

No. 22-1280

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COALITION FOR TJ,

Plaintiff-Appellee,

vs.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court for the
Eastern District of Virginia, No. 1:21-cv-00296-CMH

**BRIEF OF *AMICI CURIAE* TJ ALUMNI FOR RACIAL JUSTICE,
VIRGINIA STATE CONFERENCE OF THE NAACP, CASA INC.,
HISPANIC FEDERATION, ASIAN AMERICAN YOUTH LEADERSHIP
EMPOWERMENT AND DEVELOPMENT, AND HAMKAE CENTER IN
SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL**

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RULE 29(A)(4)(A) CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel for *Amici* TJ Alumni for Racial Justice; Virginia State Conference of the NAACP (“VA NAACP”); CASA Inc.; Hispanic Federation; Asian American Youth Leadership Empowerment and Development (“AALEAD”); and Hamkae Center (f/k/a NAKASEC VA) make the following disclosures:

TJ Alumni for Racial Justice does not have a parent company and there is no publicly owned corporation that owns 10% or more of TJ Alumni for Racial Justice’s stock.

VA NAACP does not have a parent company, and there is no publicly owned corporation that owns 10% or more of VA NAACP’s stock.

CASA Inc. does not have a parent company and there is no publicly owned corporation that owns 10% or more of CASA Inc.’s stock.

Hispanic Federation does not have a parent company and there is no publicly owned corporation that owns 10% or more of Hispanic Federation’s stock.

AALEAD does not have a parent company and there is no publicly owned corporation that owns 10% or more of AALEAD’s stock.

Hamkae Center does not have a parent company and there is no publicly owned corporation that owns 10% or more of Hamkae Center’s stock.

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INTEREST OF AMICI CURIAE

Amici TJ Alumni for Racial Justice, Virginia State Conference of the NAACP, CASA, Inc. in Virginia, Hispanic Federation, Asian American Youth Leadership Empowerment and Development (“AALEAD”), and Hamkae Center (f/k/a NAKASEC Virginia) are nonprofit organizations that promote equality of opportunity for all, including in education. *Amici*, and the communities of color they serve and represent, stand together in support of equal access to Thomas Jefferson High School for Science and Technology (“TJHSST”). *Amici* offer the perspective that appropriate efforts to equalize opportunities and foster diversity are beneficial and do not contravene the Equal Protection Clause.¹

¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

If this Court were to accept the district court’s reasoning, a school district could not remove obstacles that deny some students an equal chance to compete for admission to selective programs. It would be a distortion of the Equal Protection Clause, which stands for equal opportunity for all, to find a violation of that provision simply because a school district rightly attempts to create a fairer admissions process—one that yields a greater representation of previously under-identified students, thereby fostering racial, socioeconomic, geographic, and other forms of diversity. It remains so even if decisionmakers anticipated and welcomed this effect.

As often happens, extreme racial disparities—in particular, the paucity of Black and Latino students admitted to TJHSST—functioned as the canary in the coal mine, making obvious that something was amiss with TJHSST’s prior admissions policy. In the five years prior to the admissions changes, no more than 10 Black students and no more than 23 Latino students were admitted in classes of more than 480 students each year. JA0561-0576. The stark, racially-disparate impact of TJHSST’s prior admissions policy exposed that policy as invalid,² in that it failed to

² Admissions criteria (including TJHSST’s admissions test) are “valid” when they assess “what they claim to measure (i.e., content validity) and correlate strongly with performance in [the academic institution they are used to assess suitability for, here, TJHSST] (predictive validity)” *Consultation on the Validity of Testing in Education*

identify many students who would thrive in TJHSST's academic program. Indeed, research shows that standardized tests like the TJHSST admissions test underpredict the potential of Black and Latino students;³ that fees dissuade low-income students from applying;⁴ and that teacher recommendation letters are often infected with racial bias.⁵ It simply cannot be that only a handful of Black and Latino students in

and Employment Before the U.S. Comm'n on Civil Rights (June 16, 1989) (statement of James W. Loewen) in *THE VALIDITY OF TESTING IN EDUCATION AND EMPLOYMENT*, 42 (Eileen Rudert ed., 1993).

³ Rather than measuring aptitude, standardized tests assess cultural literacy—i.e., how familiar the examinee is with the colloquial language commonly used in white middle-class homes like those of the test creators, and artificially depress the test scores of Black and Latino examinees. Jim 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>.

⁴ See, e.g., C. S. Mott Children's Hospital, *Mott Poll Report: Pay-to-Participate: Impact on School Activities*, 33 NAT'L POLL ON CHILD.'S HEALTH 1, 1-2 (2019), https://mottpoll.org/sites/default/files/documents/031819_PayToParticipate.pdf (pay-to-participate fees disproportionately disadvantaged low-income children).

⁵ See, e.g., Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AERA OPEN 1 (2016) (Black students are less likely to be identified for gifted and talented programs when teachers exercise discretion over which students are screened); Hala Elhoweris et al., *Effect of Children's Ethnicity on Teachers' Referral and Recommendation Decisions in Gifted and Talented Programs*, 26 REMEDIAL AND SPECIAL EDUC. 25–31 (2005) (white students receive higher referral rates than their minority counterparts, despite similar student descriptions).

the four vast counties and one city served by TJHSST had the aptitude to excel there.⁶

Accordingly, the school board abandoned biased admissions criteria and implemented a race-neutral, top 1.5% plan that controlled for inequities in educational opportunities across middle schools and helped correct the under-identification of Black, Latino, English Language Learner (“ELL”), and low-income students, including Asian Americans. The district court erroneously enjoined these changes as unconstitutional, reasoning that efforts to remedy the under-identification of Black and Latino students, “would, by necessity, decrease the representation of Asian-Americans,” thereby constituting intentional racial discrimination. JA2981. This Court must reverse this unprecedented misinterpretation of the Equal Protection Clause.

⁶ Indeed, the research supports this inference. *See, e.g.*, MARCIA GENTRY ET AL., GIFTED EDUCATION IN THE UNITED STATES: LAWS, ACCESS, EQUITY, AND MISSINGNESS ACROSS THE COUNTRY BY LOCALE, TITLE I SCHOOL STATUS, AND RACE 4 (2019) (schools fail to identify 63-74% of gifted Black students for known, correctable reasons), <https://www.dropbox.com/s/0lxzznyh5u0jj1/Access%20Denied.pdf>.

BACKGROUND

I. The Prior Admissions Process Under-Identified Talented Black, Latino, ELL, and Low-Income Students.

Founded in 1985, less than a generation after the Fairfax County School Board (“FCSB”) ended *de jure* school segregation,⁷ TJHSST’s student body has been composed since its early years of around 90% white and Asian American students.⁸ As early as 2002, FCSB acknowledged that its admission criteria denied some students an equal chance to compete. Its guidelines for TJHSST admissions staff stated: “Standardized testing for minority students does not necessarily reflect their abilities. The scores may be depressed.”⁹ In 2012, the Fairfax County Branch of the NAACP filed a complaint with the U.S. Department of Education’s Office for Civil Rights on behalf of Black and Latino students, raising the admissions process’s

⁷ *Historic Records: Desegregation*, FAIRFAX CNTY. PUB. SCHS., <https://www.fcps.edu/about-fcps/history/records/desegregation> (last visited May 11, 2022). See also *Blakeney v. Fairfax Cnty. Sch. Bd.*, 334 F.2d 239, 240 (4th Cir. 1964) (per curiam) (finding the injunction to “prohibit a system of segregated schools . . . should have been granted”).

⁸ Sonia Kanchan, *Dwindling Diversity*, TJ TODAY (Nov. 25, 2018) <https://www.tjtoday.org/24808/showcase/dwindling-diversity/> (last visited May 11, 2022) (noting TJHSST’s demographic data in the early 1990s).

⁹ LETTER OF FINDINGS, Re: OCR Complaint No. 11-04-1020, Letter from Alice Wender, Director, U.S. Dep’t of Educ. Office for Civil Rights, to Jack Dale, Superintendent, Fairfax Cnty. Pub. Schs. (May 25, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11041020-a.pdf>.

overreliance on test scores that benefitted students from households with the financial resources to pay for test preparation courses.¹⁰

Nevertheless, TJHSST's admissions process continued to rely heavily on test scores; a \$100 application fee; enrollment in, or completion of, advanced courses that only recently became available at all middle schools; and teacher recommendations.¹¹ The prior admissions regime thereby artificially depressed the admissions rates of Black and Latino students, as well as ELL and low-income students, including Asian American students.¹² See Table 1 and Figure 1 below. Indeed, for 2019-2020, while low-income students were 30% of 8th graders and 7%

¹⁰ 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. By letter dated September 25, 2012, OCR retained jurisdiction over complainants' race-based allegations. NOTIFICATION/PARTIAL DISMISSAL LETTER, Re: OCR Complaint No. 11-12-1503, Letter from Dale Rhines, Program Manager, Dep't of Educ., 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>.

¹¹ JA0041; JA0297; *TJ Admissions Merit Lottery Proposal, School Board Work Session*, FAIRFAX CNTY. PUB. SCHS. (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).

¹² See also Oh Decl. (Ex. 1) ¶¶ 5, 10, 12 (Chinese, Indian, and Korean students may struggle with poverty, lack of citizenship, medical debt, and housing insecurity); Vohra Decl. (Ex. 2) ¶¶ 5-6, 8, 11 (Northern Virginia's Asian American community consists of numerous diverse ethnic subgroups, including individuals with refugee backgrounds, and those who face language barriers).

of applicants, they comprised only 1.4% of semi-finalists.¹³ ELL students also constituted a smaller percentage of applicants and semi-finalists: 3% and 0.6%, respectively, although they comprised 10% of 8 graders.¹⁴ Likewise, only 2% of Asian American students attending TJHSST were low-income, as compared to 19.8% of Asian American 8th grade students attending the school divisions served by TJHSST who were low-income. *See* Oh Decl. (Ex. 1 hereto) ¶ 11.

	SY19-20 8 th graders ¹⁶	Applicants	Admitted
Asian American	5,167 (17%)	1,423 (56%)	355 (73%)
Black	3,702 (12%)	160 (6%)	≤10 (≤2%)
Latino	7,991 (26%)	208 (8%)	16 (3%)
White	11,594 (38%)	595 (23%)	86 (18%)
Total	30,247	2,539	486

¹³ VA DEP'T OF EDUC., 2019-20 FALL MEMBERSHIP REPORTS (2020), <https://p1pe.doe.virginia.gov/buildatable/fallmembership>; JA 300.

¹⁴ *Id.*

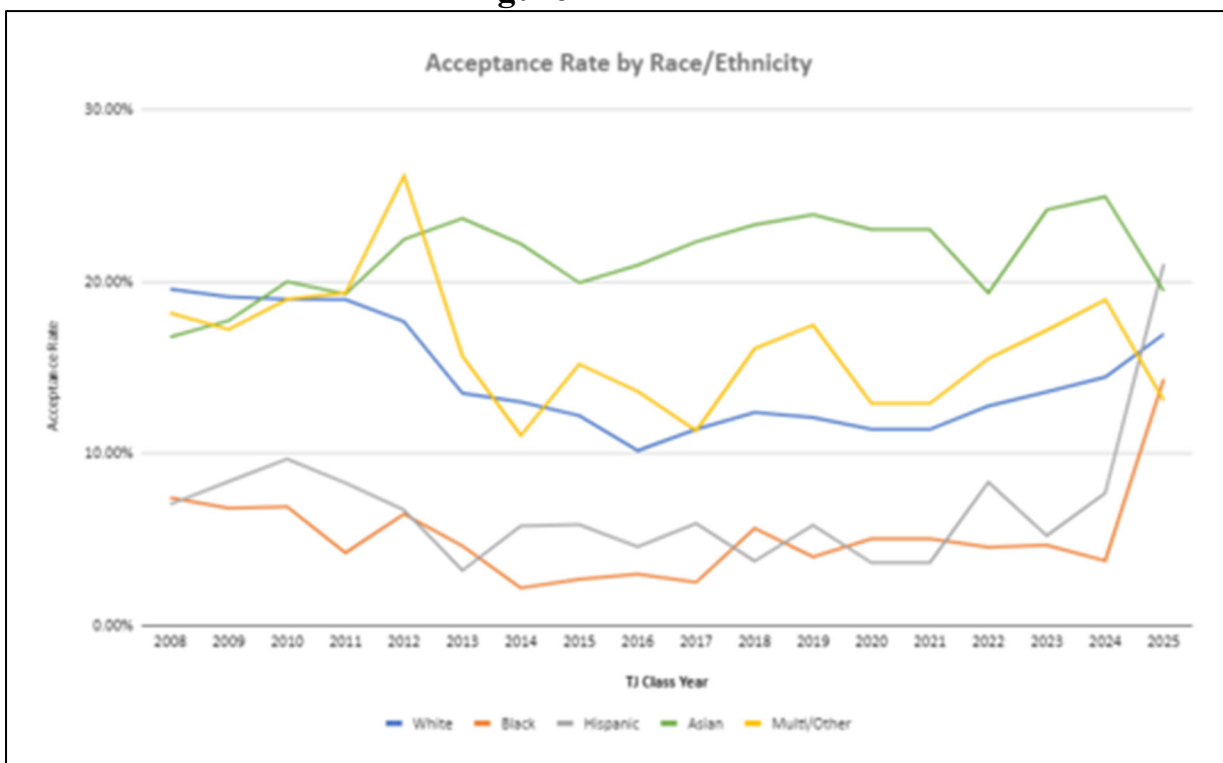
¹⁵ *See* JA0009 n.10 (citing Press Release, Fairfax Cnty. Pub. Schs., TJHSST Offers Admission to 486 Students (June 1, 2020), <https://www.fcps.edu/news/tjhsst-offers-admission-486-students>); VA DEP'T OF EDUC., 2019-20 FALL MEMBERSHIP REPORTS, (2020), <https://p1pe.doe.virginia.gov/buildatable/fallmembership>. Due to suppression of data in categories containing less than 10 students, some figures are approximate.

¹⁶ This column shows the number of eighth graders in various groups in Arlington County, Fairfax County, Falls Church City, Loudoun County, Prince William County, and across these school divisions.

II. The New Admissions Process More Objectively Identifies Talented Black and Latino Students, and ELL and Low-Income Students, Including Asian Americans.

The new admissions process (the “Plan”) expanded the applicant pool, yielding a nearly 20% increase in applications overall. JA0555. It also increased the average GPA of applicants and admitted students; ensured admission of students from all public middle schools in Fairfax County, Arlington County, Falls Church City, Loudoun County and Prince William County; and, by removing criteria that unfairly disadvantaged some applicants, led to a sixfold increase in admittees from historically underrepresented schools (from 5.56% to 30.73%), and helped correct the under-identification of Black, Latino, ELL, and low-income students. JA0556.¹⁷

¹⁷ Press Release, Fairfax Cnty. Pub. Schs., TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM (June 23, 2021), <https://www.fcps.edu/news/tjhsst-offers-admission-550-students-broadens-access-students-who-have-aptitude-stem>; *Debunking the Lie*, TJ ALUMNI ACTION GROUP, <https://www.tjaag.org/debunking-the-lie> (last visited May 11, 2022); VA DEP’T OF EDUC., 2019-20 FALL MEMBERSHIP REPORTS (2020), <https://p1pe.doe.virginia.gov/buildatable/fallmembership>. Due to suppression of data in categories containing less than 10 students, some figures are approximate.

Figure 1

ARGUMENT

I. Appellant’s Race Neutral Measures to Equalize Opportunity are Lawful and Do Not Trigger Strict Scrutiny.

Under controlling precedent, rational basis review applies to a facially neutral policy *unless* the plaintiff shows discriminatory intent. *See, e.g., Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 260 (1979) (a facially race-neutral policy “does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977). To show discriminatory intent, the plaintiff must show “more than intent as volition or intent as awareness of

consequences” Indeed, the plaintiff must prove that the decisionmaker acted “at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279.

First, the district court erred when it reached the factually and legally unsupported conclusion that the Plan had an adverse effect on Asian Americans. The district court incorrectly reasoned that there was a disparate impact because Asian Americans made up a smaller share of the admitted class than the previous year. *See* JA2968. Instead, the district court should have assessed whether the Plan caused Asian American applicants to be far less likely than their peers to secure admission. That analysis reveals that there is no disparate impact as Asian Americans were *more likely* to be admitted than their peers.

Second, the district court misapplied *Feeney* when it inferred discriminatory intent from the mere “awareness of consequences.” The district court erroneously concluded that FCSB acted with discriminatory purpose because its “policy was designed to increase Black and Hispanic enrollment, which would, *by necessity*, decrease the representation of Asian-Americans at TJ.” JA2981-2982 (emphasis added). In other words, the district court inferred discriminatory intent where the policy was adopted “merely ‘in spite of’” any potential adverse impact on an identifiable group, discarding *Feeney*’s causal requirement. As Judge Heytens explained in his concurring opinion granting FCSB’s stay pending appeal, “[t]his

aspect of *Feeney*'s holding operates as a *critical limitation* on the potential to lodge constitutional challenges to facially neutral laws of all stripes.” Order Denying Stay at 4 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring) (emphasis added). By finding intentional discrimination without evidence that FCSB was motivated, at least in part, to harm Asian American students, the district court’s approach is “flatly inconsistent” with *Feeney* and legally impermissible. *Id.*; see also *Bos. Parent Coal. for Acad. Excellence Corp.*, No. 21-cv-10330, 2021 WL 4489840 at *15 (D. Mass. Oct. 1, 2021) (“While the increase of a zero-sum resource to one group necessitates the reduction of that resource to others, the case law is clear—the concern is action taken because of animus toward a group, not in spite of an action’s necessary effect on a group or groups.” (citing *Feeney*, 442 U.S. at 256, 258 (1979))).

Appellee appears to recognize that controlling precedent foreclosed a finding of discriminatory intent, but nevertheless invited the district court to misapply the law in furtherance of its attempt to change the law to prevent schools across the country from removing known barriers to opportunity and adopting race-neutral, research-based reforms to promote equality. See Appellee’s Emergency Application to Vacate the Stay Pending Appeal, 21A590 (S. Ct.), at 14, 22 (inviting the Supreme Court to change the interpretation of *Arlington Heights* and *Feeney* where a “zero-sum process” is involved or “where the government relies on an interest in promoting diversity”). Appellee argues that the interpretation of controlling

precedent should change because “*the only way* to increase the proportion of Black and Hispanic students admitted is to change the criteria in a way that makes it disproportionately harder for Asian-American students to get in,” implying that any change preceding an increase in the representation of Black and Latino students is, *per se*, racial discrimination against Asian Americans. *Id.* at 22 (emphasis added). Instead of actually proving discriminatory intent, Appellee contends that such intent can be inferred from a mere increase in the number of Black and Latino admittees—an argument that would require the Court to endorse the racially discriminatory premise that Black and Latino students are disproportionately unlikely to be hardworking or talented enough to objectively merit admission. *See id.* at 21-23 (arguing that courts should equate awareness that a policy change could lead to an increase in the representation of some groups with an intent to discriminate against remaining groups). Appellee is wrong, and this Court should forcefully repudiate these racist beliefs.

Third, applying rational basis review—the proper legal standard—the Plan, as detailed below, readily passes constitutional muster.

This Court should reverse.

A. The Plan Had No Disparate Impact.

The district court improperly concluded that Asian American applicants suffered a racially disparate impact under the Plan by making the wrong comparison.

As Judge Heytens explained, the district court’s “simple before-and-after comparison” is the “wrong comparator” to assess disparate impact, and the district court “*never* explained” why this was the proper baseline.¹⁸ Order Denying Stay at 7 (emphasis added).

Using past results as a baseline is not only improper, it is woefully misleading. As the district court in *Boston Parent* correctly noted, when a racial group has been significantly overrepresented in the prior system, “nearly any changes to the admissions process will likely result in some reduction, if only from the law of averages.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. CV 21-10330-WGY, 2021 WL 4489840, at *15 (D. Mass. Oct. 1, 2021). This is a mathematical certainty and alone “is not a consequence that the caselaw considers a disparate impact.” *Id.*; *see also* Order Denying Stay at 7 (“Nor am I aware of any other authority for the proposition that current government policy creates a floor against which all future policies will be judged, a principle that would, if adopted, make it exceedingly difficult for government actors to change existing policies that have a real (albeit unintentional) racially disparate impact.”).

¹⁸ The sole case the district court cited in support was *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016). But as Judge Heytens explained, *McCrory* “simply does not say” that a simple before-and-after comparison is the proper method; “[t]o the contrary . . . *McCrory* specifically rejected an election-to-election comparison of voter turnout to assess disparate impact.” Order Denying Stay at 7 (citing *McCrory*, 831 F.3d at 232–33).

In endorsing Appellee’s unworkable theory that *any* change in the racial composition of an admitted class sufficiently evidences disparate impact, the district court has turned the Equal Protection Clause on its head. After all, the Equal Protection Clause was not intended to be a bulwark for the status quo, and this Court must not allow it to be used to entrench inequalities. *See generally Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 46 (1st Cir. 2021); *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”).

Using the correct comparator, the data shows that Asian American applicants did not suffer disparate impact under the Plan. As Judge Heytens explained, “the more obviously relevant comparator for determining whether this race-neutral admissions policy has an outsized impact on a particular racial group is the percentage of applicants versus the percentage of offers.” Order Denying Stay at 7. This metric shows “whether members of one group have, proportionally, more difficulty securing admission than others,” which addresses the “core question for assessing disparate impact.” *Id.*; *Bos. Parent Coal.*, 996 F.3d at 46 (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”); *Vaughns v. Bd. of Educ. of Prince George’s Cty.*, 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”); *Gallup-McKinley County Schools Resolution*, 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”).

Under the Plan, the percentage of Asian Americans accepted (54.36%) was higher than the percentage Asian American applicants (48.59%). JA675. Moreover, the admissions rate for Asian American students admitted was consistent with historical trends going back at least 17 years.¹⁹ As Figure 1 *supra* shows, between 2004 and 2020, the acceptance rate for Asian American applicants ranged from 16.8% to 25.0%.²⁰ In 2021, under the Plan, the percentage of accepted Asian American applicants was 19.48%, well within the historical range.²¹ Indeed, Asian

¹⁹ *Debunking the Lie*, TJ ALUMNI ACTION GROUP, <https://www.tjaag.org/debunking-the-lie> (last visited May 11, 2022).

²⁰ *Id.*

²¹ *Id.*

American applicants had a *lower* acceptance rate the year before the Plan's implementation.²²

As Judge Heytens observed, “[a]t the very least, the record reveals a likely dispute of fact on this question that would preclude summary judgment in favor of the Coalition.” Order Denying Stay at 8.

B. There Was No Discriminatory Intent.

FCSB's efforts to remove obstacles preventing students from enjoying an equal opportunity to be admitted to TJHSST do *not* evince racially discriminatory intent. Nor do they constitute “racial balancing.” The Plan includes neither racial quotas nor targets, and there is no evidence that it is designed to admit any specific percentage of students based on race. Rather, FCSB attempted to fulfill its obligation to provide equal opportunities to all students, including by remedying policies that had the practical effect of unfairly excluding Black, Latino, ELL, and low-income students, including Asian Americans. *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

²² *Id.* (The acceptance rate of Asian applicants was 19.35% for the Class of 2022). Furthermore, Asian American students have only recently made up more than 60% of TJHSST's student body; prior to the Class of 2016, Asian Americans regularly represented less than 60% of the incoming class. *See id.*

the objectives of the program as respect individuals of a particular race, color, or national origin”); *see also 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”). FCSB’s new policy is facially race-neutral and uniformly applied, and as such “good faith [is] presumed in the absence of a showing to the contrary.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978).

The district court’s conclusion that the “Board’s requests for and consideration of racial data demonstrate discriminatory intent” is also contrary to well-established precedent. JA2981. As Justice Kennedy explained in his concurrence to the controlling opinion in *Parents Involved*, school district decisionmakers may take race-neutral affirmative measures to equalize educational opportunities and foster diversity without triggering strict scrutiny. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in judgment).²³ Justice Kennedy

²³ *See also Raso v. Lago*, 135 F. 3d 11, 16 (1st Cir. 1998), *cert denied*, 525 U.S. 811 (1998) (“[P]laintiffs are mistaken in treating ‘racial motive’ as a synonym for a constitutional violation. Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically ‘suspect’ under the Equal Protection Clause.”); *Spurlock v. Fox*, 716 F. 3d 383, 394 (6th Cir. 2013) (“If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required

specifically recommended several of the race-neutral elements used by FCSB in TJHSST's new admission process. *Id.* at 788-89. The Court reaffirmed these principles in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015), explaining that “race may be considered in certain circumstances and in a proper fashion,”²⁴ and quoting the portion of Justice Kennedy’s *Parents Involved* opinion recognizing that “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods.” *Id.* at 544. Under this precedent, FCSB’s awareness that the Plan might yield greater representation of previously underrepresented students does not evince discriminatory intent.

to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions.”); *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 358 (5th Cir. 2015) (“[T]he district court’s legal conclusion that the Board’s consideration of demographic data . . . ‘does not amount to [adopting] a rezoning plan that assigns students on the basis of race’ conforms to Supreme Court case law.”); *cf. United States v. Hayes*, 515 U.S. 737, 745 (1995) (“We recognized in *Shaw [v. Reno]*, however, that ‘the legislature always is aware of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.’”).

²⁴ See, e.g., *City of Richmond v. JA Croson Co.*, 488 U.S. 469, 507 (1989) (endorsing the use of race-neutral means of increasing minority participation in city contracting).

The district court additionally erred in characterizing elements of the TJHSST's admissions process as "proxies that disproportionately burden Asian American students." JA2966. As a matter of law, courts have "repeatedly disavowed" the "claim that geography-based school assignments 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). After all, reframing *any* neutral classification that is somehow correlated with race as an impermissible proxy for race would only serve to undermine all forms of diversity. To this point, even Supreme Court justices who have dissented from opinions upholding race-conscious measures to diversify post-secondary educational institutions have endorsed race-neutral measures like the top-1.5% plan at issue here. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2236 (2016) (Chief Justice Roberts and Justice Thomas joining a dissenting opinion by Justice Alito, where he notes that UT Austin could have relied more heavily on race-neutral measures like, for example, UT Austin's top 10% plan).

As a factual matter, no element of the Plan is sufficiently correlated with race as to operate as a proxy. The district court infers discriminatory intent from the top-1.5% plan and the consideration of underrepresented schools as an "experience factor" because these mechanisms allegedly impact students at TJHSST feeder schools more than their peers at underrepresented schools. JA2969-70. But students

attending the handful of cherry-picked, so-called feeder schools are not a protected class. As such, changes that may burden these students violate the Equal Protection Clause only if they are not rationally related to a legitimate government interest under rational basis review, which is clearly not the case as discussed below. The district court's logic in finding discriminatory intent only makes sense if attendance at a so-called feeder school is a proxy for race, but it is not. Indeed, the proportions of Asian American students at these schools—Carson (46%), Longfellow (26%), Kilmer (24%), Rocky Run (45%), Frost (24%), and Jackson (19%), FCSB Br. at 33-34—are similar to and, in fact, sometimes even *lower* than the proportions of Asian American students at other eligible middle schools—Loudoun County: Stone Hill (60%), Mercer (44%), Willard (41%), J. Michael Lunsford (39%), Brambleton (38%), Eagle Ridge (34%), Farmwell Station (29%), Trailside (25%); Fairfax County: Cooper (30%), Liberty (30%), Franklin (25%), Frost (24%); Prince William County: Pennington (24%).²⁵ Nor are the other “experience factors” racial proxies, especially given that Asian American applicants were the highest or second highest percentage of applicants and admittees who *benefitted* from extra points for “experience factors.” JA2902; *see* FCSB Br. at 40-44. No element of TJHSST's admissions process comes close to “target[ing Asian Americans] with almost

²⁵ VA DEP'T OF EDUC., 2020-21 FALL MEMBERSHIP REPORTS (2021), <https://p1pe.doe.virginia.gov/buildatable/fallmembership>.

surgical precision” in a way that indicates discriminatory intent. *McCrorry*, 831 F.3d at 214. Rather, in the context of FCSB’s other efforts to equalize access to TJHSST, such as eliminating the application fee and removing the standardized testing requirement, this is a case where “the legitimate noninvidious purposes of a law cannot be missed.” *Feeney*, 442 U.S. at 275.

Finally, the district court misconstrues the relevant historical context in its *Arlington Heights* analysis. The district court does not explain how FCSB’s “decade-long tinkering” with TJHSST’s admissions process “intended to impact issues of diversity and inclusion” leads to its conclusion that the Plan was motivated by discriminatory intent. JA2970. Instead, there was no “racial balancing.” FCSB’s facially race-neutral effort to address longstanding obstacles used no racial targets or quotas. Indeed, in expanding access, the district opened opportunities for many students, including Black and Latino students, as well as low-income and ELL Asian American students who were previously disadvantaged under the old system. This Court must reverse these erroneous conclusions to allow students of all races an equal opportunity to compete for a place at TJHSST.

C. The New Admissions Policy is Constitutional.

1. Rational Basis Review Applies, Under Which the Plan Would Easily Pass Constitutional Muster.

Under a rational basis standard, a government entity need only establish that the challenged conduct or policy is rationally related to a legitimate government

interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This standard thus affords the challenged policy “a strong presumption of validity,” and the policy must be upheld “unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [official’s] actions were irrational.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (quotation omitted).

Here, as discussed at length in Section I, the Plan was designed to equalize opportunity for all students and thereby achieve FCSB’s legitimate interests in fostering diversity and diminishing racial isolation. In short, there was a “combination of legitimate purposes” for the Plan’s enactment; therefore, the Plan must be upheld as constitutional under rational basis review.

2. The Plan Is Rationally Related to Legitimate Government Interests.

In *Brown v. Board of Education*, the U.S. 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. 483, 493 (1954). The Court has also 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).

More recently, in *Parents Involved*, five members of the Supreme Court found that the interest in 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.” 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in judgment). And *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio*—in discussing the interest in diversity in elementary and secondary school settings—explained:

If [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 253, 283 (S.D.N.Y. 2019), *aff’d* 788 F. App’x 85 (2d Cir. 2019).

Research shows that attending a racially diverse school has a positive impact on academic achievement and is beneficial to all students.²⁶ For example, diversity

²⁶ U.S. COMM’N ON CIVIL RIGHTS, PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION 5 (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>; Amy Stuart Wells, et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf; Jennifer Ayscue et al., *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools*, NAT’L COAL. ON SCH. DIVERSITY (Mar. 2017), <https://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf>.

in the learning environment fosters richer classroom discussions that promote creativity, critical thinking, and problem-solving skills.²⁷ Likewise, 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.²⁸ 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.²⁹ Given this, there is at least a legitimate government interest in fostering the educational benefits of diversity.

Furthermore, the U.S. Supreme Court has long recognized the harmful impacts of racial isolation. In *Parents Involved*, five Justices agreed that, given the Nation’s “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children,” “[a] compelling interest exists in avoiding racial isolation.” 551 U.S. at 797-98

²⁷ See Wells, et al., *supra* note 26; *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/>.

²⁸ See Ayscue, et al., *supra* note 26.

²⁹ See Wells, et al., *supra* note 26.

(Kennedy, J., concurring in part and concurring in judgment; Breyer, J., joined by Stevens, J., Souter, J., & Ginsburg, J., dissenting).³⁰

The effects of racial isolation at TJHSST have been devastating. One of TJHSST's few Black students experienced “shameful walks down the hall,” while “wondering if anyone was staring at me, thinking ‘Whoa, look, a Black kid,’ and the racist jokes that seemed funny to everyone but me.”³¹ Racial isolation led her to try to bleach her skin to “look less Black” and fit in.³² She “realized that one year at [TJHSST] made the real 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.”³³

Likewise, a Latina TJHSST student felt “uncomfortable . . . , 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

³⁰ See also Rae R. Stevenson, “*I Don't Want to Be Ashamed, I Want to Learn About My History*”: Racial Isolation in Portland's White Schools, 13 PSU MCNAIR SCHOLARS ONLINE J. 1, 3 (2019) <https://doi.org/10.15760/mcnair.2019.13.1.3> (describing harms that students who lack same-race peers face).

³¹ 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/>.

³² *Id.*

³³ *Id.*

that could.”³⁴ She added that the underrepresentation of Latino 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.”³⁵

Similarly, a 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.”³⁶ Avoiding racial and socioeconomic isolation is a legitimate government interest that this Court must uphold.

Finally, FCSB’s compliance with federal and state anti-discrimination laws is an independent legitimate government interest that justifies removing barriers to equal educational opportunity.³⁷ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[T]he 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.”); *H.B. Rowe Co. v.*

³⁴ 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/>.

³⁵ *Id.*

³⁶ 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/>.

³⁷ FCSB is also 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 2021).

Tippett, 615 F.3d 233, 256 (4th Cir. 2010) (“The State has a compelling interest, indeed an ‘absolute duty,’ to remedy this injustice [of disparate impact racial discrimination in public-sector subcontracting].”).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the decision of the district court and remand with instructions to grant summary judgment to FCSB.

DATED: May 13, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points and contains 5,729 words.

DATED: May 13, 2022

ARNOLD & PORTER KAYE SCHOLER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which sent notification of such filing to all registered CM/ECF users.

DATED: May 13, 2022

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Arthur Luk
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EXHIBIT 1

DECLARATION OF LINDA SOOKYUNG OH

I, Linda Sookyung Oh, pursuant to the provisions of 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct:

1. I am over the age of eighteen years and make this declaration of my own personal knowledge.

2. I am the Director of the National Korean American Service & Education Consortium's Virginia chapter ("NAKASEC VA"). In that capacity, I ensure that NAKASEC VA's mission is realized and oversee the programmatic, fiscal, and operational needs of the organization, and manage our staff.

3. I submit this declaration in support of the brief of *amici curiae* and more generally in support of measures to reduce barriers to access to Thomas Jefferson High School for Science and Technology ("TJHSST") and to promote equality of educational opportunities for all students. In my experience as Director of NAKASEC VA, my immigrant rights' work with NAKASEC national, and serving on the board of the Virginia Civic Engagement Table (VCET), Virginia Coalition for Immigrant Rights (VACIR), and the Fairfax County Alliance for Human Services, I believe that reducing barriers to educational opportunities benefits all students, including diverse Asian American communities in Northern Virginia.

NAKASEC VA's Support of Asian Americans

4. NAKASEC VA is a non-profit, grassroots, membership Asian American organizing and advocacy organization. NAKASEC VA's mission is to organize Asian Americans to achieve social, racial, and economic justice. NAKASEC VA develops holistic programs and campaigns that are guided by community members, meets immediate needs while building Asian American community power in Virginia to make long-term systemic changes that

address the root causes of these needs, and centers human connections. NAKASEC VA began working with community members in Northern Virginia in 2012, soon after the announcement of the Deferred Action for Childhood Arrivals program. NAKASEC VA is part of the national NAKASEC affiliation, with affiliates in Illinois, New York, Pennsylvania, and an emerging chapter in Texas.

5. NAKASEC VA's membership and the communities we serve reflect the rich diversity of the Asian American communities in Virginia, including Korean, Vietnamese, Chinese, Filipino, Indian, and Pakistani community members. Approximately 60% of the community NAKASEC VA serves is low-income, and many live in Northern Virginia, including Fairfax County, Loudoun County, Prince William County, Alexandria, Arlington, and Falls Church. NAKASEC VA serves community members with various immigration statuses, including recent immigrants. Many members of the communities that NAKASEC VA serves speak a language other than English at home, and approximately 75% are limited English proficient ("LEP"). In Fairfax County, census data show that 73.5% of Asian Americans ages five years and older are foreign born, and 30.9% of Asian Americans ages five years and older speak English "less than very well."¹

6. NAKASEC VA's programs and campaigns include immigrant rights, civic engagement, and youth leadership development, as well as language access to public programs and health care affordability and access. NAKASEC VA also has a robust community services program that provides information and referrals about health care and COVID-19 related

¹ U.S. Census Bureau, 2019 ACS 5 year estimates, Table B16005D, NATIVITY BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER (ASIAN ALONE) (Fairfax County, Virginia) <https://data.census.gov/cedsci/table?q=United%20States&t=Asian%3ALanguage%20Spoken%20at%20Home&g=0500000US51059&tid=ACSDT5Y2019.B16005D>.

assistance, particularly for LEP community members. NAKASEC VA works closely with the Asian American communities in Virginia through a statewide, non-partisan, and multi-lingual civic engagement program focused on registering, education, mobilizing, and protecting Asian American voters and decennial census participation. NAKASEC VA also devotes resources to advocating for our Asian American communities around the racial biases that our communities face, such as anti-Asian harassment and violence and harmful stereotypes that flatten identities and rob individuals of their humanity.

7. Through the youth leadership development program, NAKASEC VA provides paid internship opportunities to Asian American youth in Virginia. NAKASEC VA engages youth through lessons on the mechanics of organizing and developing campaigns to address problems that impact the Asian American community. The youth learn how to identify issues and work together to engage with community members. The youth program participants this year have expressed concerns about their mental health and wellbeing, and the pressures they face in school and concerns about their future.

8. During the COVID-19 pandemic, NAKASEC VA has experienced an unprecedented number of requests for language assistance from community members seeking to access public services to meet their basic needs. Due to the economic stresses of the pandemic, a large number of NAKASEC VA's community members need assistance with utility payments, access to food, unemployment insurance, as well as COVID-19 vaccination information. Many of the phone lines and websites for these public services in Northern Virginia are not translated or provide interpretation services in Asian languages that our community members speak, such as Korean, Chinese, and Vietnamese. The low-income and LEP communities that NAKASEC VA serves has been particularly affected by the challenges posed by the COVID-19 pandemic,

and many continue to face long-term economic and health impacts. Additionally, many immigrant community members without health insurance forgo seeking treatment for COVID-19 due to fears of immigration consequences and financial concerns.

Improving Access to TJHSST Benefits All Students, Including Asian Americans

9. As an organization that works with and is grounded in Asian American communities, NAKASEC VA advocates for measures that center equity in education and promote access and opportunities for all students, including low-income and immigrant students. As such, NAKASEC VA supports policies that reduce barriers to access to TJHSST for economically disadvantaged students, including low-income Asian American students. Further, as an organization rooted in the community, NAKASEC VA believes it is critically important to implement measures and promote messaging to protect and care for the mental health and wellbeing of Asian American youth and all students. On September 22, 2020, NAKASEC VA submitted a letter to relevant stakeholders, including Fairfax County School Board members, elected state officials in Virginia, and the Secretary of the Virginia Department of Education, to provide an Asian American perspective on the proposed changes to the admissions process at TJHSST at the time. *See An Asian American Perspective on Admissions Process at Thomas Jefferson High School for Science and Technology*, attached hereto as Ex. A.

10. Based on my experience as Director of NAKASEC VA, I believe that Asian American communities are not harmed by efforts to address institutional barriers to high-quality education for all students. Labeling measures to reduce barriers to access as “anti-Asian” misses the mark and can be harmful to Asian American communities by trivializing the very real racial biases and discrimination that our communities face. The Asian American communities NAKASEC VA serves is incredibly diverse and is comprised of communities from different

backgrounds and lived experiences, and fostering learning environments that include this rich diversity can benefit all students.

11. The low-income Asian American communities that NAKASEC VA serves is acutely aware of the inequities and barriers that communities of color face in institutions, including in education. Demographic data show that Asian Americans who are low-income or English language learners (“ELL”) have been starkly underrepresented at TJHSST. In the 2020-21 school year, 28.8% of eighth grade students in the school divisions served by TJHSST were economically disadvantaged and 10.5% were ELLs.² And while 19.8% of Asian American eighth grade students in these school divisions were economically disadvantaged, only 2.0% of the Asian American students at TJHSST were economically disadvantaged, and less than ten Asian American students were ELLs.³

12. Among Chinese, Indian, and Korean American communities that NAKASEC VA serves, for example, there are students and families who struggle with poverty, lack of citizenship, medical debt, and housing insecurity. NAKASEC VA staff have spoken with several Asian American students who had applied to TJHSST under the prior admissions policy, who formed study groups with their friends to study for the admissions test because their parents could not afford private tutoring. These students shared with NAKASEC VA staff that the demands of preparing for the admissions test took a toll on their mental health, and that they also missed out on opportunities to participate in extracurricular activities due to the focus on test preparation through their self-study groups. *See* Ex. A at 4.

² *See* Virginia Department of Education, Fall Membership Build-A-Table, https://p1pe.doe.virginia.gov/apex/f?p=180:1:8645387548386:SHOW_REPORT::::

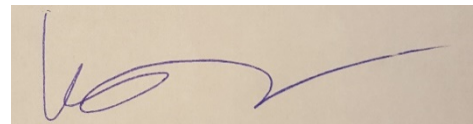
³ *Id.*; *see also* Suppression Rules provided on the webpage, explaining that numbers less than ten are suppressed.

13. The overwhelming majority of the low-income Asian American communities that NAKASEC VA serves supports efforts to expand access to educational opportunities for all students. A parent of a Fairfax County Public School student shared with me that several students were encouraged to apply to TJHSST for the class of 2025 after learning that the \$100 application fee and admissions test were removed, and that some students would not have applied under the previous admissions policy because they could not afford the application fee.

14. Based on my experience and knowledge of the Asian American communities in Virginia, I believe that measures to make TJHSST more accessible would benefit the Asian American communities that NAKASEC VA serves and help reflect the diversity of our communities that is often overlooked, including low-income Asian Americans, Asian Americans from refugee backgrounds, as well as ELLs.

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

Executed in Annandale, VA on September 13, 2021_____.



Linda Sookyoung Oh

EXHIBIT A

Date: September 22, 2020
From: NAKASEC Virginia
To: Relevant Stakeholders

Re: An Asian American Perspective on Admissions Process at Thomas Jefferson High School for Science and Technology

Summary: NAKASEC Virginia, a non-profit organization that works with and is grounded in Asian American communities, supports reform of the admissions process to Thomas Jefferson High School for Science and Technology (hereafter referred to as “TJ”). A public school like TJ belongs to the public, and measures to offset the unearned advantages enjoyed by applicants from higher-income families is much needed. For decades, TJ has accepted only a handful of economically disadvantaged students, as well as Black and Latino students. Labeling such reform efforts as attacks on Asian Americans and meritocracy are sensational sound bites. Reform will benefit Asian American students in Northern Virginia, especially those who are low-income. While this memo will not go into more detail on the following, NAKASEC Virginia also supports related efforts that seek to center equity, including scrutinizing the Advanced Academics Program, curriculum at TJ, and teacher hiring. Lastly, NAKASEC Virginia would like to raise a critical message from Asian American students that Fairfax County Public Schools, teachers, staff, parents, and other students need to stop the message that TJ is the best and only path to success. This message is factually incorrect and feeds distress, isolation, and anxiety of Asian American youth.

Organizational background

NAKASEC Virginia is one of the region’s only grassroots Asian American organizing and advocacy organizations. NAKASEC Virginia’s mission is to organize Asian Americans to achieve social, racial, and economic justice. We opened our doors in Annandale in 2012 by first organizing undocumented Korean Americans to fight for immigration reform, and later supporting eligible undocumented Asian American youth to apply for the Deferred Action for Childhood Arrivals (DACA) program. We later expanded to supporting low-income Asian Americans complete N-400 citizenship applications. Since 2012, we have expanded organizing issue campaigns to also include health care affordability/access and language access to public programs; a robust community services program that provides information and referrals (particularly for Korean and Vietnamese speaking populations in Northern Virginia) about health care and COVID-19 related assistance, a statewide non-partisan multi-lingual civic engagement program focused on registering, educating, mobilizing, and protecting Asian American voters and Census 2020 participation; and leadership development with Asian American high school and college aged-youth. Staff primarily reside in Northern Virginia and are of Korean, Vietnamese, Filipino, and Taiwanese heritage. We expanded into a second office in Fall 2019 in Centreville. Currently both offices are closed because of COVID-19 and we have pivoted all work that allows staff and volunteers to work from home.

TJ is a public school whose current admissions process is heavily tilted in favor of students whose families come from higher-income families.

When comparing the demographic makeup of all public high schools in the TJ catchment area to that of TJ, TJ is not equally accessible to the diverse student populations across Northern Virginia, including economically disadvantaged, Latino, disabled, English language learners, and

female students. Across the five school divisions, 30% of high school students are economically disadvantaged, compared to 1.9% at TJ. Black and Latino students make up 11.6% and 27% of public high school student enrollment compared to 1.7% and 2.7%, respectively, at TJ. This pattern of enrollment not only fails to reflect the greater diversity in Northern Virginia, it also manifests when looking at disabled student, English language learner, and female student enrollment. See Table 1 for further detail.

Table 1: Overview of Demographics of Grades 9-12 in 5 school divisions and TJ

Division or School	Enrollment (#)	Asian (%)	Black (%)	Latino (%)	Econ. Disadv. (%)	Disabled (%)	ELL (%)	Female (%)	Asian & Econ. Dis (%)
Arlington	28,151	9.1%	10.1%	28.3%	28.0%	14.8%	20.0%	48.4%	38.1%
Fairfax County	188,930	19.5%	9.8%	26.8%	29.2%	14.7%	19.3%	48.0%	19.8%
Falls Church City	2,649	7.7%	3.5%	14.1%	7.7%	12.6%	5.7%	47.0%	10.7%
Loudoun County	83,933	22.8%	6.8%	18.0%	20.0%	11.5%	11.9%	48.7%	11.5%
Prince Wm County	92,270	9.2%	20.1%	35.4%	41.7%	12.7%	17.3%	48.6%	39.6%
TOTAL	395,933	16.9%	11.6%	27.0%	30.0%	13.6%	17.2%	48.3%	20.6%
TJ	1,809	71.5%	1.7%	2.7%	1.9%	1.1%	No available data	39.7%	2.1%

Data Source: 2019-2020 Fall Membership Reports, Virginia Department of Education

If TJ were a private school, perhaps the controversy about the admissions process would not be as pronounced. However, it is a public school funded by taxpayer dollars (including from the families whose students do not get accepted or attend). Admission should be free from bias. However, because the current admissions process to TJ overemphasizes a single test, parents in affluent areas often spend thousands of dollars on coaching and tutoring programs (such as Curie Learning LLC) to prepare 7th and 8th grade students specifically for the TJ exam.

While not specific to the TJ exam, researchers have repeatedly found that higher income students enjoy significant advantages throughout the college application process, and that income greatly impacts student performance on standardized tests. Plainly put, the current TJ admissions process rewards wealth and increases inequality.

As many have already pointed out, the majority of TJ students whose home district is Fairfax County went to a handful of middle schools. It should be no surprise that these middle schools are located in neighborhoods with higher property values, and therefore can better resource elementary and middle schools.

Meritocracy in this case is an illusion. Students in Northern Virginia do not have equal opportunity to prove themselves. This statement is not meant to invalidate that individual students, regardless of their background, put in countless extra hours to study for the TJ exam. Rather, in the wake of the 2008 financial crash and the current COVID-19 public health crisis

where countless Virginians who have worked hard lost their homes and/or currently unemployed, insisting that admission to TJ is solely the result of individual effort is damaging and untrue.

Admissions reform is not anti-Asian.

A majority of Asian American students in the TJ catchment area do not attend TJ. Less than 2% of all Asian American high school students in Arlington County, Fairfax County, Falls Church City, Loudoun County, and Prince William County attend TJ. Broadly speaking, discussions about admissions and the TJ exam command a disproportionate amount of attention among Asian American communities.

Yet, admissions reform is associated as an “Asian American issue,” primarily because the anti-reform efforts are led by Asian Americans who describe the discussion as “anti-Asian.” It makes for an easy soundbite because it is sensational and provocative. But it is wrong.

Calls for admissions reform are driven not by anti-Asian sentiment, but by the shocking disparities made plain by enrollment data that clearly shows that economically disadvantaged students, Black, Latino, and other populations (like female and disabled) students face major barriers to getting into TJ. Consequently, one of admissions reform’s intended consequences should be to ensure more equity in terms of access to TJ.

Asian American communities are not harmed by efforts to address institutional barriers to high-quality education for non-Asian American communities. Labeling the proposed educational reform efforts aimed at furthering racial and economic equity as “anti-Asian” misses the mark and may even trivialize the very real racial biases that our communities face, such as:

- 1) Asian Americans reporting violence (physical, verbal, emotional) or threats of violence because of outside physical appearance (such as what’s happening because of COVID-19 and associations of the virus with people specifically of Chinese heritage or South Asian Americans after 9/11);
- 2) Behavior/rhetoric/policies that create an uncomfortable environment that is neither welcoming or inclusive of Asian Americans (for example, in the face of housing segregation policies, many Chinese American communities formed Chinatowns in the late 1800s or being told to “go back/you’re not welcome here”);
- 3) Flattening our identities to stereotypes that rob us of our full humanity (such as “tiger moms,” “model minorities,” and “being naturally good at math and science);
- 4) Maintaining or creating policies based solely on race (incarceration of Japanese Americans, including citizens, during World War II or requiring that immigrant men from predominantly Muslim countries to register with the federal government after 9/11 and these men were primarily of South Asian descent);
- 5) Preference/discrimination in which lighter skin is privileged over darker skin among Asian Americans (colorism, use of toxic/harmful “beauty” products);
- 6) Public services and programs not taking into account the specific needs of Asian Americans (such as meaningful language access or failing to provide outreach and communication to Asian American communities); or
- 7) Not being treated with respect because speaking with an accent

We at NAKASEC Virginia have devoted our organizational resources to advocating for our Asian American communities around the issues above.

Reform will benefit Asian Americans.

Research strongly and clearly demonstrates the benefits of diversity in education. A more representative and diverse body of peers cultivates an increasingly positive and healthier learning environment. Immersing students in an environment with others from backgrounds and with experiences different from themselves has been shown to improve cognitive skills such as critical thinking and problem-solving.

NAKASEC Virginia's anecdotal understanding is that TJ can be made more accessible for Asian American communities, too. For instance, within the Asian American community, reform could lead to more access for low-income Asian Americans and Asian Americans from refugee backgrounds, such as Vietnamese, Bhutanese, and Cambodians. Such reforms could also help more people to understand that far from homogenous, Asian Americans are an internally diverse group, with subgroups such as Vietnamese, Pakistani, Bengali, and other ethnic groups at substantial risk of being underserved. Robust data disaggregation at TJ (and throughout Fairfax County Public Schools) will greatly aid our fuller understanding.

In addition, among Chinese, Indian, and Korean American communities, there are students and families who struggle with poverty, lack of citizenship, medical debt, and housing insecurity. Several of the Asian American students we spoke with described how because their parents could not afford private tutoring, they formed study pods with their friends in middle school. The Asian American students who attend TJ are disproportionately higher-income (see Table 1). For example, nearly 20% of Asian American students who attend Fairfax County public high schools are economically disadvantaged; that percentage is only 2.1% at TJ.

Conversations with Asian American students, including those who were rejected from TJ and those who were accepted and decided to go to their neighborhood high school (with that decision supported by their Asian American parents) uncovered an unhealthy message that admission to TJ represents the only viable path to success. For Asian American students who were not admitted, dealing with the rejection has long-lasting damaging impacts and these stressors on mental and emotional health are unnecessary. These same students also reported how their singular focus to prep for the TJ exam (not in private academies because their parents could not afford it but in self-organized study pods encouraged by their middle school teachers and counselors) meant that they did not participate in extracurricular activities. Their lives were shaped by one exam. We must expand this narrative and ensure that not only TJ, but all of our public schools, are adequately resourced.

Other reforms are needed

To be clear, not every Asian American student or parent wants or sees TJ in their future. In addition to admissions reform, we learned from interviewing Asian American students who dropped out of TJ after one year that there are myriad factors that play into a child's success before that child applies to high school and these factors must be considered. While the spotlight is on TJ, specifically its admissions process, stakeholders should also scrutinize the Advanced

Academic Programs (AAP) and the unwelcoming environment (often created by staff and teachers) reported by students of color and students from lower-income households at TJ. Lastly, NAKASEC Virginia supports efforts to diversify teacher recruitment, hiring, and retention in Northern Virginia public schools districts.

Conclusion

What is clear that an admissions process that overemphasizes a single test is flawed. It promotes the demonstrably false concept of a fair system, sets up unnecessary mental health anguish, limits young people's imagination of who they can be, and justifies socioeconomic/racial/gender inequity. It is hard not to feel like we are all being set up to fight each other, considering that TJ accounts for less than .5% of Northern Virginia's high school student population. Yes, the school features state-of-the art laboratories, including a technological computational center, along with opportunities for independent research and experimentation, and interaction with professionals from the scientific, technological, engineering communities. Perhaps there is a future where TJ opens its doors further to provide science and technology enrichment for all Northern Virginia high school students. Presently, the state of Virginia, Fairfax County Public Schools, and other stakeholders have an incredible opportunity to do right for all young people in Northern Virginia, by pursuing an admissions reform that seeks to address the long-standing exclusion of too many in our communities.

EXHIBIT 2

DECLARATION OF AKIL VOHRA

I, Akil Vohra, pursuant to the provisions of 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct:

1. I am over the age of eighteen years and make this declaration of my own personal knowledge.

2. I am the Executive Director of Asian American Youth Leadership Empowerment And Development (“AALEAD”). In that capacity, my role is to help set the vision of AALEAD and ensure the capacity and infrastructure necessary to realize AALEAD’s mission. My responsibilities include supervising AALEAD staff, who report to me during weekly meetings and provide monthly written reports of the program areas.

3. I submit this declaration in support of the brief of *amici curiae* and more generally in support of measures to reduce barriers to access to Thomas Jefferson High School for Science and Technology (“TJHSST”) and to promote equality of educational opportunities for all students.

4. Based on my personal experience with the Asian American community in Northern Virginia and my experiences as Executive Director of AALEAD; serving as the former Director of Strategic Initiatives at the White House Initiative on Asian Americans and Pacific Islanders (WHIAAPI), where I led the team that guides federal government policy on education, civil rights, bullying and harassment, data, workforce diversity, religion, language access, and My Brother’s Keeper; and my prior work with community based organizations and grassroots advocates, I believe that measures to advance opportunities for underserved students benefit all students, including underserved Asian American and Pacific Islander youth and all historically marginalized communities.

5. AALEAD's mission is to support low-income and underserved Asian American and Pacific Islander youth with educational empowerment, identity development, and leadership. Founded in 1998 with a vision to create and grow a community organization that belongs to the community, AALEAD initially served a large Vietnamese refugee and immigrant population in Washington, D.C. With changes in demographics over the years in the region, AALEAD expanded its reach and now serves a multi-ethnic Asian American and Pacific Islander community in Fairfax County, Virginia, Washington, D.C., and Montgomery County, Maryland.

6. AALEAD works to support underserved Asian American and Pacific Islander youth as well as their families and communities. The community that AALEAD serves is diverse, and includes Vietnamese, Chinese, Indian, Bangladeshi, Cambodian, Filipino, Korean, Sri Lankan, Thai, Tibetan, Afghan, Pakistani, Black, Latinx, and White families, and approximately 73% of our community members are low-income. In Fairfax County, nearly half of the youth AALEAD serves qualify for Free or Reduced Priced Meals, and a third are foreign-born.

7. AALEAD serves middle school and high school students through our afterschool, summer, and mentorship programs. AALEAD's programs provide academic and college preparation support through the Positive Youth Development approach, which engages youth in a supportive and nurturing environment. The programs also engage youth in learning about Asian American history and provides youth opportunities to explore their own identities, in addition to learning about the histories of other marginalized communities and allyship. Additionally, AALEAD's programs provide opportunities for leadership development and civic engagement, and the youth have led various efforts and campaigns, including submitting comments to the Virginia Department of Education advocating for the teaching of Asian

American history in Fairfax County Public Schools. AALEAD believes that all students, including Asian American students, benefit from learning along with students of diverse backgrounds and lived experiences and being in an educational environment that welcomes and nurtures all students.

8. AALEAD's services and advocacy also extend beyond the classroom. To better understand the needs of the communities that AALEAD serves, AALEAD regularly surveys youth in our programs about their concerns and issues affecting them. Through the surveys, AALEAD identified a critical need for mental health services, and started working with a clinical psychologist to support our youth and families, including webinars on mental health and best practices. AALEAD also provides language assistance, translated materials, and culturally appropriate communication to help families access resources and navigate the school system. Additionally, for over twenty years, AALEAD has built strong ties with our community and has served as a trusted voice and advocate for the Asian American and Pacific Islander community in front of local school boards and city councils.

9. During the on-going COVID-19 pandemic, AALEAD youth have experienced increased stress and anxiety about their own health and safety, as well as for their families and community members. Many families that AALEAD serves have experienced disruptions in income related to COVID-19. The rise in anti-Asian hate incidents and harassment have further caused frustration, fear, and distress in the community. AALEAD youth have experienced disruptions in learning and extracurricular activities, increased need for academic support, and feelings of being disconnected from teachers and peer networks that are important to their socioemotional development.

10. The middle school and high school youth that AALEAD serves reflect the diversity of the Asian American community in Fairfax County. Many underserved families that AALEAD supports are recent immigrants to the United States and are often unfamiliar with the complex school systems and the myriad requirements necessary to access various educational opportunities. Based on my knowledge and experience as Executive Director of AALEAD, I know that the families AALEAD serves value having access to the same opportunities for their youth to learn and succeed as everyone. Outreach and clear communications of the ways to access TJHSST is important to meaningfully expand access to TJHSST for the underserved families that AALEAD supports.

11. The changes to the admissions process at TJHSST have resulted in increasing the number of economically disadvantaged students (from 0.62% to 25.09%) and English language learners (0.62% to 7.09%)¹; the very population served by AALEAD. Based on my knowledge and experience as Executive Director of AALEAD, I know that this increase in diversity of the student body at TJHSST is beneficial to the communities that AALEAD serves as it will increase opportunities for underserved youth and to create a more diverse learning environment that can lessen the isolation that many low-income and ELL students feel, including Asian Americans and Pacific Islanders.


12. Based on my experience and knowledge, I believe that labeling the changes to the TJHSST admissions process to reduce barriers to opportunities as “anti-Asian” is not only misleading, but obscures the diversity of the lived experiences, backgrounds, and histories of the

¹ See *TJHSST Offers Admission to 500 Students; Broadens Access to Students Who Have an Aptitude for STEM*, (June 23, 2021), available at <https://www.fcps.edu/news/tjhsst-offers-admission-550-students-broadens-access-students-who-have-aptitude-stem>; Def.’s Br. in Opp. to Pl.’s Renewed Mot. for Prelim. Inj., ECF 64 at 15.

Asian American and Pacific Islander community in Northern Virginia, and feed into the harmful perception of the community as a monolith. Measures to reduce barriers to accessing educational opportunities benefit the underserved Asian American and Pacific Islanders communities AALEAD works with and help expand opportunities for students whose diverse experiences are too often overlooked.

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

Executed in _Washington DC_ on ___September 13, 2021_____.



Akil Vohra