 2019-20 school year, “Asian and White [middle school] students were primarily enrolled in Algebra I, meeting the minimum math course requirement to apply to TJHSST.”<sup>54</sup> “In contrast, Black and Hispanic students were largely enrolled in Pre-Algebra, a course that does not meet the [eligibility] requirement that applicants be enrolled in Algebra I or higher[,]”<sup>55</sup> rendering these students ineligible to even apply to TJHSST.

3. Test scores and extracurriculars are not objective measures of merit.

Test scores underpredict the potential of Black and Latinx students. The process “used by psychometricians to construct admissions tests such as the SAT, ACT, GRE, LSAT, GMAT, MCAT, and many other bubble tests” is racially biased.<sup>56</sup> Indeed, four Sixth Circuit judges

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<sup>52</sup> See *Thomas Jefferson High School for Science and Technology (TJHSST) as a High School Option*, <https://www.lcps.org/cms/lib4/VA01000195/Centricity/Domain/4896/TJ%20Permission%20Slip.pdf> (listing “Algebra 1 or higher in 8th grade” as an eligibility requirement for the 2012-2013 cycle).

<sup>53</sup> See OCR Compl., *supra* note 13 (noting that prior to 2012, not all middle schools offered the prerequisite courses).

<sup>54</sup> FCPS Office of Research and Strategic Improvement et al., *Thomas Jefferson High School For Science And Technology: Improving Admissions Processes: Research And Proposal* (Nov. 2020), [https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BWE23Y004896/\\$file/TJ%20White%20aper%2011.17.2020.pdf](https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BWE23Y004896/$file/TJ%20White%20aper%2011.17.2020.pdf)

<sup>55</sup> *Id.*

<sup>56</sup> Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in *SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS* 134 (Joseph A. Soares 2015); see William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 146, 156 (2002); James W. Loewen, *Here We Go Again: Tests for the Common Core May Be Unfair to Some and Boring to All*, HISTORY NEWS NETWORK, Nov. 18, 2014, <https://historynewsnetwork.org/blog/153543>; Roy O. Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003); Maria Veronica Santelices & Mark Wilson, *Unfair*

recognized that standardized test scores are not objective measures of merit, stating “the record indicates that LSAT scores are neither race-neutral or gender-neutral criteria for admissions decisions.” *Grutter v. Bollinger*, 288 F.3d 732, 771 (6th Cir. 2002) (Clay, J., concurring), *aff’d*, 539 U.S. 306.

Moreover, families have paid for expensive test preparation programs designed to give students a “significant boost” in the TJHSST admissions process<sup>57</sup>—belying Plaintiff’s contention that the admissions process, including the standardized test, was “solely merit-based.”<sup>58</sup> And while FCPS itself did offer a TJHSST test preparation course, that course still cost \$445.<sup>59</sup> Furthermore, major educational decisions “should not be made solely or automatically on the basis of a single

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*Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106, 126 (2010).

<sup>57</sup> See Hannah Natanson, *How should a premier magnet school boost Black and Latino enrollment? A suggested lottery spurs fierce debate*, WASH. POST (Oct. 2, 2020 3:51 PM), [https://www.washingtonpost.com/local/education/how-should-a-premier-magnet-school-boost-black-and-latino-enrollment-a-suggested-lottery-spurs-fierce-debate/2020/10/02/ccd10348-04b1-11eb-a2db-417cddf4816a\\_story.html](https://www.washingtonpost.com/local/education/how-should-a-premier-magnet-school-boost-black-and-latino-enrollment-a-suggested-lottery-spurs-fierce-debate/2020/10/02/ccd10348-04b1-11eb-a2db-417cddf4816a_story.html); see also Curie Learning Program, <https://blobby.wsimg.com/go/f3476daf-2f3a-478e-9e4a-0f297817f6fc/downloads/Curie%20learning%20Schedule.pdf> (test preparation company claiming that 176 students from their test preparation program were in the freshman classes of TJHSST or similar schools in Loudoun County).

<sup>58</sup> Mem. in Supp. of Mot. for Preliminary Injunc. (ECF No. 16), at 3.

<sup>59</sup> See TX04000 JUMPSTART: TJ TEST PREP (GRADES 6-8), <https://aceclasses.fcps.edu/CourseDetails.aspx?AreaID=10981&AreaName=&CourseID=9bbd9044-dc86-4b9c-8a53-b796c12df7d6&ProgramID=343&ProgCatgName=Test+Prep&CategoryID=10166&IsCourse=1> (last visited May 11, 2021).

test score,”<sup>60</sup> given that “the use of a single test . . . does not provide a meaningful measure of academic achievement and potential.”<sup>61</sup>

Likewise, extracurricular activities such as STEM camps, which enhance an applicant’s resume,<sup>62</sup> are not equally accessible to all students.<sup>63</sup> In addition to the cost, students and parents need time and transportation to the activities, and many families do not have access to these resources. Indeed, the correlation of wealth and access to TJHSST is shown in the class of 2024: only 1.4% of the semifinalists for the class of 2024 were economically disadvantaged whereas the overall FCPS economically disadvantaged student population is 29.3%.<sup>64</sup>

As discussed at length by Defendants in their filings before this Court, the new admissions policy was implemented as part of an attempt to remove these barriers.<sup>65</sup> Not only does the new policy eliminate both the application fee and the test, but it requires that “[e]ach public school

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<sup>60</sup>See US Dep’t of Educ., *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers*, <https://www2.ed.gov/offices/OCR/archives/pdf/TestingResource.pdf>; see also Community Service Society of New York and NAACP Legal Defense and Educational Fund, Inc., *The Meaning of Merit* (Oct. 2013), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS\\_MeaningOfMerit\\_finalWebSmaller.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/CSS_MeaningOfMerit_finalWebSmaller.pdf) (“The test-only admissions policy . . . enforces an artificially narrow view of merit,” and “educational experts agree that a single test cannot be considered a definitive measure of a student’s knowledge.”).

<sup>61</sup> *The Meaning of Merit*, *supra* note 60.

<sup>62</sup> See Hannah Natanson, *How should a premier magnet school boost Black and Latino enrollment? A suggested lottery spurs fierce debate*, WASH. POST (Oct. 2, 2020 3:51 PM), [https://www.washingtonpost.com/local/education/how-should-a-premier-magnet-school-boost-black-and-latino-enrollment-a-suggested-lottery-spurs-fierce-debate/2020/10/02/ccd10348-04b1-11eb-a2db-417cddf4816a\\_story.html](https://www.washingtonpost.com/local/education/how-should-a-premier-magnet-school-boost-black-and-latino-enrollment-a-suggested-lottery-spurs-fierce-debate/2020/10/02/ccd10348-04b1-11eb-a2db-417cddf4816a_story.html).

<sup>63</sup> See K. Snellman et al., *Inequity Outside the Classroom: Growing Class Differences in Participation in Extracurricular Activities*, 40 VOICES IN URBAN EDUC. 11 (2015), <https://files.eric.ed.gov/fulltext/EJ1056739.pdf>.

<sup>64</sup> *TJ Admissions Merit Lottery Proposal, School Board Work Session, Fairfax County Public Schools* (Sept. 15, 2020) [https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BTGKX652F413/\\$file/TJHSST%20Admissions%20Merit%20Lottery%20Proposal.pdf](https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BTGKX652F413/$file/TJHSST%20Admissions%20Merit%20Lottery%20Proposal.pdf).

<sup>65</sup> Mem. in Support of Mot. to Dismiss (ECF No. 22) at 3.

within Fairfax County and each cooperating school division will be presumptively allocated a number of seats equal to 1.5% of that school’s 8th grade student population.”<sup>66</sup> This, in turn, is intended to equalize access for each middle school, rather than reinforce the focus on attending the appropriate “feeder” school.<sup>67</sup> And finally, the need to improve equity of access is even more important given the ongoing pandemic, which has exacerbated the challenges faced by Black and Latinx students.<sup>68</sup>

## **II. Strict scrutiny does not apply when there is no showing of discriminatory purpose.**

Contrary to Plaintiff’s assertions, a facially race-neutral policy without discriminatory intent does not trigger strict scrutiny. Strict scrutiny does not apply when a plan is facially neutral and was not created for a discriminatory purpose. Plaintiff fails to show *any* discriminatory animus against Asian Americans. Consequently, strict scrutiny does not apply.

- A. School boards may devise race-conscious measures to remove barriers to equal opportunity—and they can do so while aware of the racial composition of the student population and the effect the measures may have on that composition—without triggering strict scrutiny.

Because our nation’s “strength comes from people of different races, creeds, and cultures uniting,” diversity “is a compelling educational goal a school district may pursue.” *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in judgment). Indeed, “ensuring all people have equal opportunity regardless of their race” is an important government

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<sup>66</sup> Regulation 3355.14 (V)(A)(5)(b); Mem. in Supp. of Mot. to Dismiss (ECF No. 22), Ex. 2.

<sup>67</sup> See also Mem. in Supp. of Mot. to Dismiss (ECF No. 22), at 6 (discussing how the 1.5% plan was designed to “provide equity of access and opportunity” (internal quotation marks omitted)).

<sup>68</sup> See Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, and Ellen Viruleg, COVID-19 AND LEARNING LOSS—DISPARITIES GROW AND STUDENTS NEED HELP, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help#> (last accessed May 6, 2021); see also Hannah Natanson, *Failing Grades Spike in Virginia’s Largest School System as Online Learning Gap Emerges Nationwide*, WASH. POST, (Nov. 24, 2020, 7:16 PM), [https://www.washingtonpost.com/local/education/fairfax-schools-more-failing-grades/2020/11/24/1ac2412e-2e34-11eb-96c2-aac3f162215d\\_story.html](https://www.washingtonpost.com/local/education/fairfax-schools-more-failing-grades/2020/11/24/1ac2412e-2e34-11eb-96c2-aac3f162215d_story.html).

interest. *Id.* at 788. The Constitution limits “solutions” that impose “state-mandated racial classifications.” *Id.* at 782. But schools are welcome to “devise race-conscious measures” remedying *de facto* racial segregation without triggering strict scrutiny. *Id.* (“School districts can seek to reach *Brown*’s objective of equal educational opportunity.”). For example,

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including 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. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.

*Id.* at 789.<sup>69</sup> Indeed, expanding admissions processes so that disadvantaged gifted students may access specialized schools is “exactly the sort of alternative, race-neutral means to increase racial diversity that the Court has repeatedly suggested governments may use in lieu of express racial classifications.” *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 284 (S.D.N.Y.), *aff’d*, 788 F. App’x 85 (2d Cir. 2019). And TJHSST’s revised admissions policy at least *attempts* to accomplish that: it aims to equalize access across a range of middle schools by implementing the 1.5% plan; eliminates the application fee; and removes the standardized testing requirement (thereby also eliminating the need to pursue expensive test preparation courses). These measures do not trigger strict scrutiny at all.

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<sup>69</sup> In *Parents Involved*, the Supreme Court found that two school districts violated the Equal Protection Clause by using explicit racial classifications in their school assignment policies. 551 U.S. 701. The four members of the plurality did “not acknowledge that the school districts . . . identified a compelling interest in increasing diversity” *Id.* at 783 (Kennedy, J., concurring in part and concurring in judgment) (citing the opinion of Roberts, J.). Justice Kennedy authored a separate concurrence that the educational benefits of diversity are in fact compelling interests, joining the four dissenting justices on that ground. *Id.* Several courts have found that Justice Kennedy’s concurrence is the controlling opinion. *See, e.g., United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 683 & n.5 (M.D.N.C. 2009).

B. Plaintiff's allegations fail to show any discriminatory intent against Asian Americans.

Since FCPS' admissions plan is race-neutral, Plaintiff must show "a discriminatory intent" to trigger strict scrutiny. *Boyapati v. Loudoun Cty. Sch. Bd.*, No. 120CV01075AJTIDD, 2021 WL 943112, at \*8 (E.D. Va. Feb. 19, 2021). "[N]o reasonable inference of discriminatory intent, purpose or animus against Asian students can be drawn from any impact alone." *Id.* (citing *Vill. of Arlington Heights*, 429 U.S. 252, 265 (1977)). Many policies have a racial impact, but "[o]ne may not simply bootstrap any neutral classification arguably correlated with race and, claiming that it is an impermissible proxy therefor, strip away all forms of diversity." *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. CV 21-10330-WGY, 2021 WL 1422827, at \*14 n.18 (D. Mass. Apr. 15, 2021). Even though impact alone cannot lead to an inference of intent, Plaintiff relies principally on demographic data to demonstrate "strong evidence of Defendants' racial motivation." Mem. in Support of Mot. for Prelim. Inj. at 12. This argument falls flat.

According to Plaintiff, FCPS's top-1.5% plan—which is intended to increase the student population from the most under-represented middle schools—is a proxy for racial discrimination. *See id.* at 10-12. This argument is both legally and factually incorrect. As a matter of law, courts have "repeatedly disavowed" the "claim that geography-based school-assignment policies are unconstitutional because they are really nothing more than race-based policies in disguise." *Spurlock v. Fox*, 716 F.3d 383, 396 (6th Cir. 2013).

As FCPS points out, Plaintiff mischaracterizes the 1.5% plan. *See Opp. to Mot. for Prelim. Injunc.* (ECF No. 24), at 4-5, 13-14. Plaintiff highlights the proportion of Asian American students of four prominent TJHSST "feeder" schools under the prior standardized test based approach to

admissions—Carson (46%), Longfellow (26%), Kilmer (24%), and Rocky Run (45%).<sup>70</sup> See Mem. in Support of Mot. for Prelim. Inj. at 10-12. But quite a few middle schools have a similar or higher proportion of eighth grade Asian American students than the schools Plaintiff highlighted—in Loudoun County: Stone Hill (60%), Mercer (44%), Willard (41%), J. Michael Lunsford (39%), Brambleton (38%), Eagle Ridge (34%), Farmwell Station (29%), Trailside (25%); in Fairfax County: Cooper (30%), Liberty (30%), Franklin (25%), Frost (24%); in Prince William County: Pennington (24%).<sup>71</sup> Plaintiff certainly has not shown the type of “clear pattern, unexplainable on grounds other than race, emerg[ing] from the effect of the state action” that in and of itself might demonstrate discrimination. *Arlington Heights*, 429 U.S. at 266; see also *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. 21-1303, 2021 WL 1656225, at \*6 (1st Cir. Apr. 28, 2021) (noting that even though school officials “clearly viewed increasing geographic, socioeconomic, and racial diversity as goals,” a plan was not discriminatory, in part because “no student’s race will be the reason for admission or rejection”).

Notably, even if the new admissions plan results in a smaller percentage of Asian American students at TJHSST than have been admitted in prior admissions cycles, Asian American students are highly unlikely to become underrepresented relative to the racial makeup of the surrounding community. Plaintiff’s contentions mirror those in a recent case where Judge Trenga rejected arguments that strict scrutiny should be triggered when a race-neutral admissions plan aimed at increasing diversity in specialized high schools was projected to impact the percentage of Asian American students at the school. See *Boyapati*, 2021 WL 943112, at \*8-10. Plaintiff, like those in

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<sup>70</sup> The following are the proportions of Asian American students in the eighth grade class: Carson (47%), Rocky Run (45%), Longfellow (26%), and Kilmer (24%). VA Dep’t of Educ., 2020-21 Fall Membership Reports, <https://p1pe.doe.virginia.gov/buildatable/fallmembership>

<sup>71</sup> VA Dep’t of Educ., 2020-21 Fall Membership Reports, <https://p1pe.doe.virginia.gov/buildatable/fallmembership>.

*Boyapati*, does “not contend that the Plan will have a disproportionate impact on Asian students relative to their representation . . . overall” but instead only that “fewer Asian students [will be] admitted than had been admitted under the previously used admissions process.” *Id.* at \*8. As Plaintiff mentions, Fairfax County’s population is about 19% Asian and Pacific Islander. Mem. in Support of Mot. for Prelim. Injunc. (ECF No. 16), at 3. Based on some unexplained and unsupported “data analysis,” Plaintiff avers that “the percentage of Asian American students accepted into the incoming TJ Class of 2025 will drop to approximately 31%.” *Id.* at 12. Even if Plaintiff’s unexplained calculations turn out to be correct, Asian Americans will comprise a larger percentage of TJHSST’s incoming class than of Fairfax County. Nothing about the challenged admissions plan, then, leads to an inference of discrimination.<sup>72</sup>

C. Contrary to showing discrimination, Defendants’ efforts to provide equal educational opportunity are appropriate in light of the relevant background.

*Arlington Heights* directs courts, *inter alia*, “to consider ‘the historical background of the decision’ challenged as racially discriminatory.” *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016) (brackets omitted). As discussed in Part I.A, *supra*, FCPS has had a long history of racial segregation and persistent racial inequities in educational opportunities. Since TJHSST’s founding, Black and Latinx students have been severely underrepresented at the school. *See supra* Part I.A. FCPS has repeatedly attempted to remove barriers to equal educational opportunity. Some efforts saw success, but they were then abandoned. *See supra* Part I.B. As a result of abandoned efforts to promote equity and an admissions process that became highly advantageous for families with significant resources, TJHSST’s representation of Black and Latinx students has become notably low. *Supra* Part I.B. Against this background, the school district

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<sup>72</sup> Amici note that the diversity within the Asian American community in Fairfax County and surrounding areas is not reflected at TJHSST in terms of economically disadvantaged and ELL students. *See, e.g., supra* at Part I.B.

undertook efforts to modify TJHSST’s admissions process and remove barriers to equal educational opportunity.

Contrary to Plaintiff’s view, school boards do not impermissibly classify students based on race when they consider whether an admissions policy may increase educational opportunity for students of a particular race. *See Spurlock*, 716 F.3d at 394 (“Racial classification requires more than the *consideration* of racial data.”). Rather, school boards that seek to ensure equity and access to education are simply discharging their public duties. *See id.* (noting that forbidding officials from considering racial and ethnic data would “impose a duty of ignorance on the part of public officials”). Thus, even with the new admissions policy, FCSB not only can but *should* continue to consider additional methods for removing barriers to equal educational opportunity, and to increase equity of such opportunity. *See United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 684 (M.D.N.C. 2009) (finding that the school system operated under unitary status and dissolving the desegregation order, “but with the expectation that the School System will continue to act in good faith to ensure that the prior discriminatory system is not allowed to resurface, and that all students in the School System will have equal access to high quality educational opportunities”). As discussed at length below, an increasingly diverse student population will benefit all TJHSST students—not only Black and Latinx students, but Asian American and white students as well.

**III. Even if strict scrutiny did apply, race-neutral policies that seek to equalize educational opportunities are permissible to achieve the legitimate and compelling interest in the educational benefits of diversity and compliance with federal and state law.**

As discussed *supra* Part II.B, strict scrutiny does not apply to a race-neutral policy absent discriminatory intent. But even if strict scrutiny were to apply, it is proper for school districts to consider race-neutral alternatives designed to promote diversity because of the compelling

interests in the educational benefits of diversity, combating racial isolation, and compliance with federal and state law. While, as noted, Amici do not have the information needed to determine whether TJHSST's revised admissions plan is sufficient to achieve these benefits, what is clear is that TJHSST's decision to make changes in an effort to do so does not violate the Constitution.

A. The educational benefits of diversity are legitimate and compelling interests.

In the landmark *Brown v. Board of Education* decision, the Supreme Court recognized education as “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” 347 U.S. at 493. The Court further explained that racial segregation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* at 494. Since *Brown*, the Supreme Court has recognized the “substantial, . . . important and laudable” benefits that flow from a diverse student body. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.). A diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, . . . enables students to better understand persons of different races,” *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210 (2016) and facilitates “enhanced classroom dialogue and the lessening of racial isolation” on campus. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 308 (2013). Crucially, diversity in education helps “prepar[e] students for work and citizenship” in our extraordinarily diverse society. *Grutter*, 539 U.S. at 331; *see also Bakke*, 438 U.S. at 313 (“[T]he nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” (internal quotation marks omitted)).

In *Parents Involved*, five members of the Supreme Court found that the compelling interest of the educational benefits of diversity long recognized in higher education extend to the

elementary and secondary educational setting. Justice Kennedy, in his concurrence, explained that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.” *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in judgment). The concurrence further provided that “[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. . . . Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.” *Id.* at 797-98. Likewise, Justice Breyer opined that “[i]n light of this Court’s conclusions in *Grutter*, the ‘compelling’ nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.” *Id.* at 842 (Breyer, J., dissenting). And *Christa McAuliffe*—in discussing the compelling interest in diversity in elementary and secondary school settings, as well as in higher education—explained:

If [the educational] benefits flow from increasing racial diversity in universities, the Court sees no logical reason why increasing racial diversity in high schools would not benefit students to the same extent. Indeed, an argument could be made that increased racial diversity is more beneficial at the high school level, when students are younger.

364 F. Supp. 3d at 283.

Further, empirical evidence demonstrates the array of the educational benefits derived from diverse learning environments. Research shows that attending a racially diverse school has a positive impact on academic achievement and is beneficial to all students.<sup>73</sup> For instance, diversity

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<sup>73</sup> U.S. Comm’n on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* 5 (Jan. 2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>; Amy Stuart Wells, Lauren Fox, and Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), <https://production->

in the learning environment also fosters richer classroom discussions that promote creativity, critical thinking and problem-solving skills.<sup>74</sup>

As noted above, the Court recognized the importance of avoiding racial isolation. *See* 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment); *id.* at 865 (Breyer, J., dissenting, joined by Stevens, Souter, & Ginsburg, JJ.). Evidence buttresses the Supreme Court’s finding that a diverse student body facilitates the “lessening of racial isolation.” *Fisher I*, 570 U.S. at 308. These benefits also extend beyond the classroom. An environment in which students from diverse racial and ethnic backgrounds can learn and work together allows students to form close cross-racial friendships, helps ameliorate feelings of isolation, reduces prejudice and stereotypes, and promotes positive intergroup relations.<sup>75</sup> Racially diverse schools also positively impact attitudes that students have about other racial groups.<sup>76</sup> For example, studies have found that Black and Latinx college students who interacted with students of different races more frequently had more favorable attitudes toward Asian Americans and vice versa, suggesting that a racially diverse

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tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse\_AmyStuartWells-11.pdf; Jennifer Ayscue, Erica Frankenberg, & Genevieve Siegel-Hawley, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools*, NAT’L COALITION ON SCH. DIVERSITY (Mar. 2017), <https://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf>.

<sup>74</sup> *See* Wells, *et al.*, *supra* note 73; *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUNDATION (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/>.

<sup>75</sup> *See* Wells, *et al.*, *supra* note 73; Linda R. Tropp and Suchi Saxena, *Re-Weaving the Social Fabric through Integrated Schools: How Intergroup Contact Prepares Youth to Thrive in a Multiracial Society*, NAT’L COALITION ON SCH. DIVERSITY (May 2018), [https://school-diversity.org/wp-content/uploads/2018/05/NCSD\\_Brief13.pdf](https://school-diversity.org/wp-content/uploads/2018/05/NCSD_Brief13.pdf).

<sup>76</sup> *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, *supra* note 74.

student body “may play a role in stereotype reduction and improving overall intergroup relations for Asian Americans.”<sup>77</sup>

Finally, diverse educational settings continue to benefit students after high school. Studies have found that students who attended integrated schools have greater comfort in interracial settings—a comfort that extends into adulthood—and are more likely to live and work in diverse settings.<sup>78</sup> Diverse learning environments also prepare students to work and become leaders in an increasingly global economy. For instance, the ability to share ideas and viewpoints with a varying array of people, as well as the leadership expertise fostered in diverse environments, are valued skills.<sup>79</sup> In sum, students who attend racially diverse schools also have greater levels of civic engagement and feel more prepared to participate in the democratic process.<sup>80</sup>

B. The educational benefits of diversity especially extend to all students at TJHSST.

As a STEM-focused school, the educational benefits of diversity in the classroom are particularly compelling for TJHSST. The School’s mission is “to foster a culture of innovation based on ethical behavior and the shared interests of humanity.”<sup>81</sup> And its core beliefs include “understand[ing] the languages, systems and diverse cultures of people throughout the world,” “effective communication,” and “collaborative learning.”<sup>82</sup>

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<sup>77</sup> Julie J. Park, *Asian Americans and the Benefits of Campus Diversity: What the Research Says*, NAT’L COMMISSION ON ASIAN AM. AND PAC. ISLANDER RES. IN EDUC., [http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian\\_am\\_diversity\\_D4.pdf](http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf).

<sup>78</sup> See Ayscue et al., *supra* note 73.

<sup>79</sup> See Wells, et al., *supra* note 73.

<sup>80</sup> See Ayscue et al., *supra* note 73.

<sup>81</sup> ABOUT TJHSST, [https://tjhsst.fcps.edu/about?fbclid=IwAR10B75F3am76oQfKJOBdH12Wqaz3WdPVcsbqH2FCO3G\\_29IfXIDk4JV7E](https://tjhsst.fcps.edu/about?fbclid=IwAR10B75F3am76oQfKJOBdH12Wqaz3WdPVcsbqH2FCO3G_29IfXIDk4JV7E) (last visited Oct. 7, 2020).

<sup>82</sup> *Id.*

Further, diversity of perspectives and lived experiences enhance the ability of scientists and researchers to collaborate to solve complex problems together.<sup>83</sup> For instance, diverse learning environments help students become effective problem solvers and thinkers who are better able to understand the needs of different groups and create a variety of products and services.<sup>84</sup> And in nurturing a “culture of innovation,” TJHSST has a particular interest in fostering a learning environment that represents a diversity of perspectives and ideas.<sup>85</sup>

Yet the lack of representation of Black, Latinx, ELL, and low-income students at TJHSST diminishes the experiences of students beyond academics. Underrepresented students of color at TJHSST have reported experiencing racial isolation at the school, demonstrating that there also exists a compelling interest in diversity to promote an inclusive learning environment and to combat racial isolation. For example, one senior at TJHSST who identifies as Black, wrote about her experience of being one of the only Black students in her AAP program in elementary school and middle school, and then at TJHSST.<sup>86</sup> She experienced “shameful walks down the hall” at TJHSST, “wondering if anyone was staring at me, thinking ‘Whoa, look, a Black kid,’ and the racist jokes that seemed funny to everyone but me.”<sup>87</sup> Racial isolation also led her to try to bleach her skin to “look less Black” and fit in.<sup>88</sup> She “realized that one year at Jefferson made the real

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<sup>83</sup> See Kenneth Gibbs, Jr., *Diversity in STEM: What it is and Why it Matters*, SCI. AM. (Sept. 10, 2014), <https://blogs.scientificamerican.com/voices/diversity-in-stem-what-it-is-and-why-it-matters/>.

<sup>84</sup> See Wells, et al., *supra* note 73.

<sup>85</sup> ABOUT TJHSST, *supra* note 81.

<sup>86</sup> See Didi Elsyad, *My not so Black-and-White look at diversity at Jefferson*, TJ TODAY (June 20, 2020), <https://www.tjtoday.org/29057/new-on-tjtoday/my-not-so-black-and-white-look-at-diversity-at-jefferson/>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

me—from my culture to my own skin—feel foreign and unwanted. My school didn’t accept me; I didn’t accept me. At that moment, I felt completely and utterly alone.”<sup>89</sup>

Likewise, another student who identifies as Latina, wrote that as one of the few Latinx students at TJHSST, she feels “uncomfortable at Jefferson, not because of who I am, but because there aren’t enough of me. There aren’t enough Latinx people that can say they attend the #1 public school in the country, when there are so many that could.”<sup>90</sup> She added that the underrepresentation of Latinx students at TJHSST makes it difficult to combat stereotypes and signals to prospective TJHSST applicants “that the only way to get ahead is to distance themselves from their culture.”<sup>91</sup> Similarly, another student of South Asian descent described feelings of isolation at TJHSST as a low-income student. When a friend asked her why she needed to find a job, she “remembered all the times I’d been laughed at for being poor and kept my mouth shut.”<sup>92</sup>

As demonstrated by empirical evidence and the lived experiences of students, diversity and representation are critical to address isolation, combat stereotypes, and create a more inclusive learning environment for all students. School districts have a compelling interest in combating racial isolation and seeking to promote the multitude of educational benefits that flow from diversity, and which benefit all students. And as Justice Kennedy explained, the Constitution does not “mandate[] that state and local school authorities must accept the status quo of racial isolation in schools.” *Parents Involved*, 551 U.S. at 788. Finally, beyond the compelling interest in increasing diversity in educational settings, as *supra* Part I.A demonstrates, FCPS also has a

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<sup>89</sup> *Id.*

<sup>90</sup> Andrea Silva, *What it means to be a TJ Latina*, TJ TODAY (July 3, 2020), <https://www.tjtoday.org/29172/showcase/what-it-means-to-be-a-tj-latina/>.

<sup>91</sup> *Id.*

<sup>92</sup> Gurleen Kaur, *Your finish line and mine*, TJ TODAY (June 20, 2020), <https://www.tjtoday.org/29068/new-on-tjtoday/your-finish-line-and-mine/>.

compelling interest in “remedying the effects of past intentional discrimination” that “help inform the present inquiry.” *Id.* at 791.

C. Compliance with federal and state law are compelling interests.

Even if strict scrutiny did apply (and it does not), compliance with state and federal anti-discrimination laws is an independent compelling interest that would justify narrowly-tailored measures to remove barriers to equal educational opportunity. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“The governmental interest at stake here is compelling . . . the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history.”).<sup>93</sup> Like other recipients of federal funds, FCPS must comply with Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination based on race, color, or national origin, including both intentional discrimination and disparate impact discrimination. *See* 42 U.S.C. § 4000d(b); 34 C.F.R. § 100.3(b)(2) (“A recipient, in determining . . . the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria . . . which have the effect of . . . defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”). In addition, FCPS is bound by the Virginia Human Rights Act, which likewise prohibits intentional and disparate impact racial discrimination in educational institutions. Va. Code Ann. § 2.2-3902 (West) (“[C]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color . . . or national origin . . . is an unlawful discriminatory practice under this chapter.”).

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<sup>93</sup> *Bob Jones Univ.*, 461 U.S. at 593 (“[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”)

Thus, all federally funded educational institutions, including those that have not engaged in (or have been deemed to have satisfactorily remedied) intentional racial discrimination, have a legitimate and compelling interest in—indeed, an obligation to—comply with federal and state statutes that prohibit policies that have an unnecessary racially disparate impact. *See Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1306-07 (2016) (“compliance with § 5 of the Voting Rights Act [which proscribed both intentional racial discrimination and racially disparate impacts] is also a legitimate state consideration”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 n.12, 485 n.2, 518 (2006) (wherein eight Supreme Court justices specifically recognized that compliance with Section 5 of the Voting Rights Act is a compelling state interest (*see* page 475 n.12 (Stevens, J. & Breyer, J.), page 485 n.2 (Ginsburg, J. & Souter, J.), page 518 (Scalia, J.; Roberts, C.J.; Thomas, J.; Alito, J.)); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 256 (4th Cir. 2010) (“The State has a compelling interest, indeed an “absolute duty,” to remedy [disparate impact racial discrimination in public-sector subcontracting].”); *Edwards v. City of Houston*, 37 F.3d 1097, 1113 (5th Cir. 1994), *on reh’g en banc*, 78 F.3d 983 (5th Cir. 1996) (measures to remedy a racially disparate impact that violated Title VII of the Civil Rights Act of 1964 were “justified by a compelling government interest, namely remedying prior discrimination” (the disparate impact)); *King v. State Bd. of Elections*, 979 F. Supp. 619, 622 (N.D. Ill. 1997), *aff’d sub nom. King v. Illinois Bd. of Elections*, 522 U.S. 1087 (1998) (“remedying a potential violation of or achieving compliance with § 2 [of the Voting Rights Act, which bans racially disparate impacts] constitutes a compelling state interest”). And here, given the enduring racially disparate impact of the various iterations of TJHSST’s eligibility and admissions criteria, FCPS has a legitimate and compelling interest in fulfilling its legal obligation to cure its apparent longstanding noncompliance with state and federal anti-discrimination laws.

## CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Preliminary Injunction and grant Defendants' Motion to Dismiss.

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Respectfully submitted,

/s/ Christine J. Choi

Christine J. Choi (VSB No. 90623)  
Kristen O. Riemenschneider (VSB No. 73360)  
Arthur Luk (*pro hac vice* pending)  
Kirby Mayo (*pro hac vice* pending)  
Elizabeth Denning (*pro hac vice* pending)  
Megan Pieper (*pro hac vice* pending)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Ave. NW  
Washington, D.C. 20001  
Telephone: (202) 942-5000  
Facsimile: (202) 942-5999  
Christine.Choi@arnoldporter.com  
Kristen.Riemenschneider@arnoldporter.com  
Arthur.Luk@arnoldporter.com  
Kirby.Mayo@arnoldporter.com  
Elizabeth.Denning@arnoldporter.com  
Megan.Pieper@arnoldporter.com

Niyati Shah (*pro hac vice* pending)  
Eri Andriola (*pro hac vice* pending)\*  
ASIAN AMERICANS ADVANCING  
JUSTICE-AAJC  
1620 L. St. NW  
Suite 1050  
Washington, D.C. 20036  
Telephone: (202) 296-2300  
Facsimile: (202) 296-2318  
NShah@advancingjustice-aajc.org  
EAndriola@advancingjustice-aajc.org

*\*Admitted only in New York. D.C. practice limited to Federal Courts.*

Michaele N. Turnage Young (*pro hac vice* pending)  
NAACP LEGAL DEFENSE &

EDUCATIONAL FUND, INC.  
700 14th Street NW, Suite 600  
Washington, DC 20005  
Telephone: (202) 682-1300  
Facsimile: (202) 682-1312  
Mturnageyoung@naacpldf.org

Francisca D. Fajana (*pro hac vice* pending)  
LATINOJUSTICE PRLDEF  
475 Riverside Drive, Suite 1901  
New York, NY 10115  
Telephone: 212.219.3360  
Facsimile: 212.739.7507  
Ffajana@latinojustice.org

*Counsel for Proposed Amici Curiae*

<p style="text-align: center;"><b>APPENDIX 1</b>  <b>Available Demographic Data of Students Admitted to the TJHSST Graduating  Classes of 2008-2024<sup>94</sup></b></p>		
Graduating Academic Class Year	Percentage Admitted Students who Identify as Black	Percentage Admitted Students who Identify as Hispanic
2024	**TS	3.30%
2023	**TS	2.40%
2021	1.80%	1.60%
2019	1.60%	2.40%
2018	2.10%	1.60%
2017	1.00%	3.10%
2016	1.50%	2.70%
2015	1.30%	2.70%
2014	0.80%	2.70%
2013	1.70%	1.30%
2012	1.86%	2.06%
2011	1.43%	2.66%
2010	1.97%	3.55%
2009	2.42%	3.84%
2008	2.44%	2.22%

<sup>94</sup> See *TJHSST Offers Admission to 486 Students*, (2020), <http://www.fcag.org/TJ%20Admissions%20class%20of%202024.pdf> (showing demographic data for the TJHSST class of 2024); *FCPS' TJHSST Offers Admission to 494 Students*, (2019), <http://www.fcag.org/TJ%20Admissions%20class%20of%202023.pdf> (showing demographic data for the TJHSST class of 2023); *FCPS' Thomas Jefferson High School for Science and Technology Offers Admission to 490 Students* (2019), <http://www.fcag.org/documents/Press%20Release%20Class%20of%202021.pdf> (showing demographic data for the TJHSST class of 2021); *TJHSST Admissions Statistics for Class of 2019*, <http://www.fcag.org/documents/tjadmissions0415.pdf>; *TJHSST Admissions Statistics for Class of 2018*, <http://www.fcag.org/documents/tjadmissions0414.pdf>; TJ ADMISSIONS STATISTICS FOR CLASS OF 2017, <http://www.fcag.org/tjadmits2013.html> (last visited May 6, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2016, <http://www.fcag.org/tjadmits2012.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2015, <http://www.fcag.org/tjadmits2011.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2014, <http://www.fcag.org/tjadmits2010.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2013, <http://www.fcag.org/tjadmits2009.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2012, <http://www.fcag.org/tjadmits2008.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2011, <http://www.fcag.org/tjadmits2007.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2010, <http://www.fcag.org/tjadmits2006.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2009, <http://www.fcag.org/tjadmits2005.html> (last visited May 11, 2021); TJ ADMISSIONS STATISTICS FOR CLASS OF 2008, <http://www.fcag.org/tjadmits2004.html> (last visited May 11, 2021).

**CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2021, I electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send a notice of such filing (NEF) to counsel of record for all Parties.

*/s/ Christine J. Choi*

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Christine J. Choi (VSB No. 90623)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Ave. NW  
Washington, D.C. 20001  
Telephone: (202) 942-5000  
Facsimile: (202) 942-5999  
Christine.Choi@arnoldporter.com  
*Counsel for Proposed Amici Curiae*