IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ASSOCIATION FOR EDUCATION FAIRNESS,	*	
Plaintiff,	*	
v.	*	Case No. 8-20-CV-2540
MONTGOMERY COUNTY BOARD OF EDUCATION, et al.,	*	
Defendants.	*	

OPENING BRIEF OF *AMICI CURIAE* MONTGOMERY COUNTY BRANCH OF THE NAACP, MONTGOMERY COUNTY PROGRESSIVE ASIAN AMERICAN NETWORK, ASIAN AMERICAN YOUTH LEADERSHIP EMPOWERMENT AND DEVELOPMENT, IDENTITY, INC., AND CASA, INC. IN SUPPORT OF DISMISSAL

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INTRODUCTION[1]

The Equal Protection Clause promises equal opportunity *for all*. Public schools further that foundational promise of our Constitution when they adopt race-neutral, research-backed reforms—such as universal screening, local norming, and lotteries—to allocate educational opportunities, funded by public dollars, more fairly.

This lawsuit aims to deter school systems across the country from pursuing such beneficial measures—even when they are urgently necessary to remedy the longstanding denial of equal educational opportunities to Black, Latino, and underserved Asian American students. Plaintiff need not ultimately prevail to achieve this chilling effect; given the potential costs of protracted litigation, merely surviving a motion to dismiss would do.

Fortunately, controlling precedent forecloses such a result. The latest race-neutral, research-backed process adopted by Montgomery County Public Schools ("MCPS")—universal screening, local norming of test scores, and a lottery of all applicants who meet basic objective criteria (collectively, the "lottery process")—does not offend the Equal Protection Clause. Indeed, the lottery process's constitutionality is so apparent as a matter of law that dismissal is warranted under Rule 12(b)(6) for three independent reasons: the Amended Complaint (1) fails to allege that the lottery process has a disparate impact on Asian American students; (2) fails to support any plausible inference that the adoption of the lottery process was intended to discriminate against Asian Americans; and (3) makes plain that the lottery process is so reasonable and carefully

[1] Amici Curiae (hereinafter, "Proposed Intervenors") include the Montgomery County Branch of the NAACP, Montgomery County Progressive Asian American Network, Asian American Youth Leadership Empowerment and Development, Identity, Inc., and CASA, Inc. A description of Proposed Intervenors and their interests can be found in the Memorandum in Support of the Motion to Intervene, ECF 69-1. Proposed Intervenors are not-for-profit entities and are not affiliated with any corporate party; nor are they associated with any entity that may have a financial interest in the outcome of this litigation. No party's counsel authored any part or contributed money to the filing of this amicus brief.

tailored that it survives any standard of review.

BACKGROUND

MCPS "is largely a socio-economic and racially segregated school system" in which roughly 75% of Black, Latino, and Limited English Proficient ("LEP") students, and 80% of Free and Reduced-priced Meals students ("FARMS" or "low-income") students, attend high-poverty schools where they endure opportunity gaps.[2] Unequal educational opportunity is evident in MCPS's persistent and longstanding under-identification of these subgroups of students for participation in selective programs such as the middle school magnets. These underserved students include many Asian American students whose interests Plaintiff does not represent. For example, in FY 2019, 14.9% of Asian American students in MCPS were low-income, as measured by FARMS status.[3] And over 79% of Asian Americans in Montgomery County speak a language other than English at home, while 30% report speaking English less than "very well."[4]

Unfair barriers to educational opportunities in MCPS are most readily apparent when it comes to the marked under-identification of Black and Latino students for its middle school magnet programs.[5] While Black and Latino students comprised about 53% of the MCPS student

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[2] *See* Montgomery Cnty. Off. of Legis. Oversight, OLO Rep. No. 2019-14, MCPS Performance and Opportunity Gaps, at (iii), 5 (2019).

[3] *Id.* at 11.

[4] Montgomery Cnty. Dep't of Health and Hum. Serv., Blueprint for the Asian American Health Initiative, 2020-2030, at 9, https://aahiinfo.org/wp-content/uploads/2020/04/Blueprint_Final_Web_v3_ADA-compliant.pdf.

[5] *See, e.g.*, Eugene L. Meyer, *A shameful past*, Bethesda Mag. (Mar. 29, 2021), https://bethesdamagazine.com/bethesda-magazine/march-april-2021/a-shameful-past/ (recounting history of segregated schooling in MCPS); Karen L. Mapp, et al., *Race, Accountability and the Achievement Gap (A)*, Pub. Educ. Leadership Project at Harvard Univ., 3, 5, 8 (2008), https://projects.iq.harvard.edu/files/pelp/files/pel043p2.pdf (noting that in the 1980s, complaints made by parents of color that MCPS was deliberately re-segregating schools were the catalyst for MCPS's creation of magnet programs but that gifted students of color remained persistently under-included in magnet programs).

population in 2018-2019, they constituted imperceptible percentages of admittees in the Clemente and MLK middle school magnet programs, and roughly a quarter to a third of admittees at the Takoma Park and Eastern middle school magnet programs.[6] Although precise data is not readily available with respect to underserved Asian American subgroups or LEP and low-income students, LEP and low-income students have historically experienced similar underrepresentation in these programs.[7]

Given these inequalities within its middle school magnet programs, MCPS implemented research-backed reforms long advocated by Proposed Intervenors.[8] Universal screening—which means that *all* fifth grade students are automatically screened for eligibility and invited to apply if they satisfy a set of defined criteria—and local norming (which better accounts for student's opportunities to foster their natural talents) equalize opportunity for all students, including Black, Latino, and underserved Asian American students, many of whom are LEP and low-income.[9] In

[6] ECF 35, at 16; MCPS, School Year 2018-2019 Annual Report to the Community, Student Demographics.

[7] Montgomery County Public Schools: Study of Choice and Special Academic Programs, Report of Findings and Recommendations, Metis Associates 83–87 (Mar. 8, 2016) https://www.montgomeryschoolsmd.org/uploadedFiles/info/choice/ChoiceStudyReport-Version2-20160307.pdf (hereinafter, "Metis Report").

[8] ECF 69-1, at 3; *see also* ECF 33-1, at 4–5.

[9] *See, e.g.*, David Card & Laura Giuliano, *Universal screening increases the representation of low-income and minority students in gifted education*, 113(48) PNAS 13678, 13683 (2016), https://www.pnas.org/content/pnas/113/48/13678.full.pdf (discussing a study finding 174% increase in classification disadvantaged students as gifted); Seminole County Public Schools, *SCPS Gifted Population Increases Across the District*, https://www.scps.k12.fl.us/news/scps-gifted-population-increases-across-the-district.stml (last visited Feb. 28, 2022) (noting universal screening boosted participation rates for economically disadvantaged and Black students in gifted programs by more than 100%); Scott J. Peters, et al., *Effect of Local Norms on Racial and Ethnic Representation in Gifted Education*, 5(2) AERA Open 1, 4 (Apr.-June 2019), https://journals.sagepub.com/doi/pdf/10.1177/2332858419848446 (noting that the American Educational Research Association, American Psychological Association, and National Council for Measurement in Education call for the use of local norming when test scores are considered in gifted placement decisions).

2019, about 8,000 Downcounty students were screened, a tenfold increase over the 700–800 Downcounty students who sought consideration through the referral-only process used in prior years.[10] From 2016 to 2020, MCPS acted to better identify underserved students who previously would have missed out on these programs, adopting race-neutral reforms such as local norming of Cognitive Abilities Test ("CogAT") scores within three bands of MCPS schools (high, moderate, and low poverty) and "peer grouping."[11] These were the subject of the original complaint and prior motion to dismiss. But in 2020, MCPS adopted a new and fundamentally different approach: it uses a baseline set of academic performance criteria to identify all eligible students from the entire population of fifth graders, then allocates space in the middle school magnets among everyone who is eligible by random lottery.[12]

Predictably, given a fairer opportunity to compete, students from previously underserved subgroups have become more likely to secure admission to the middle school magnet programs under the lottery process. In 2021, the first year of the lottery process, Black and Latino students together comprised about 33% and 41% of admittees to the two Upcounty magnet programs, and 37% and 40% of admittees to the two Downcounty magnet programs.[13] Similarly, also in 2021, low-income students were 33% and 40% of admittees to the two Upcounty magnet programs, and 30% and 33% of admittees to the two Downcounty magnet programs.[14]

ARGUMENT

I. The Amended Complaint Fails to State a Claim Under the Equal Protection Clause

Because Plaintiff concedes that the lottery process is race-neutral, rational-basis review

[10] ECF 35, at 12.
[11] *Id.* at 12–15.
[12] ECF 27-3 ¶¶ 31–34
[13] ECF 33-1, at 20–23.
[14] *Id.*

will apply unless Plaintiff plausibly alleges *both* that the lottery process had a disparate impact on Asian Americans *and* that racially discriminatory intent motivated its adoption. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977). Even then, Plaintiff would need to plausibly allege that the policy does not survive strict scrutiny to survive a motion to dismiss. Because (a) Plaintiff fails to allege any legally cognizable disparate impact; (b) the allegations of the Amended Complaint do not support a plausible inference of discriminatory intent; and (c) the lottery process would satisfy strict scrutiny even if it applied, Plaintiff's Amended Complaint must be dismissed.

A. The Amended Complaint Does Not Plausibly Allege Disparate Impact

Dismissal is warranted first because the Amended Complaint does not give rise to a reasonable inference of disparate impact on Asian American students. Since this issue was not subject to adversarial briefing before, Proposed Intervenors begin by clarifying the proper standard for disparate impact claims.

1. Disparate Impact is Measured by a Comparison with the Overall Student Body, Not Past Years' Admissions Results

As other courts have held in cases concerning admissions to K-12 specialized programs, the proper comparison for analyzing the disparate impact of an admissions policy is between the affected group's representation in the overall student population and its representation among those selected for the program. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 46 (1st Cir. 2021) ("*Boston Parent II*") (holding that plaintiffs were not likely to succeed in challenging a magnet school admissions policy because the policy had no disparate impact "as compared to a random distribution of invitations" to all students); *Vaughns v. Bd. of Educ. of Prince George's Cnty.*, 574 F. Supp. 1280, 1304 (D. Md. 1983), *aff'd in part, rev'd in part on other grounds*, 758 F.2d 983 (4th Cir. 1985) (comparing "[B]lack children . . . in the

[gifted and talented] program relative to their population in the school system as a whole"). This is also the comparison that is used by the Department of Education's Office of Civil Rights to determine disparate impact in the K-12 context for purposes of administrative proceedings under Title VI. *See, e.g.*, Gallup-McKinley Cnty. Sch. Resol., OCR Case No. 08-11-5002 (2017) (comparing "the number of American Indian students enrolled in the District and the number of American Indian students who participate in the District's [gifted and talented] program and honors and AP courses"). This straightforward comparison of a discrete pool of potential candidate students to a discrete group of selected students is well suited to resolution on a motion to dismiss. *See Hayden v. Cnty. of Nassau*, 180 F.3d 42, 46, 51–52 (2d Cir. 1999) (in the employment context, affirming a dismissal at the motion to dismiss stage for failure to plead that a selection exam's results reflected a disparate impact relative to representation in the candidate pool).

Without the benefit of adversarial briefing on the issue, the Court concluded that Plaintiff adequately alleged disparate impact by comparing the results of the field test to the results of *prior* policies. *See* ECF 35, at 34–35.[15] However, in the briefing on the motions to dismiss the initial Complaint, no party raised the important observation that using the results of a prior policy as a baseline for disparate impact transforms "a variable consequence" of a defendant's own policies into a constitutional "baseline against which all future [outcomes] must comport." *Bos. Parent*

[15] The Court previously relied on *Lewis v. Ascension Parish School Board*, 662 F.3d 343 (5th Cir. 2011) and *Boyapati v. Loudon County School Board*, No. 20-cv-1075, 2021 WL 943112, at *8 (E.D. Va. Feb. 19, 2021), for the proposition that previous admissions levels are the appropriate baseline comparator for Plaintiff's disparate impact allegations. ECF 35, at 34. Although the district court in *Boyapati* entertained the plaintiff's arguments using that baseline comparator, that consideration was dicta as it noted the absence of admissions data following the implementation of the challenged plan and ultimately concluded that any "impact on Asian students is uncertain." 2021 WL 943112, at *8. The disparate impact discussion in *Lewis*, 662 F.3d 343 (5th Cir. 2011), was in the context of a school district's re-zoning plan and did not involve school admissions.

Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos., No. 21-cv-10330, 2021 WL 4489840, at *15 n.20 ("*Boston Parent III*") (D. Mass. Oct. 1, 2021) (citing *Boston Parent II*, 996 F.3d at 46). Use of this baseline risks effectively entrenching the status quo, and the "Equal Protection Clause is not a bulwark for the status quo." *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. 21-cv-10330, 2021 WL 1422827, at *14 n.18 (D. Mass. Apr. 15, 2021) ("*Boston Parent I*"); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (explaining, in the employment context, that disparate impact liability targets policies that "operate to 'freeze' the status quo of prior discriminatory employment practices"). The parties also failed to point out that using past results as a baseline can also be misleading. As the district court in *Boston Parent III* correctly noted, when a racial group has been significantly overrepresented in the prior status quo, "nearly any changes to the admissions process will likely result in some reduction, if only from the law of averages." 2021 WL 4489840, at *15. This alone "is not a consequence that the caselaw considers a disparate impact." *Id.*

2. The Amended Complaint Fails to Allege Disparate Impact

Applying a baseline comparing the affected group's representation in the relevant candidate pool and its representation among those who receive offers, the undisputed facts show that the lottery process does not have a disparate impact on Asian Americans. MCPS data referenced in the Amended Complaint reveals that Asian American students were 16.5% and 13.2% of the candidate pool in the Upcounty and Downcounty regions, respectively. *See* Am. Compl. ¶ 88; ECF 33-1, at 20–23. But Asian American students were admitted to each of the four magnet middle schools at nearly *double* those rates: they were 29.3% and 32.0% of the students admitted to Clemente and MLK (the Upcounty magnets) and 20.8% and 22.3% of the students admitted to Takoma Park and Eastern (the Downcounty magnets), respectively. ECF 33-1, at 20–23. Black and Latino students, in contrast, were admitted to the magnet middle schools at

considerably *lower* rates than they appear in the overall population of fifth graders considered.[16]

Put differently, the alleged overall impact of the lottery process was that Asian American fifth graders were *more likely* to receive an offer of admission to the middle school magnets than fifth graders from any other demographic group. At each of the four magnet middle schools, Asian American students were between 1.6 and 3.4 times more likely than Black students to be admitted, and between 2.5 and 3.8 times more likely than Latino students. *Id.* They were also more likely than white students to be admitted to each of the four programs. *Id.* Overall, while 1.4%–1.8% of all fifth graders were admitted in each program, between 2.5% and 3.4% of Asian American fifth graders were admitted. *Id*.[17]

Using the proper comparators, the Amended Complaint fails to plausibly allege that the lottery process has a disparate impact on Asian American students. *See Boston Parent II*, 996 F.3d at 46; *Vaughns*, 574 F. Supp. at 1304; Gallup-McKinley Cnty. Sch. Resol., OCR Case No. 08-11-5002 (2017); *see also Hayden*, 180 F.3d at 46, 51–52.[18]

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[16] Black students were 34.9% of Upcounty fifth graders and 21.7% of Downcounty fifth graders, but only 18.7% and 14.7% of the students admitted to Clemente and MLK (the Upcounty magnets) and 20.8% and 19.6% of the students admitted to Takoma Park and Eastern (the Downcounty magnets); while Latino students were 34.9% of Upcounty fifth graders and 31.0% of Downcounty fifth graders, but only 22.7% and 18.7% of the students admitted to Clemente and MLK (Upcounty) and 16.0% and 20.5% of the students admitted to Takoma Park and Eastern (Downcounty). ECF 33-1, at 20–23.

[17] These risk ratios are calculated by dividing the percentage of the Asian American fifth grade population admitted by the percentage of the comparator population admitted. This data is available in ECF 33-1, at 20–23.

[18] The propriety of this manner of conducting a disparate impact analysis holds despite a recent summary judgment ruling in *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 21-cv-296, ECF No. 143 (E.D.V.A. Feb. 25, 2022), wherein the court cited to *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), and stated that to determine disparate impact, "a simple before-and-after comparison" is needed. *Coalition for TJ*, ECF No. 143, at 14–15. This opinion is non-precedential and contrary to binding precedent. In *McCrory*, the Fourth Circuit held that a North Carolina voting law had a racially disparate adverse impact where "the General Assembly enacted legislation restricting all—and only—practices disproportionately used by

3. Even Considering Other Comparators, the Amended Complaint Fails to Allege Disparate Impact

Instead of utilizing the relevant comparison, the Amended Complaint advances multiple unsound comparators and cites assessment data that has no role in the lottery process in an attempt to plead disparate impact. Thus, even assuming that a comparison to the results of past admissions processes was an appropriate measure of disparate impact—which it is not, *see supra* I.A.1—the factual allegations of the Amended Complaint would *still* fail to yield any coherent basis from which the Court could infer disparate impact.

First, the Amended Complaint does not commit to one baseline; instead, the Amended Complaint switches from one comparator to the next depending on which is convenient. *See* Am. Compl. ¶ 88 (asserting that, for the STEM programs, Asian Americans "received substantially fewer offers than they had *even under the field test*" and that, for the humanities programs, Asian Americans "earned fewer seats than they had *before the field test was implemented*") (emphasis added); ECF 33. Not only does the Amended Complaint compare the results of the lottery process to *both* the field test results and the pre-field test results as a baseline, but with respect to a comparison to the prior field test, the Amended Complaint highlights data from the two STEM magnet programs (at Takoma Park and Clemente) but omits any mention of the two humanities magnet programs (at Eastern and MLK). *See* Am. Compl. ¶ 89. Such cherry-picking of "isolated instances" is insufficient to show disparate impact. *See Anderson ex rel. Dowd v. City of Bos.*, 375 F.3d 71, 89 (1st Cir. 2004) (in a case challenging a school district's facially race-neutral school assignment plan, holding that "showing only isolated instances of students not receiving

African Americans." 831 F.3d at 230. *McCrory* specifically disavowed a simple before-and-after comparison, holding that "[t]he district court also erred in suggesting that Plaintiffs had to prove that the challenged provisions prevented African Americans from voting at the same levels they had in the past." *Id.* at 232.

assignments" was "insufficient," as there was "no clear pattern of disparate racial impact, much less the 'stark' pattern contemplated by *Arlington Heights*").

Moreover, the Eastern and MLK data that is conspicuously absent from the Amended Complaint contradicts Plaintiff's allegations that the lottery process had a disparate impact relative to the field test. The percentage of Asian Americans from among the overall candidate pool who were admitted to the magnet program actually *increased considerably* at MLK in the first year of the lottery process relative to the prior field test results, and the percentage of Asian American students admitted to Eastern remained essentially unchanged. At MLK, the share of Asian American students admitted increased from 24.3% under the 2020 field test to 32.0% under the lottery process. ECF 33-1, at 22. And at Eastern, the share of Asian American students admitted remained relatively stable (23.9% (2020) and 22.3% (2021)). *Id.* at 21.

In addition, Plaintiff alleges that the number of Asian American students "who achieved at the highest level in the MCAP assessment in 2019" is higher than the number of Asian American students admitted to STEM magnet programs in 2021. *See* Am. Compl. ¶ 89. Plaintiff characterizes this as evidence that "local norming makes it harder for Asian[ ]American students to enter the lottery pool." *Id.* But that conclusion does not follow, because Plaintiff does not allege that MCAP (Maryland Comprehensive Assessment Program) scores play any role in magnet middle school admissions. To the contrary, the Amended Complaint alleges that the only standardized tests used to determine eligibility for the lottery are Measure of Academic Progress ("MAP") tests—which are different from the MCAP test, despite the similar acronyms. *Id.* ¶¶ 86, 90.

At bottom, Plaintiff's zero-sum theory appears to be that any race neutral change in admissions policy that yields a change from prior results with respect to the racial composition of the admitted class (no matter how fragmentary, and even if other data tell a countervailing story)

could give rise to a disparate impact that evinces discriminatory intent. That is not the law. "[S]uch a reduction is not a consequence that the caselaw considers a disparate impact." *Boston Parent III*, 2021 WL 4489840, at *15; *see also Boston Parent II*, 996 F.3d at 46 (noting that there was no disparate impact on white and Asian American students where those students were still markedly overrepresented, albeit less so, in the exam schools after the admissions policy change necessitated by the pandemic). Nor should it be; otherwise, the Equal Protection Clause would cement the status quo, no matter how inequitable it may be.

B. The Amended Complaint Does Not Plausibly Allege Discriminatory Intent

The Amended Complaint does not give rise to a reasonable inference of discriminatory intent. As discussed below, Plaintiff makes no allegations that the lottery process was adopted through a process with even a hint of bias. The lottery process also does not rely on "peer grouping" or local norming of ability test scores, the two features on which Plaintiff previously relied to raise an inference of discriminatory intent with respect to the now-abandoned field test process. Instead, the lottery works in tandem with universal screening and local norming of achievement test scores[19] to equalize opportunity for *all* students, regardless of race.

1. The Lottery Process Does Not Evince Discriminatory Intent

The nature of the lottery process itself strongly undercuts any inference of discriminatory motive. *See, e.g.*, *Boyapati*, 2021 WL 943112, at *9 (explaining that "the substance of" geography-based public school admissions reforms was inconsistent with discriminatory intent); *see also* Tr. Mot. to Dismiss Hr'g 15 (the Court, noting that with "the lottery system . . . I'm not sure you have

[19] The achievement test utilized in the lottery process—the Measures of Academic Progress ("MAP") tests—are universally administered general assessment tests used for a range of purposes besides middle school admission. In contrast, the field test process utilized the CogAT, "a standardized aptitude test designed to measure quantitative, verbal, and nonverbal skills." ECF 35, at 12.

an equal protection challenge"). The random selection aspect of the lottery process reduces MCPS's discretion and virtually eliminates opportunities for the process to be warped by bias—against Asian Americans or anyone else. This random lottery process builds upon the practice of universally screening all MCPS fifth graders for eligibility, another discretion-minimizing reform that is inconsistent with allegations of intentional discrimination against or in favor of any particular group. Simply put, if the school district's goal were to engineer "racial balance" within the middle school magnet program, it would not have chosen a random process that does not allow educators discretion to influence the outcome, let alone target Asian Americans with "surgical precision." *Cf. McCrory*, 831 F.3d at 214 (finding evidence of discriminatory intent where a law "target[ed] African Americans with almost surgical precision").

Moreover, the current lottery process omits both of the discretionary elements of the field test process on which Plaintiff previously centered its intentional discrimination claim. In its original complaint, Plaintiff contended that two features of the prior field test process operated to covertly disfavor its members: "peer grouping" and local norming of CogAT scores. *See* ECF 35, at 15, 35. Unlike Plaintiff's original complaint, the Amended Complaint does not allege that "peer grouping" is a feature of the lottery process, nor does it claim that the CogAT, which was discontinued in light of the COVID-19 pandemic, is utilized in the lottery process. *See* Am. Compl. ¶ 86 & n.50.

The Amended Complaint alleges that some form of "local norming" applies to determine students' MAP reading and math scores. Am. Compl. ¶¶ 86–87. Even assuming that it does, the influence is marginal at best because MAP scores are just one of several criteria that go into screening for the broader pool of *qualified* students who will then participate equally in the lottery process. *See* Am. Compl. ¶ 86. MAP tests are also used for a range of purposes besides middle

school admission. Local norming of MAP scores would be an oddly blunt instrument to use if MCPS's goal was to produce a particular racial outcome in this admissions process.

More generally, local norming of the sort discussed in the Amended Complaint simply is not a plausible proxy for race. The only local norming that the Amended Complaint describes in any detail turns on *poverty levels*, not race. *See* Am. Compl. ¶ 67 (providing detail on the field test's local norming of CogAT scores). Although Plaintiff alleges that Asian American students are clustered in low-poverty schools, as of the latest U.S. Department of Education data available,[20] 23% of Asian American elementary school students attended Title I schools. *See* Am. Compl. ¶ 67. Moreover, though Plaintiff alleges that Black and Latino students are clustered in moderate to high-poverty schools, *see id.*, per the latest U.S. Department of Education data, 58% of Black elementary school students and 66% of Latino elementary school students attended Title I schools. In other words, Black and Latino students were nearly as concentrated in Title I schools as Asian American students were in non-Title I schools, which means that, by Plaintiff's logic, they, too, could be disadvantaged by local norming.

In sum, there is a glaring mismatch between Plaintiff's assertion of discriminatory motive and the only means by which MCPS is allegedly acting on it. Local norming of MAP scores is the type of constitutionally permissible policy described in *Feeney*, one for which "the legitimate noninvidious purposes of a law cannot be missed." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979). Any other conclusion would violate the black-letter principle that "[o]ne may not simply bootstrap any neutral classification arguably correlated with race and, claiming that it is an impermissible proxy therefore, strip away all forms of diversity." *Boston Parent I*, 2021 WL

[20] U.S. Dep't of Educ. Off. for C.R., Civil Rights Data Collection for the 2017–18 school year, Detailed Data Tables: Enrollment Data, retrieved from https://ocrdata.ed.gov/flex/Reports.aspx?type=school.

1422827, at *14 n.18.

2. Events Leading to the Adoption of the Lottery Process Do Not Evince Discriminatory Intent

The sequence of events leading to the decision to adopt the lottery process further confirms that the policy was not motivated by intentional discrimination. *See Arlington Heights*, 429 U.S. at 267 (identifying this factor). As Plaintiff acknowledges, MCPS's overhaul of the admissions process in 2020 was closely linked to the onset of a global pandemic. *See* Am. Compl. ¶¶ 83, 86. Realizing that administering the CogAT exam during the pandemic would pose public health and security concerns, MCPS officials decided to abandon the CogAT exam in favor of a lottery process. *See* ECF 27-3 ¶¶ 13–19, 27–29.[21] The exigencies of the COVID-19 pandemic therefore supply an immediate *non-racial* impetus for the creation of the lottery process. By contrast, Plaintiff alleges no racially discriminatory reason why the school district would have implemented these changes when it did.

Moreover, "contemporary statements" by MCPS corroborate the non-discriminatory intent behind the changes. *Arlington Heights*, 429 U.S. at 268. Here the only stated justifications for adopting the lottery process that Plaintiff identifies are non-discriminatory. As Plaintiff concedes in the Amended Complaint, MCPS referred to the lottery process as the "Pandemic Plan," Am. Compl. ¶ 86, and explained that the lottery process was intended to "reduce and remove the subjective assessment of committee members from the selection process" and be "more transparent and easier for community members to understand, especially because MCPS already uses a lottery as an admissions tool" in other contexts. ECF 27-3 ¶ 26 (discussed at Am. Compl. ¶ 84). Plaintiff does not allege any other contemporaneous statements that contradict or cast doubt on these plainly

[21] The Amended Complaint incorporates this declaration by reference. It specifically references this declaration several times and specifically relies on its description of the process that led to the adoption of the lottery. *See* Am. Compl. ¶ 84.

race-neutral, laudable policy goals. *See* Am. Compl. ¶¶ 83–90.

The broader historical context tells the same story. At all relevant times, MCPS has been legally obligated to provide equal educational opportunities, including by remedying policies that have the practical effect of unfairly excluding Black and Latino students. *See, e.g.*, 42 U.S.C. § 2000d; 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"). Indeed, concerns in the Metis Report about "significant racial and socioeconomic disparities" in enrollment in selective programs put MCPS on notice that its prior admissions process was failing to identify all qualified students, and that the failure fell along racial lines, in violation of anti-discrimination laws. Metis Report at v; *see* ECF 35, at 2 n.1 (Metis Report is incorporated by reference).

3. Plaintiff Cannot Rely on Years-Old Statements Made About Prior Policies to Raise a Reasonable Inference of Discriminatory Intent that Implicates the Lottery Process

Without any *contemporaneous* evidence to cast doubt on the non-discriminatory nature of the lottery process, Plaintiff recycles verbatim the same statements that it previously cited regarding the formulation of the now-abandoned field test process. For at least two reasons, these years-old statements cannot be bootstrapped onto the lottery process to conjure up discriminatory intent.

In short, (1) these statements were made years before the lottery was even under consideration; some of them were made by individuals who no longer had any decision-making role when the lottery process was adopted; and (2) these statements were all focused on ensuring equal opportunity for Black, Latino, and other underserved students—not animus or hostility to Asian Americans. These statements therefore fail to cast doubt on the "obvious alternative

explanation" that the lottery process was intended to promote equal opportunity for students of all backgrounds in the midst of a pandemic, much less push Plaintiff's theory of "purposeful, invidious discrimination" "across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 683 (2009) (citation omitted).

First, these years-old comments are no longer contemporaneous to the formulation of the challenged policy. The Metis Report was publicly released in early 2016, more than four and a half years before the adoption of the lottery process. Am. Compl. ¶ 31. The statements by MCPS officials that Plaintiff has re-alleged were mostly made in 2016, or in some cases 2018. *Id.* ¶¶ 37–45, 58–62. Indeed, several statements are attributable to former school board members who had *left the Board* by the time the lottery process was adopted. Plaintiff does not and cannot allege that these prior members played a role in the formulation of the lottery process. Plaintiff also does not allege that remaining members of the board took an active role in crafting the new policy. To the contrary, Plaintiff alleges that a "working group" created the lottery process, Am. Compl. ¶ 84, and that working group did not include any of the school board members who are alleged to have made the statements on which Plaintiff chiefly relies. *See* ECF 27-3 ¶ 20. For all these reasons, the relevance of the statements that Plaintiff previously relied on has greatly diminished. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 306 (4th Cir. 2020) (holding that the district court erred in inferring discrimination based on the years-old legislative history of a different law, while explaining that an "intervening event" had "undermined" an inference of discriminatory intent that the older history once supported); *Greater Birmingham Ministries v. Sec'y of State*, 966 F.3d 1202, 1227 (11th Cir. 2020) ("[T]he statements Plaintiffs identify were not made about the law at issue in this case and thus do not evidence discriminatory intent behind it.").

Second, none of these statements evince an intent to specifically disadvantage Asian

American students. The groups who historically and persistently were denied an equal opportunity to compete for admission to the magnet middle schools prominently included Black and Latino students. Efforts to address such glaring inequities are not expressions of anti-Asian sentiment. Courts have repeatedly held that expressing a desire to remedy exclusion of one or more disadvantaged groups "is not analogous to an intent to discriminate" against other groups who may happen to have fared better under the prior policy. *See Boston Parent III*, 2021 WL 4489840, at *15 ("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 actions' necessary effect on a group or groups." (citing *Feeney*, 442 U.S. at 258)); *Jana-Rock Constr., Inc. v. N.Y. Dep't of Econ. Dev.*, 438 F.3d 195, 211 (2d Cir. 2006) (a desire to alleviate discrimination against "some disadvantaged groups" is not the same as "an intent to discriminate against other groups"); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (categorically deeming attempts to remedy discrimination against a racial group to be constitutional violations would stymie "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, [which necessarily] reflect a concern with race").

To apply strict scrutiny on such a tenuous basis would effectively require doing so whenever "anyone involved in designing [a policy] happened to think that its effect in reducing the underrepresentation of a group was a good effect." *Boston Parent II*, 996 F.3d at 50. That is not the law, and it would confuse and destabilize the law in this area to hold otherwise.

C. The Lottery Process is Constitutional Under Any Standard of Review

Because Plaintiff failed to plausibly allege intentional discrimination, rational basis is the applicable level of scrutiny. "Rational basis review affords the challenged policy 'a strong presumption of validity,' and the policy 'must be upheld . . . if there is any reasonably conceivable

state of facts that could provide a rational basis' for it." ECF 35, at 32. Plaintiff does not contend that the lottery process fails to satisfy the rational basis standard, and rightfully so. *See* Am. Compl. ¶¶ 100, 103 (alleging only that the lottery process does not survive strict scrutiny). But even applying strict scrutiny to the facts alleged in the Amended Complaint, the lottery process passes constitutional muster. Defendants have compelling interests in (a) complying with federal laws requiring them to provide equal educational opportunities, (b) the educational benefits of diversity, and (c) reducing racial isolation. And the lottery process is narrowly tailored to those interests.

1. The Lottery Process is Justified by Compelling Interests in Complying with Federal Law and the Educational Benefits of Diversity

Compliance with federal anti-discrimination law is a compelling government interest. *See Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). As a recipient of federal funds, MCPS must comply with Title VI of the Civil Rights Act of 1964 and its implementing regulations, which forbid policies that have the effect of discriminating against Black and Latino students. *See* 34 C.F.R. §100.3(b)(2) (described *supra*). Given that past inequities resulted in the under-identification of qualified Black, Latino, and LEP students, MCPS risked being found in violation of Title VI on the basis of race or national origin if it did not reform its process.[22] It therefore had a compelling interest in curing any such violation. *See Cooper*, 137 S. Ct. at 1464.

In addition, the Supreme Court has long recognized that the educational benefits that flow from racial diversity, including reducing racial isolation, are compelling government interests. *See*

[22] The Metis Report warned that a standardized-test-based admissions process similar to MCPS's had also under-identified Black and Latino students for gifted programs in a nearby public school district. *See* Metis Report at 30, 109. It specifically noted that policy had become the subject of a complaint alleging racial discrimination that was filed with the U.S. Department of Education's Office of Civil Rights. *See id.*; *see also* Dep't of Educ. Resol. Agree. with Elk Grove Unified Sch. Dist., OCR Case No. 09-11-5002 (2014) (finding that the school district, which failed to equally identify African American students for Gifted and Talented, Advanced Placement, and honors courses created an "unlawful disparate impact on African American students").

Fisher v. Univ. of Texas, 570 U.S. 297, 308–09 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). While *Grutter* and *Fisher* reaffirmed this principle in the higher education context, it applies in the primary and secondary school context as well. *See* ECF 35, at 6 n.4 (this Court's prior opinion, noting that the Fourth Circuit has "assumed that fostering 'racial diversity' represented a compelling government interest" in the primary and secondary school context). As the court reasoned in *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio* ("*Specialized High Schools*"), "[i]f these 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 . . . when students are younger." 364 F. Supp. 3d 253, 283 (S.D.N.Y. 2019), *aff'd*, 788 F. App'x 85 (2d Cir. 2019).

2. The Lottery Process is Narrowly Tailored to These Compelling Interests

MCPS's race-neutral lottery process is exactly the kind of race-neutral approach to promoting these compelling interests that courts have repeatedly characterized as constitutionally permissible. In *Specialized High Schools*, the court considered a very similar set of magnet school admissions reforms and held that it was "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." 364 F. Supp. 3d at 284 (holding that the policy would satisfy strict scrutiny). Consistent with that conclusion, the Supreme Court has specifically described the use of a lottery system as a "workable race-neutral alternative[]" in the context of narrow tailoring. *See Grutter*, 539 U.S. at 340; *see also Fisher v. Univ. of Tex. at Austin* ("*Fisher II*"), 136 S. Ct. 2198, 2213 (2016) (favorably discussing "consideration of socioeconomic and other" race-neutral factors in a narrow tailoring analysis); *Spurlock v. Fox*, 716 F.3d 383, 396 (6th Cir. 2013) (discussing the

constitutionality of "geography-based school-assignment policies").

Moreover, MCPS carefully considered numerous "race-neutral alternatives." Metis Report at 31. The Amended Complaint alleges that MCPS "implemented a number of initiatives" prior to the lottery process to achieve its compelling government interests. Am. Compl. ¶ 25. Because these efforts proved insufficient to address the root causes of persistent lack of diversity, racial isolation, and potential violations of federal law, MCPS was plainly justified in trying this latest race-neutral approach. *See Grutter*, 539 U.S. at 339 (explaining that narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the [school] seeks"); *Specialized High Schools*, 364 F. Supp. 3d at 284 (upholding similar race-neutral admissions changes because "[d]efendants have shown that they have exhaustively attempted numerous other racially neutral efforts over many years to achieve greater diversity").

For these reasons, even if strict scrutiny were to apply, Plaintiff has failed to allege that the lottery was not narrowly tailored to these compelling state interests, which is yet another independent basis for dismissal.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully request that this Court dismiss Plaintiff's Amended Complaint under Rule 12(b)(6) for failure to state a claim.

Date: February 28, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on February 28, 2022, via the Court's electronic filing system and is available to all counsel of record for viewing and downloading.

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