No. 22-2649

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK,
Plaintiff – Appellant,
CHRISTA MCAULIFFE INTERMEDIATE SCHOOL PTO, INC., ASIAN AMERICAN COALITION FOR EDUCATION, PHILLIP YAN HING WONG, YI FANG CHEN, CHI WANG,
Plaintiffs,
v.
ERIC ADAMS, in his official capacity as Mayor of New York, RICHARD A. CARRANZA, in his official capacity as Chancellor of the New York City Department of Education,
Defendants – Appellees,
TEENS TAKE CHARGE, DESIS RISING UP AND MOVING, HISPANIC FEDERATION, ELIZABETH PIERRET, on behalf of her minor son O.R., ODUNLAMI SHOWA, on behalf of his minor child A.S., TIFFANY BOND, on behalf of her minor child K.B, LAUREN MAHONEY, on behalf of her minor children N.D.F and N.E.F, ROSA VELASQUEZ, on behalf of her minor child C.M., COALITION FOR ASIAN AMERICAN CHILDREN AND FAMILIES,
lntervenors – Appellees.

On Appeal from the United States District Court
for the Southern District of New York
Honorable Edgardo Ramos, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Chinese American Citizens Alliance of Greater New York, a private nongovernmental party, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 2201. Federal jurisdiction exists because Plaintiffs allege that changes to the admissions process at New York City's specialized high schools violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating against Asian-American students.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The district court issued a judgment on September 8, 2022, granting summary judgment to Defendants-Appellees and concluding that their revisions to the specialized high school admissions process did not have a discriminatory effect on Asian Americans. App. 496–519 (Ramos, J.).[1] Appellant timely appealed from the grant of summary judgment. *Id.* at 520–21.

[1] The decision has not been reported but is available at *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, No. 18 Civ. 11657, 2022 WL 4095906 (S.D.N.Y. Sep. 7, 2022).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Is an aggregate racially disparate impact a prerequisite to an equal protection claim under *Village of Arlington Heights v. Metropolitan Housing Development Ctr.*, 429 U.S. 252 (1977), such that direct evidence of a discriminatory purpose may not be considered unless there is first a showing of aggregate disparate impact?

B. Did Defendants-Appellees' revised admissions policy lack a racially discriminatory effect as a matter of law, simply because Asian Americans as an aggregate racial group did not have reduced admissions to all specialized schools, even where the policy denied certain Asian-American students admission to their preferred schools?

INTRODUCTION

New York City's specialized high schools are the crown jewels of the City's public education system and among the best in the nation. Graduates of the specialized schools include Nobel laureates, Pulitzer Prize winners, politicians, and national leaders in science, technology, and nearly every major industry. It is no wonder that nearly 30,000 eighth graders take the Specialized High School Admissions Test (SHSAT) each year seeking admission into these schools. Only about 5,000 are admitted.

Despite the specialized high schools' unparalleled success, in 2018 then-Mayor Bill de Blasio and then-Education Chancellor Richard Carranza announced a plan they said would help cure what they saw as a serious problem at the specialized high schools. The schools were not performing poorly. Nor were there concerns about their curriculum, staffing, or infrastructure. Instead, the "problem" was that these schools' student bodies did not match the racial composition of students in the City's public schools. More than half of the specialized schools' students were Asian American, compared to about sixteen percent in the City's public schools, while black and Hispanic students were less represented

at the specialized schools than in the City's public schools. De Blasio and Carranza sought to correct this racial imbalance.

Because they were bound by state law requiring that admission to the specialized schools be based on SHSAT scores, de Blasio and Carranza directed the City Department of Education (DOE) to adjust the schools' racial makeup by modifying the "Discovery" program. Discovery was originally designed as a way for a few low-income students who just missed the SHSAT cutoff score to nonetheless gain admission after completing a summer preparatory program. Before DOE modified Discovery, it was open to all economically disadvantaged applicants in the City, but comprised only a small portion—less than five percent—of specialized high school seats.

The Mayor and Chancellor made two significant changes. First, they massively expanded the program, quadrupling the students admitted through Discovery to a full 20 percent of seats at *every* specialized high school. Second, they restricted eligibility for Discovery to disadvantaged students attending certain middle schools: those that were rated 0.6 or higher on the DOE-created "Economic Need Index," or "ENI." The ENI floor of 0.6 excluded students at many high-performing,

heavily Asian-American middle schools from Discovery eligibility, and DOE predicted that locking out these schools would reduce the overall offers given to Asian-American students by 2.1 percentage points.

Appellant is an Asian-American civil rights group, the Chinese American Citizens Alliance of Greater New York (CACAGNY). CACAGNY joined with other Plaintiffs to challenge the plan to racially balance the specialized schools as a violation of the equal protection rights of Asian-American students. The lawsuit alleged that de Blasio and Carranza instituted the Discovery changes to limit the number of Asian Americans at the specialized schools. Although facially race-neutral, the Discovery changes were an unconstitutional attempt to pick winners and losers based on race. But the district court refused to allow Plaintiffs to conduct discovery into Defendants' discriminatory purpose. It limited discovery to the issue of whether Defendants' revisions caused an aggregate drop in Asian-American admissions to the specialized high schools as a whole.

The district court also denied a preliminary injunction, allowing Defendants to implement their Discovery revisions. Due to contemporaneous and unrelated changes in the way DOE calculated

ENI, affecting which middle schools' students were eligible for Discovery, Defendants' attempt to racially balance the specialized schools was only partially successful. They were able to marginally reduce the number of Asian Americans who were invited to attend the two most selective and prestigious schools—Stuyvesant and Bronx Science—but the predicted aggregate 2.1 percentage point drop did not occur. Indeed, Asian-American admissions to the specialized schools as a whole fared slightly better under the new policy. Defendants sought summary judgment and the district court granted it, holding that as a matter of law, Plaintiffs could not establish an equal protection violation without an aggregate disparate racial impact across the specialized schools as a whole.

In that ruling, the district court committed two legal errors that require reversal. First, aggregate disparate racial effect is not the be-all and end-all of an intentional discrimination claim, and it need not be shown in every case. If Defendants intended to discriminate against Asian-American students but merely failed to correctly model and anticipate the racial effect of their plan, the lack of an aggregate effect does not excuse the unequal treatment that the plan imposes on Asian-American students at middle schools excluded from Discovery. Moreover,

the Supreme Court has explained that racial impact is only one factor in determining whether a policy was enacted with discriminatory intent. The district court's unwavering focus on aggregate data ignores the harm to individual students at heavily Asian-American schools that were excluded—and are still excluded—from 20 percent of the specialized high school seats. And it fails to account for the fact that Discovery-eligible eighth-grade schools remain only about 8% Asian American—half the percentage of Asian-American students in the City as a whole.

Second, the district court improperly disregarded direct evidence of harm to individual Asian-American students. Plaintiffs' expert analysis showed that under the revised Discovery plan, some Asian-American applicants who would have received invitations to Stuyvesant and Bronx Science (their preferred schools) before the admissions changes were instead denied admission to those schools. Equal protection is an individual right, and the harm these individual students suffered due to the Discovery program changes means that Plaintiffs should at least be allowed discovery into Defendants' discriminatory purpose.

STATEMENT OF FACTS

I. New York City's Specialized High Schools

The original three specialized high schools were founded in the early 1900s and are colloquially known as the "Big Three": Stuyvesant High School, Bronx High School of Science, and Brooklyn Technical High School.[2] Five additional, smaller specialized high schools were established between 2002 and 2006.[3] Collectively, these schools have long been among the best public high schools in the United States. Many of their graduates attend top universities, and their alumni are leaders in nearly every major industry. The Big Three have even produced an astonishing 14 Nobel laureates.[4]

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[2] *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 264 (S.D.N.Y. 2019) (previous decision in this case).

[3] These include Brooklyn Latin School; High School for Mathematics, Science and Engineering at City College of New York; High School of American Studies at Lehman College; Staten Island Technical High School; and Queens High School for the Sciences at York College. *Id.*

LaGuardia High School of Music & Art and Performing Arts is also a specialized school under state law, but it admits students using competitive auditions instead of an exam and is not at issue in this case. *Id.* at 264 n.3.

[4] *Id.* at 264 (noting that Stuyvesant and Bronx Science have produced a combined 12 Nobel prize winners); Brooklyn Technical High School,

Yet rather than being filled with the children of New York City's elite, the specialized high schools educate children of low-income and working-class parents. Over sixty percent of the 6,000 students at Brooklyn Tech (the largest specialized high school) in 2017–18 came from families that the City classified as being in poverty.[5] Nearly half of the student bodies at Stuyvesant and Bronx Science were similarly disadvantaged.[6] And according to the New York City Department of Education (DOE), most of the Asian-American, African-American, and Hispanic students invited to attend the specialized high schools in 2018 were from low-income families. App. 35 ¶ 54 (Defendants' Answer).

Admission to the specialized high schools has traditionally been through a competitive objective examination. In 1971, the New York legislature enacted the Hecht-Calandra Act to protect that tradition, requiring that admission to the specialized high schools "shall be solely and exclusively by taking a competitive, objective and scholastic

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School History, *available at* https://www.bths.edu/school_history.jsp (last visited Jan. 11, 2022) (reporting another two).

[5] *See* Decl. of Christopher Kieser at 2 & Ex. 4, Christa McAuliffe PTO v. de Blasio (No. 1:18-cv-11657-ER), ECF No. 18.

[6] *Id.*

achievement examination." N.Y. Educ. Law § 2590-g(12)(b) (1997) (photocopy available at App. 157).[7] The specialized schools currently use the Specialized High School Admissions Test (SHSAT), administered each year in the late fall, to conduct admissions. *See* App. 498 (decision below).

Once SHSAT scores are calculated, admission is determined through an objective, ranked-choice formula. *See id.* at 498–99. Applicants rank the specialized schools they want to attend, in order of preference. The student with the highest SHSAT score is awarded a seat at her first-choice school. The student with the next highest score is then awarded a seat in her first-choice school, and so on. When the process reaches a student whose first-choice school has been filled, she is offered a seat in her second-choice school. If the second-choice school is filled, she is placed in her third-choice school, and so on, until all the seats at all the schools are filled.

[7] In 1998, the legislature replaced the text of Hecht-Calandra with a provision stating that "admissions to the special schools shall be conducted in accordance with the law [previously] in effect." N.Y. Educ. Law § 2590-h(1)(b) (1998). Thus, the 1997 version of the statute remains operative.

Under this objective, predictable process, each specialized high school has an SHSAT cutoff score for admission, with Stuyvesant and Bronx Science traditionally being among the most selective. *See id.*; *see also id.* at 425 (listing SHSAT cutoff scores between 2016 and 2019). In effect, each applicant receives an offer to attend the highest-choice school for which he or she scores above the cutoff. DOE also calculates an overall SHSAT cutoff score; students who score below that cutoff do not receive an offer to attend any specialized high school, unless they qualify for the "Discovery" program, described below. *See id.* at 499.

II. The Discovery Program

The Hecht-Calandra Act provides an opportunity for certain low-income students to gain admission to the specialized schools despite scoring below the SHSAT cutoff. The statute authorizes each specialized school to maintain a "discovery program" that affords "disadvantaged students of demonstrated high potential an opportunity to try the special high school program," although such a program must be implemented "without in any manner interfering with the academic level of those

schools." N.Y. Educ. Law § 2590-g(12)(d) (1997).[8] The Discovery program is open to students who: (1) earn a SHSAT score just below the overall cutoff; (2) are certified by their local schools as disadvantaged; and (3) are recommended as having "high potential for the special high school program." *Id.* To gain admission, students who are invited to participate in Discovery must submit additional paperwork and pass a summer preparatory program administered by their preferred specialized school. *Id.*

State law does not mandate the size of the Discovery program, meaning that decisions about whether to implement it at all and the number of students to accept have traditionally been left to the schools themselves. In the years before Defendants changed the Discovery program, it had fallen out of favor: from 2006 to 2015, only about 1 to 3% of seats at the specialized schools were filled through the Discovery program, and by 2015, Stuyvesant and Bronx Science were no longer

[8] Like the examination provision, *see supra* n.7, the Discovery program text has been replaced but remains in effect under a 1998 enactment providing that the "special schools shall be permitted to maintain a discovery program in accordance with the law [previously] in effect." N.Y. Educ. Law § 2590-h(1)(b) (1998).

accepting Discovery students.[9] Since Discovery students are not selected until after all the offers are given based solely on SHSAT score, they have scores well below the cutoff for the most competitive specialized schools, raising concerns about their preparation to succeed in those environments.[10]

III. Racial Demographics of the Specialized High Schools and the Discovery Program

Recently, the specialized schools have tended to have large Asian-American enrollment, well above the proportion of Asian-American students in New York City. For example, in 2017–18, the City public school system was approximately 40 percent Hispanic, 26 percent black, 16 percent Asian-American, and 15 percent white. App. 497. Yet the Big Three were each majority-Asian-American: Stuyvesant was 73.5 percent Asian American, Bronx Science was 65.6 percent Asian American, and

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[9] App. 436–37 (Pls.' Resps. to Defs.' Statement of Facts) (noting that from 2006–2015, Discovery was "about 1–3%" of admissions); Winnie Hu, *Elite New York High Schools to Offer 1 in 5 Slots to Those Below Cutoff*, N.Y. Times (Aug. 13, 2018), *available at* https://nyti.ms/2nwRUku (noting that by 2015, Stuyvesant and Bronx Science weren't accepting Discovery students, although they again accepted a few in 2017 and 2018).

[10] *See* Hu, *Elite New York High Schools*, *supra* (in 2018, Discovery students' SHSAT scores "fell at least 78 points below the [Stuyvesant] cutoff").

Brooklyn Tech was 61.3 percent Asian American. *Id.* at 498. The newer five specialized high schools also had a higher proportion of Asian-American students than New York City public schools generally.[11]

Similarly, participants in the Discovery program in recent years have been predominantly Asian American. Of the approximately 270 students who participated in Discovery in 2018, 64 percent were Asian American; in 2017, that number was 67 percent.[12] In other words, the racial composition of low-income students who score just below the SHSAT admissions cutoff has been quite similar to that of students who score above the cutoff. That is due in part to high poverty rates among students—including Asian-American students—who gain admission to the specialized high schools. According to DOE, 61 percent of the Asian-American students who received an offer to attend a specialized high school in 2018 were in poverty. *Id.* at 35 ¶ 54. The same percentage of

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[11] The percentages of Asian-American students were as follows: Brooklyn Latin School, 51.5%; High School for Mathematics, Science and Engineering, 36.2%; High School of American Studies, 22%; Staten Island Tech, 48.4%; and Queens High School for the Sciences, 81%. App. 498.

[12] *See* Alex Zimmerman, *New Data Show How Few Black and Hispanic Students Benefit from New York City's Specialized High School Diversity Program*, Chalkbeat (Aug. 14, 2018), *available at* https://bit.ly/3VWZ2o1.

black students who received offers were disadvantaged, while 53 percent of Hispanic students were classified that way. *Id.*

IV. Defendants' Changes to the Discovery Program

As early as 2016, some commentators observed that Discovery, which they incorrectly believed to be a program to promote racial diversity, resulted in more Asian-American students gaining admission to the specialized schools. One lamented that Discovery "is helping more white and Asian students get into those schools" and that this "illustrat[es] the challenge of boosting black and Hispanic enrollment."[13] Of course, Discovery is not a program for promoting racial diversity, but for providing opportunity to low-income students who just miss the SHSAT cutoff. And because there are plenty of disadvantaged Asian-American students in New York City,[14] it is no surprise that many of them would be eligible for Discovery.

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[13] Annie Ma, *Getting Black and Hispanic Students Into Specialized High Schools Remains a Challenge, Even for Programs Designed to Help*, Chalkbeat (June 9, 2016), *available at* https://bit.ly/3ikTKoS.

[14] *See* Asian American Federation, *Hidden in Plain Sight: Asian Poverty in New York City* 13 (2018), *available at* http://www.aafederation.org/doc/AAF_poverty_2018.pdf (comparing poverty rates across the five boroughs).

In June 2018, Mayor de Blasio and Chancellor Carranza announced plans for a significant overhaul of the Discovery program. The day before, de Blasio published an op-ed at *Chalkbeat* in support of his overhaul.[15] The Mayor called the racial makeup of the specialized high schools a "monumental injustice" and asked "Can anyone defend this? Can anyone look the parent of a Latino or black child in the eye and tell them their precious daughter or son has an equal chance to get into one of their city's best high schools?"[16] Earlier, Chancellor Carranza commented in response to the racial makeup of the 2018 admission offers that he does not "buy into the narrative that any one ethnic group owns admission to these schools."[17] This comment was clearly directed at Asian-American students, given their majority representation at the schools. Comments such as these set the stage for admissions changes designed to limit the number of Asian-American students at the specialized schools.

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[15] Bill de Blasio, *Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, Chalkbeat (June 2, 2018), *available at* https://bit.ly/3Cugd9G (copy also available at App. 236–38).

[16] *Id.*

[17] Quoted in Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. Times (June 5, 2018), *available at* https://nyti.ms/2JjOAma.

De Blasio and Carranza envisioned a complete overhaul of the Discovery program that would both expand the program and narrow eligibility.[18] By 2020, their plan would quadruple the size of Discovery, mandating that every specialized school set aside 20 percent of its seats for Discovery students. App. 499. But that increase in seats would be accompanied by a restriction on eligibility. Many previously eligible low-income students would no longer qualify. Instead, economically disadvantaged students could only qualify for Discovery if they attend a middle school which scored below 0.6 (or 60%) on DOE's recently devised "Economic Need Index" (ENI) metric. *See id.* at 499–500.

The ENI metric was created by DOE in 2015 to measure the proportion of students at each school who suffer from economic hardship. *Id.* at 500; *see also id.* at 432 ¶¶ 19–20.[19] And the 0.6 ENI cutoff appears

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[18] Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools* (Jun. 3, 2018), *available at* https://on.nyc.gov/3Qnebhs (copy also available at App. 160–63).

[19] A school's ENI is determined by averaging the Economic Need Value ("ENV") of its students. App. 500. A student's ENV is 1.0 if: (1) her household is eligible for public assistance; (2) she lived in temporary housing in the past four years; or (3) she has a home language other than English and first enrolled in a DOE school in the past four years.

to have been selected not because it is a recognized benchmark, but because of how DOE anticipated it would affect the racial composition of the Discovery program and thus the specialized schools overall.[20] Internal DOE emails and modeling predicted that with the 0.6 ENI restriction in place, students invited to participate in the Discovery program would be just 38% Asian American—well below prior years. *Id.* at 400. And other DOE modeling concluded that if the Discovery changes had been in place during 2017, there would have been an overall 2.1 percentage point decline in offers to Asian-Americans. *Id.* at 397 (showing a drop from 53.0% to 50.9%). By making it disproportionately more difficult for Asian-American students to compete for one-fifth of seats at the specialized schools, the Mayor and Chancellor thought they could begin to fix what they saw as a "monumental injustice" in the racial makeup of the specialized schools.

Otherwise, her ENV is the proportion of families in her census tract whose income is below the poverty level. *Id.* at 500–01.

[20] Available evidence indicates that part of the reason for the 0.6 ENI floor was to ensure that the Discovery program would not have the same racial composition as students admitted based solely on SHSAT score. App. 372–76, 398 (deposition testimony of Nadiya Chadha, Director of Research and Policy in DOE's Office of Student Enrollment).

In addition to the contemporaneous public statements quoted above, the Mayor and Chancellor's press release touting the Discovery revisions demonstrates that their primary goal was racial balancing. The release laments that "the student population at the eight [specialized high schools] is not representative of the New York City high school population."[21] It anticipates that with the Discovery changes in place, "an estimated 16 percent of offers would go to black and Latino students, compared to 9 percent" without the changes.[22] Left unsaid, but heavily implied, was the belief that it is the responsibility of City policymakers to "fix" the racial composition of the specialized schools by cutting Asian-American enrollment.[23]

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[21] Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan, supra*, https://on.nyc.gov/3Qnebhs (also at App. 160).

[22] *Id.*

[23] According to the press release, de Blasio and Carranza's ultimate goal was more ambitious, but just as focused on racial balancing: convince state lawmakers to scrap the SHSAT and guarantee admission to the top students at each middle school. *Id.* They predicted that this would drastically reduce Asian-American enrollment and make the specialized schools' racial demographics better "reflect" those of the City. *Id.*

PROCEDURAL HISTORY

In December 2018, a group of Plaintiffs, including Appellant Chinese American Citizens Alliance of Greater New York (CACAGNY),[24] sued Mayor de Blasio and Chancellor Carranza in their official capacities[25] under 42 U.S.C. § 1983. App. 5–22 (Complaint). The lawsuit alleged that Defendants' proposed revision of the Discovery program violated the Equal Protection Clause of the Fourteenth Amendment because it was intended to reduce Asian-American enrollment at the specialized high schools. *Id.* at 20–22. Plaintiffs requested that Defendants be enjoined from implementing the proposed Discovery changes. *Id.* at 22.

I. Plaintiffs' Preliminary Injunction Motion

Plaintiffs requested a preliminary injunction to halt the Discovery program revisions during the pendency of the litigation. The district court denied the motion. *Christa McAuliffe Intermediate Sch. PTO, Inc.*

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[24] The other Plaintiffs included Christa McAuliffe Intermediate School Parent Teacher Organization, the Asian American Coalition for Education, and three parents of individual Asian-American public-school students. App. 7–9.

[25] Eric Adams has since replaced de Blasio as Mayor of New York, and David C. Banks has replaced Carranza as Chancellor.

v. de Blasio, 364 F. Supp. 3d 253 (S.D.N.Y. 2019). Although the court found that CACAGNY and several other Plaintiffs had standing and had established a risk of irreparable harm, it concluded that they were unlikely to succeed on the merits. *Id.* at 278.

A panel of this Court affirmed, but for a different reason: because it concluded that Plaintiffs had not established standing to seek prospective relief. *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 788 F. App'x 85 (2d Cir. 2019). The short four-paragraph opinion did not address the preliminary injunction factors, concluding instead that CACAGNY and the other plaintiff organizations had not demonstrated sufficient injury to seek injunctive relief since their asserted injury "is entirely retrospective." *Id.* at 85.[26]

On remand, CACAGNY and the other organizational Plaintiffs provided supplemental declarations discussing the prospective harm they face due to Defendants' changes to the Discovery program. After

[26] The panel also concluded that the plaintiff organizations lacked standing on behalf of their members under Circuit precedent. 788 F. App'x at 85. It did not address the district court's conclusion that one of the individual parent plaintiffs had standing. *See Christa McAuliffe PTO*, 364 F. Supp. 3d at 272–73.

reviewing the supplemental declarations, Defendants notified the district court that they "have decided not to challenge plaintiffs' standing." Letter from T. Roberts, Christa McAuliffe PTO v. de Blasio (No. 1:18-cv-11657-ER), ECF No. 133. However, because Plaintiffs' preliminary injunction request was denied, Defendants were allowed to implement their planned changes to the Discovery program.

II. A Citywide ENI Increase Alters the Expected Racial Outcome

Over Plaintiffs' objection, the district court ordered that discovery in this case should be conducted in two phases, with Phase I limited to "the impacts caused by or arising out of the changes made to" the Discovery program. App. 39. Only if Plaintiffs could "establish a disparate impact caused by the changes" would they be allowed to proceed to Phase II, under which they could obtain discovery regarding "Defendants' motivations for adopting the changes." *Id.*[27]

Among other things, Phase I discovery revealed that in 2018, there was an unexpected and dramatic Citywide increase in ENI, such that the

[27] The district court also allowed a group of intervenors to participate in the litigation as defendants. Op. & Order, Christa McAuliffe PTO v. de Blasio (No. 1:18-cv-11657-ER), ECF No. 124.

average ENI for City middle schools as a whole increased by 10.5 percentage points—far outside the range of normal ENI fluctuation. *Id.* at 333–34 (expert report of Dr. Jacob Vigdor). Thus, a middle school that had previously had a consistent ENI around 0.5 now likely had an ENI of 0.6 or above.

Regardless of the reason for the increase,[28] the dramatic shift in ENI meant that students at almost one hundred middle schools who would have been excluded from the revised Discovery program were now no longer excluded because their ENIs had risen above 0.6. *See id.* at 336 (the number of middle schools with ENI above 0.6 jumped from 417 to 515). Largely due to this shift, the expected racial impact from Defendants' revisions to the Discovery program failed to occur. Discovery program participants and overall admissions to the specialized schools remained heavily Asian American. In fact, the percentage of offers to

[28] Defendants have claimed that the increase was unrelated to the specialized school admissions process or this lawsuit and was instead due to DOE's implementation of a "Direct Certification Matching Process" required by the National School Lunch Act. *See* App. 445–47. According to Defendants, that matching process resulted in many more students being identified as economically disadvantaged. *Id.*

Asian-American students was slightly higher (53%) than it would have been absent the Discovery changes (51%).[29] *Id.* at 339 (Table 8).

This came as a surprise to Defendants. DOE apparently did not recognize or even consider how the large ENI jump would affect the racial composition of the Discovery program.[30] That misunderstanding meant that their stated expectation that the Discovery revisions would cause a decrease in overall Asian-American representation in the specialized schools did not happen. However, as described below, the Discovery revisions did result in fewer Asian Americans receiving invitations to the attend the two most selective specialized schools. And, of course, many Asian-American students were still ineligible for Discovery because the ENI at their schools did not rise above the 0.6 threshold.

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[29] Without the dramatic increase in ENI, the Discovery program changes would have reduced offers to Asian-American students by nearly four percentage points, from 51.0% to 47.4%. *See* App. 339 (Table 8).

[30] Although DOE conducted extensive modeling prior to implementing the Discovery changes to determine the racial effect of a 0.6 ENI cutoff, the modeling only used 2017 data, prior to the general increase in ENI. DOE's Director of Research and Policy testified that she was never asked to conduct any modeling using the increased ENI figures. App. 386.

III. Plaintiffs' Expert Identifies Asian-American Students Denied Admission to Stuyvesant and Bronx Science

Dr. Jacob Vigdor, an economist and Professor of Public Policy, produced an expert report for Plaintiffs. App. 322–54. As part of that report, Dr. Vigdor analyzed admissions data at the specialized high schools, including anonymized student data that redacted personal identifying information but included information such as race, middle school, SHSAT score, and ranking of preferred schools.

With this data, Dr. Vigdor was able to simulate the specialized high school admissions process under various scenarios, including a simulation of admissions if there had been no changes to the Discovery program. *Id.* at 338–40. His analysis revealed that even though (due to the Citywide increase in ENI) the percentage of Asian-American admissions to the specialized schools as a whole rose slightly, Defendants' changes caused *fewer* Asian Americans to receive invitations to the two most selective specialized schools—Stuyvesant and Bronx Science. *Id.* at 340–42. Specifically, 66.9% of Stuyvesant invitations went to Asian-American students under the revised admissions criteria, but 67.6% of invitations would have gone to Asian-American students under the prior

criteria. *Id.* at 341 (Table 9). Likewise, 55.8% of Bronx Science invitations went to Asian-American students under the revised admissions criteria, but 57.2% of invitations would have gone to Asian-American students under the prior criteria. *Id.* (Table 10).[31]

Dr. Vigdor's analysis was not a projection or estimate. Because of the specialized schools' formulaic, ranked-choice admissions process, he was able to "pinpoint specific students" who would have received invitations to Stuyvesant and Bronx Science under the prior criteria but who instead were denied a seat under the revised policy. *See id.* at 358 (supplemental Vigdor report). These students were disproportionately Asian American. In sum, Dr. Vigdor's analysis showed that "the Discovery expansion and restriction to high-ENI schools altered the racial composition of the cohort offered a chance to enroll" at Stuyvesant

[31] Dr. Vigdor's simulations further showed that if had it not been for the Citywide increase in ENI, the difference would have been even starker: a 7.4 percentage point drop at Stuyvesant and an 8.5 percentage point drop at Bronx Science. App. 340, 342.

and Bronx Science—to the detriment of individual Asian-American applicants. *Id.* at 340.[32]

IV. The District Court Grants Summary Judgment

Because there was not an aggregate drop in Asian-American admissions to the specialized schools, Defendants moved for summary judgment. *Id.* at 42. The district court granted the motion, holding that an aggregate disparate racial impact is a necessary element of an equal protection claim, such that Plaintiffs could not prevail unless they proved that Defendants' actions caused the percentage of Asian Americans at the specialized schools as a whole to drop. *Id.* at 496–518. The court also disregarded Dr. Vigdor's evidence that certain Asian-American students were denied admissions to Stuyvesant and Bronx Science because "[t]here is no showing that these minor differences [in admissions percentages] are significant" and because "this Court does not accept that

[32] Defendants' rebuttal expert claimed Dr. Vigdor should have used a different field in the data set for his analysis (the "offer" field instead of the "invitation" field). App. 212–18 (supplemental report of Michael Scuello). Dr. Vigdor responded with a supplemental report disputing that claim in part because whether someone receives an "offer" is dependent not only on applicant eligibility, but on "whether students submit the paperwork necessary to convert their 'invitation' into an 'offer.'" *Id.* at 356–57.

trends in two of the eight Schools can sustain Plaintiffs' disparate impact claim." *Id.* at 517.

CACAGNY timely filed a notice of appeal. *Id.* at 520. It now asks this Court to reverse the grant of summary judgment and to remand with instructions to allow discovery into Defendants' discriminatory intent in revising the Discovery program.

STANDARD OF REVIEW

Summary judgment "is warranted only upon a showing 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth.*, 11 F.4th 55, 61 (2d Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). In conducting that evaluation, a court "must 'resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.'" *Id.* (quoting *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam)). Additionally, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This Court reviews *de novo* a grant of summary judgment. *Bey v. City of New York*, 999 F.3d 157, 164 (2d Cir. 2021).

SUMMARY OF ARGUMENT

The Equal Protection Clause protects not only against express governmental discrimination, but against facially race-neutral policies that "are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). In *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* the Supreme Court explained that determining whether a facially race-neutral policy is motivated by an improper racial purpose requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. 252, 266 (1977). That can include looking at whether there has been an aggregate racial disparate impact, but that is only one factor to consider, depending on the facts and circumstances. If the available evidence shows a racial purpose, then the policy must be struck down unless it can pass strict scrutiny.

In granting Defendants' motion for summary judgment, the district court made two legal errors, each of which independently requires reversal. ***First***, it erroneously concluded that Plaintiffs' equal protection claim fails as a matter of law because aggregate disparate impact is a necessary element of an intentional discrimination claim. In this case, it

concluded that such an impact could only be shown by a drop in Asian-American representation at the specialized high schools as a whole. Because the evidence did not show such a drop, the court concluded that there could be no equal protection violation. But that misconstrues the *Arlington Heights* inquiry, which does not require proof of an aggregate disparate impact in every case. Instead, that is only one factor that may (or may not) be relevant to the ultimate question: whether the Defendants acted with impermissible discriminatory purpose.

The available evidence shows that Defendants' Discovery revisions, especially the 0.6 ENI restriction, disproportionately excluded Asian-American students from the Discovery program. Due to the unforeseen Citywide jump in ENI, Defendants' expectation that those revisions would reduce Asian-American admissions to the specialized schools was not met. But since aggregate disparate impact is not an essential element of an intentional discrimination claim, the district court should not have granted summary judgment without allowing Plaintiffs to obtain discovery regarding whether Defendants acted with discriminatory intent.

Second, the district court wrongly disregarded evidence that even without an aggregate disparate impact, Defendants' policy changes denied certain Asian-American students their preferred placement in the most selective and prestigious specialized schools: Stuyvesant and Bronx Science. Because only a relatively small number of students suffered this harm, the district court found that it was a "minor difference" that was not "significant." But the Equal Protection Clause protects individual rights, and denying individual Asian-American students admission to their preferred schools because of their race cannot be so easily disregarded. This evidence at least creates a dispute of material fact precluding summary judgment.

The grant of summary judgment should be reversed, and Plaintiffs should be allowed to conduct discovery on the issue of Defendants' discriminatory purpose.

ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The "central purpose" of this clause "is the prevention of official conduct

discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976).

The Clause obviously prohibits express discrimination, such as racial segregation of schools. *See Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). But government policies are also "subject to strict scrutiny … not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). If a plaintiff can show a racial purpose behind the policy, the burden shifts to the government to satisfy strict scrutiny by proving that its actions are narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204–05 (2d Cir. 2006) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race ….") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

I. Plaintiffs' Claim of Intentional Discrimination Does Not Require Proof of an Aggregate Disparate Impact Across the Specialized Schools

The foundation of an intentional discrimination claim under the Equal Protection Clause is "racially discriminatory intent or purpose." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Thus, a plaintiff claiming that a government policy intentionally discriminates on the basis of race must establish that "discriminatory purpose has been a motivating factor" in setting the policy. *Id.* at 265–66; *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (asking whether a challenged policy was enacted "at least in part because of, not merely in spite of, [the policy's] adverse effects upon an identifiable group") (internal quotation marks omitted).[33]

Here, Plaintiffs alleged exactly that. Their claim is that Defendants' revisions to the Discovery program—although facially race-neutral—were "enacted for a racially discriminatory purpose" and were "intended to racially balance the [specialized high] schools," to the detriment of

[33] The plaintiff need not show that the policy "rested solely on racially discriminatory purposes" or that a racially discriminatory purpose "was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265.

Asian-American students. App. 20–21. Plaintiffs further alleged that Defendants could not meet their burden of satisfying strict scrutiny by proving that their actions were narrowly tailored to satisfy a compelling government interest. *Id.* at 21. Unfortunately, the district court misconstrued Plaintiffs' burden and did not even allow discovery into Defendants' intent.

A. An *Arlington Heights* analysis does not invariably require proof of aggregate disparate impact

In *Village of Arlington Heights* and its predecessor, *Washington v. Davis*, the Supreme Court explained how courts are to determine whether a facially race-neutral policy is motivated by a racial purpose. Those cases establish that aggregate disparate impact is only one factor to consider in determining whether there has been an equal protection violation—it is not the be-all and end-all of the analysis, or an essential component in every case.

Davis addressed whether a facially neutral policy could violate the Equal Protection Clause based solely on its disparate impact on members of a racial group. The Court concluded that the answer is generally no. Although "[d]isproportionate impact is not irrelevant," neither is it "the

sole touchstone" of a claim of intentional racial discrimination. 426 U.S. 229, 242.[34] Instead, the question is whether there has been an "invidious discriminatory purpose," which requires looking at "the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id*. In specifying that disparate impact is not "the sole touchstone" of a discrimination claim, but only one "fact" to be considered—and then only "if it is true"—*Davis* made plain that is it not an essential component of an equal protection claim.

The following year, the Court decided *Arlington Heights*, which elaborated on *Davis*'s "totality of the relevant facts" inquiry. Disparate impact, the Court said, "may provide an important starting point" in that inquiry. 429 U.S. at 266. But except in extreme cases such as *Gomillion v. Lightfoot*, 364 U.S. 339 (1896) (redistricting measure that excluded almost all black voters but no white voters) or *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (business permits denied only to laundries with Chinese

[34] The Court recognized that in extreme cases, such as the exclusion of members of a racial group from juries, "discriminatory impact … may for all practical purposes demonstrate unconstitutionality because … the discrimination is very difficult to explain on nonracial grounds." *Davis*, 426 U.S. at 242.

owners), "impact alone is not determinative." *Arlington Heights*, 429 U.S. at 266. In the non-extreme case, a court "must look to other evidence" and conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* The precise nature of that inquiry depends on the specific facts and circumstances, but it can include looking at whether the policy "bears more heavily on one race than another." *Id.* Other non-exclusive factors that may be relevant are the historical background, irregularities in the passage of the policy, and legislative or administrative history. *Id.* at 266–67.

Notably, the Supreme Court has never said that a showing of aggregate disparate impact on a jurisdiction-wide scale is required to demonstrate an equal protection violation. And for good reason. The relevance of that gross statistical analysis will vary significantly depending on the facts of the case. Sometimes, lack of an aggregate impact can undermine an equal protection challenge—for example, if the zoning decision in *Arlington Heights* had not disproportionately harmed certain racial minorities, the case would likely have not even reached the Supreme Court. *See Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 517 F.2d 409, 414–15 (7th Cir. 1975) (finding an equal protection

violation largely due to the disproportionate racial impact of a decision not to rezone), *rev'd* 429 U.S. 252 (1977). But in other cases, looking to aggregate impact is not all that useful in determining whether government action is racially discriminatory. *See Arlington Heights*, 429 U.S. at 266 n.15 (acknowledging the often "limited probative value of disproportionate impact"). It "may provide an important starting point," *id.* at 266, or it may not, depending on the facts and circumstances of the particular case.

B. The district court erred in requiring proof of aggregate disparate impact

Contrary to *Davis* and *Arlington Heights*, the district court held that to establish an equal protection violation with respect to a facially race-neutral policy, a plaintiff must show that "the policy has disproportionately affected a racial group in the aggregate." App. 508. Applying that standard, the court concluded that unless Plaintiffs could establish that the overall percentage of offers given to Asian-Americans

was reduced[35] following the Discovery program changes, there could be no equal protection violation. *Id.* at 513–16.

This was error. Although an aggregate drop in offers to Asian-American students would likely be compelling evidence of Defendants' discriminatory intent (especially given that they anticipated such a drop), it is not a necessary element of an intentional discrimination claim. *See Arlington Heights*, 429 U.S. at 265–66; *Davis*, 426 U.S. at 242; *Briscoe v. City of New Haven*, 654 F.3d 200, 208 (2d Cir. 2011) ("The Equal Protection Clause ... prohibits only intentional discrimination; it does not have a disparate-impact component.") (quoting *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting)).

The district court's contrary conclusion—that Citywide disparate impact is an essential element of a constitutional violation—was based on a misreading of this Court's decision in *Hayden v. County of Nassau*,

[35] The parties disagreed whether the proper approach for evaluating disparate impact is to compare Asian-American representation before and after the challenged changes (Plaintiffs' view) or to compare the proportion of Asian Americans in the "applicant pool" to the proportion who were given offers (Defendants' view). App. 513–14. Because neither approach showed an aggregate reduction in Asian-American representation in the specialized high schools, this Court need not resolve that disagreement.

180 F.3d 42 (2d Cir. 1999). In relevant part, *Hayden* stated that "a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect." *Id.* at 48. The district court latched on to that conjunctive statement and reference to a "discriminatory effect" as invariably requiring proof of aggregate disparate impact to show an equal protection violation. But *Hayden* did not establish the inflexible rule adopted by the district court.

In *Hayden*, white and Hispanic applicants argued that a County's use of a redesigned police department entrance examination—revised to reduce the old test's disparate impact on black applicants—discriminated against them. *Id.* at 45. But unlike this case, the *Hayden* plaintiffs asserted both a Title VII disparate impact claim [36] and an equal protection claim, and the panel analyzed the two claims separately. *Id.* at 48–54. The Title VII claim failed simply because the revised exam did

[36] *See* 42 U.S.C. § 2000e-2 ("An unlawful employment practice based on disparate impact is established under this subchapter only if … a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin ….").

not screen out more white or Hispanic applicants than black applicants—similar to the disparate impact analysis the district court applied to this case. *See id.* at 52–53. But to reject the equal protection claim, the panel did not focus on whether there was a disparate impact, but relied instead on the fact that the new test "was administered and scored in an identical fashion for all applicants." *Id.* at 48. Thus, applicants who failed to pass the exam had not been subject to unequal treatment at all, let alone because of their race. *Id.* at 52 (concluding the plaintiffs "were neither excluded from full consideration because of their race, nor were they disadvantaged because of their race"); *cf. Davis*, 426 U.S. at 245–46 (noting that unsuccessful black applicants challenging the use of a written test "could no more successfully claim that the test denied them equal protection than could white applicants who also failed"). In that context, the panel also noted that there was no "discriminatory effect" on white and Hispanic applicants, *Hayden*, 180 F.3d at 48, but it never held that an aggregate racial disparate impact is an essential element of an intentional discrimination claim.

The district court also relied on this Court's decision in *Atkins v. Westchester County Department of Social Service*, 31 F. App'x 52 (2d Cir.

2002), but that decision supports Appellant's argument. As in *Hayden*, and unlike this case, the *Atkins* plaintiffs brought both a Title VII disparate impact claim and a claim under the Equal Protection Clause. *Id.* at 53. With respect to the Title VII claim, the panel concluded that the plaintiffs had failed to establish a disparate impact. *Id.* Then, turning to the equal protection claim, this Court said *nothing at all* about disparate impact, but instead concluded that the plaintiffs "failed to establish the *purposeful discrimination* necessary to sustain such a claim." *Id.* at 54 (emphasis added). *Atkins*'s differentiation of the Title VII claim (requiring disparate impact) and the equal protection claim (requiring purposeful discrimination) confirms that the latter does not invariably require proof of aggregate disparate impact. Because the district court concluded otherwise, its decision must be reversed.[37]

[37] The district court also claimed that its conclusion is supported by this Court's affirmance of the denial of Plaintiffs' motion for a preliminary injunction. App. 507 n.13. But this Court's decision was based entirely on standing to seek prospective relief and did not address the merits of Plaintiffs' claims or whether aggregate disparate impact is required. *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 788 F. App'x 85 (2d Cir. 2019). And this Court's standing concern was resolved through supplemental affidavits. *See* Letter from T. Roberts, Christa McAuliffe PTO v. de Blasio (No. 1:18-cv-11657-ER), ECF No. 133.

C. Defendants' policy intentionally treats Asian-American applicants unequally

1. Intentional unequal treatment violates the Equal Protection Clause even without an aggregate disparate impact

Instead of myopically focusing on aggregate disparate impact, the district court should have focused on whether Defendants purposefully imposed unequal treatment based on race. *See Hayden*, 180 F.3d at 49 ("A touchstone of equal protection is that the government may not subject persons to unequal treatment based on race."); *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005) ("To prove a violation of the Equal Protection Clause, … a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination."). As confirmed by *Hayden*, if a challenged policy treats all applicants equally, it is highly unlikely that it will violate the Equal Protection Clause. Conversely, where a government policy treats groups unequally based on race, strict scrutiny applies regardless of whether the unequal treatment results in an aggregate disparate racial impact. It is the disparate treatment itself—if supported by a racially discriminatory motive—that triggers strict scrutiny.

The same standard applies when the government implements a facially neutral policy that treats applicants differently based on a factor that is designed to operate as a proxy for race. Imagine, for example, a City policy requiring applicants who live in heavily Asian-American ZIP codes or attend majority-Asian-American middle schools to follow a different, more burdensome application process. Even if that additional obstacle did not ultimately result in an aggregate disparate impact—i.e., the Asian-American students were able to successfully navigate the more burdensome process—the policy should nonetheless be subject to strict scrutiny. Just as an express racial classification is constitutionally suspect regardless of whether it causes an aggregate disparate impact, the same is true when a facially race-neutral policy imposes unequal treatment based on a race or a proxy for race.[38]

[38] The district court's requirement of proof of disparate impact in every case would also mean that a discriminatory policy could never be challenged before it is implemented, since until then it is uncertain whether it has a disparate impact.

2. Plaintiffs produced evidence of intentional unequal treatment based on race

Here, there was evidence that Defendants' changes to the Discovery program treated Asian-American applicants unequally. Most notably, the 0.6 ENI restriction limited access to the program to only those students applying from certain middle schools—those with an ENI of at least 0.6.[39] Even with the Citywide jump in ENI, students at the excluded schools were heavily Asian-American: eleven of the twenty-four majority-Asian-American middle schools were excluded by the 0.6 ENI restriction, *see* App. 306–07 & n.6, whereas nearly 5 in 6 middle schools Citywide were eligible, *id.* at 336 (515 out of 621 schools). Moreover, students at the schools that remained eligible for Discovery after the program revisions were just 7.9% Asian American, less than half the 16.1% Citywide proportion of Asian Americans. *Id.* at 336–37.[40] Thus, the 0.6 ENI restriction disproportionately affected Asian Americans and

[39] As noted above, both the ENI metric itself and the 0.6 cutoff were created by, and remain entirely within the control of, the DOE. *See* App 431–32 ¶¶ 18–19.

[40] Before the ENI jump, the discrepancy would have been even greater, as eligible schools would have been just 5.4% Asian American. App. 337 (see the first column of Table 7).

meant that otherwise eligible students at the excluded schools were locked out of one-fifth of the specialized high school seats.

The result is that two individually disadvantaged applicants who are in all other ways similarly situated—including SHSAT score—are treated differently in the admissions process based on the schools they attend in eighth grade. Indeed, under the challenged revisions, students with far lower SHSAT scores at high-ENI schools can gain admission to even the most selective specialized high schools through the Discovery program, in place of higher scoring individually disadvantaged students at ineligible schools. *See id.* at 425–26 (listing cutoff scores based on SHSAT alone compared to cutoff scores for Discovery students).

Defendants expected that this unequal treatment would result in fewer Asian-Americans being admitted to the specialized high schools—and the evidence indicates that they selected a 0.6 ENI cutoff for that purpose.[41] DOE modeling indicated that applying the Discovery changes

[41] Although Plaintiffs have been denied full discovery into Defendants' purpose, available evidence indicates that at least part of the reason for the 0.6 ENI cutoff was to ensure that the Discovery program would not have the same racial composition as students admitted solely through the SHSAT. *See* App. 372–76, 398. And in public, Defendants promoted the

to applicants from 2017 would have resulted in a 2.1 percentage point decline in offers to Asian-Americans. *Id.* at 397. And internal DOE emails and modeling predicted that the students invited to participate in the revised Discovery program would be just 38% Asian-American—a sharp decline from past Discovery participants. *Id.* at 400. It is unsurprising that DOE thought a revised policy that rendered nearly half the City's majority-Asian-American middle schools, not to mention disproportionately more Asian-American eighth graders, ineligible for the Discovery program would also result in a drop in the percentage of Asian-American students at the specialized high schools.

To be sure, applicants at excluded middle schools were treated unequally whether or not they were Asian-American, which led the district court to conclude that there was no discrimination related to race because "all disadvantaged students attending schools with an ENI of

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new Discovery policy on the ground that it would increase the number of black and Hispanic students at the specialized high schools, quite obviously at the expense of Asian-Americans. *See* Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra*, https://on.nyc.gov/3Qnebhs (also at App. 160) ("Based on modeling of current offer patterns, an estimated 16 percent of offers would go to black and Latino students, compared to 9 percent currently.").

less than 0.6 are equally prohibited from participating in Discovery, regardless of their race." *Id.* at 512. But that improperly ignores the differing racial makeup of the excluded middle schools, which were heavily Asian-American. Because the unequal treatment falls heavily on Asian-American students, it was error for the district court to disregard it.[42]

The *Arlington Heights* inquiry is ultimately about divining discriminatory *intent*, and the fact that the revised Discovery criteria treated applicants differently based on a factor (attendance at a high-ENI middle school) that was apparently a proxy for race is strong evidence of intent. Due to the unrelated and unprecedented increase in ENI, the aggregate admission results across the specialized schools failed to produce the overall outcome Defendants hoped and predicted it would. But that does not minimize the harm felt by those students who were

[42] The district court also noted that Defendants cited studies claiming that "low-income students attending high-poverty schools are more disadvantaged and face more academic challenges than similarly-situated students attending lower-poverty schools." App. 512 (citing ECF No. 159 at 11). But whether Defendants had *good reasons* for treating heavily Asian-American schools unequally does not eliminate the fact of unequal treatment; that at most goes to the question of whether Defendants' revised policy can satisfy strict scrutiny.

excluded from Discovery but would have been eligible if not for Defendants' policy change. *Cf. N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016) (concluding that a revision to North Carolina's voting laws violated the equal protection rights of African Americans, who "disproportionately cast provisional out-of-precinct ballots, which would have been counted absent [the challenged law]," even though "aggregate African American turnout *increased* by 1.8%" under the new law) (emphasis added). Put simply, aggregate Citywide data alone does not entitle Defendants to summary judgment, and the decision below should be reversed.

II. The District Court Wrongly Disregarded Evidence that Defendants' Policy Changes Excluded Certain Asian-American Students from Their Preferred Schools

The district court's second major legal error was to disregard harm to individual Asian-American students who were denied their choice of school due to Defendants' policy changes. The analysis by Plaintiffs' expert, Dr. Vigdor, showed that certain Asian-American students were denied invitations to Stuyvesant and Bronx Science—their preferred schools, and the most selective of the specialized high schools—because of Defendants' revised admissions policy. Yet the district court

disregarded this evidence because: (1) there was "no showing that these minor differences are significant" and (2) the court "does not accept that trends in two of the eight Schools can sustain Plaintiffs' disparate impact claim." App. 517.

The court's analysis was flawed in at least three respects. First, the Equal Protection Clause protects an individual right, and harm to even one individual is "significant" if due to racial discrimination. Second, the district court improperly treated Plaintiffs' claim as one for disparate impact, rather than for intentional discrimination. Third, harm to Asian-American applicants at even one of the specialized high schools at the very least creates a dispute of material fact that should have precluded summary judgment before Plaintiffs had the chance to probe intent.

A. Defendants' Discovery program changes excluded certain Asian-American applicants from Stuyvesant and Bronx Science

Dr. Vigdor examined admissions data for the specialized high schools and concluded that the Discovery program changes caused fewer Asian-Americans to receive invitations to the two most selective specialized high schools—Stuyvesant and Bronx Science. *Id.* at 340–42. Specifically, 66.9% of Stuyvesant invitations went to Asian-American

students under the revised admissions criteria, but 67.6% of invitations would have gone to Asian-American students under the prior criteria—a difference of 0.7%. *Id.* at 340–41. Likewise, 55.8% of Bronx Science invitations went to Asian-American students under the revised admissions criteria, but 57.2% of invitations would have gone to Asian-American students under the prior criteria—a difference of 1.4%. *Id.* at 341–42.[43]

Because of the formulaic way in which invitations are given to the specialized high schools—students are ranked based on SHSAT score, then offered admission based on their preferred school—Dr. Vigdor's analysis was not a projection or hypothesis. Rather, he was able to create a simulation that could "pinpoint specific students" who would have received invitations to Stuyvesant and Bronx Science under the prior criteria but who instead were not offered a seat under the revised policy. *Id.* at 358.[44] In other words, certain specific, identifiable Asian-American

[43] Had it not been for the unexpected Citywide increase in ENI, the reduction in invitations to Stuyvesant and Bronx Science would have been 7.4 and 8.5 percentage points, respectively. App. 340, 342.

[44] Because personally identifiable information was removed from the data set, Plaintiffs are unable to determine the actual identities of the excluded Asian-American students.

students were denied invitations to their preferred schools due to Defendants' Discovery changes. And because Stuyvesant and Bronx Science are the most competitive and prestigious of the specialized high schools, these students were harmed even if they may have received invitations to attend other specialized high schools.

Defendants did not dispute Dr. Vigdor's calculations or seek to exclude his testimony. Indeed, their rebuttal expert agreed that the Discovery program changes "decreased the number of Asian students given offers to attend" Stuyvesant and Bronx Science. *Id.* at 420 (deposition testimony of Michael Scuello). Rather than challenging his analysis, their expert claimed that Dr. Vigdor should have used a different field of the data set for the analysis (the "offer" field instead of the "invitation" field). *Id.* at 212–18. Of course, a dispute between the parties' experts is not a proper basis for a summary judgment determination. *See, e.g.*, *Klein v. Tabatchnick*, 610 F.2d 1043, 1048 (2d Cir. 1979) ("[Where] the resolution of a disputed issue hinges in large measure upon conflicting opinions and judgments of expert witnesses, summary judgment is not appropriate."); *Knight v. New York State Dep't of Corr.*, No. 18-CV-7172, 2022 WL 1004186, at *12 (S.D.N.Y. Mar. 30,

2022) ("[S]ummary judgment is inappropriate when there is a battle of the experts."). The Court at this stage must take the evidence in the light most favorable to Plaintiffs and assume that Dr. Vigdor's analysis correctly shows that the Discovery program changes reduced the number of Asian-American students given the opportunity to attend Stuyvesant and Bronx Science.[45]

B. The district court improperly disregarded Dr. Vigdor's analysis

The district court improperly disregarded Dr. Vigdor's evidence of harm to Asian-American applicants to Stuyvesant and Bronx Science for two reasons. First, the court noted that relatively few students were affected and (in a line copied from Defendants' reply) stated that "[t]here is no showing that these minor differences are significant." *Id.* at 517; *see*

[45] In any event, as Dr. Vigdor explained in a supplemental report, relying on the "offer" field would be improper because whether someone receives an offer depends not only on eligibility, but on "whether students submit the paperwork necessary to convert their 'invitation' into an 'offer.'" App. 357. Thus, the "invitation" data more accurately reflects the effect of DOE's policy change, since DOE chooses which students will receive invitations. Whether those letters are converted into "offers" is largely up to the students and their families.

also id. at 467 (Defendants' reply brief).[46] Second, the district court "d[id] not accept that trends in two of the eight Schools can sustain Plaintiffs' disparate impact claim." *Id.* at 517. Neither of these is a sufficient basis for granting summary judgment, and they betray the district court's fundamental misunderstanding about both Plaintiffs' claims and the evidence.

1. Denying individual Asian-Americans invitations to their preferred school is significant

It is unclear what the district court meant by parroting Defendants' assertion that the exclusion of these Asian-American students from their preferred schools were "minor differences" that were not "significant," since the court did not cite any authority or provide any further explanation. But what is clear is that equal protection of the laws is an individual constitutional right. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) ("It is settled beyond question that the rights

[46] The district court also uncritically accepted Defendants' unexplained assertion that the percentage drops identified by Dr. Vigdor corresponded to 9 students at Stuyvesant and 13 students at Bronx Science. App. 517; *see also id.* at 467 (Defendants' reply brief). Without necessarily accepting those precise numbers, CACAGNY agrees that it appears approximately two dozen Asian-American students were affected.

created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.") (cleaned up); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups ...."). After all, the Equal Protection Clause protects "*persons*, not *groups*." *Adarand Constructors*, 515 U.S. at 227. The reductions that Defendants' policies caused at Stuyvesant and Bronx Science were unquestionably "significant" to those individual Asian-American students who were denied invitations to their preferred schools. Even though those denials may have been a relatively small percentage compared to the overall admissions process, they are a clear discriminatory effect that supports Plaintiffs' equal protection claim. No other showing of "significance" is needed.

2. Plaintiffs' claim is based on intentional discrimination, not disparate impact

The district court also refused to "accept that trends in two of the eight Schools can sustain *Plaintiffs' disparate impact claim*." App. 517 (emphasis added). That refusal misperceives the basis Plaintiffs' claim,

which is not one for disparate impact at all, but for intentional discrimination. *See Briscoe*, 654 F.3d at 208 ("The Equal Protection Clause ... prohibits only intentional discrimination; it does not have a disparate-impact component.") (quoting *Ricci*, 557 U.S. at 627 (Ginsburg, J., dissenting)). Plaintiffs do not argue—and need not establish—that the evidence of discrimination against Asian-American students at the two most selective specialized schools constitutes an aggregate disparate impact. Instead, the evidence showing that Defendants' policy change denied individual Asian-American students invitations to those schools is part of the "circumstantial and direct evidence," *Arlington Heights*, 429 U.S. at 266, that bolsters their claim of intentional discrimination. The district court's treatment of Plaintiffs' claim as one for disparate impact was flawed.

3. Plaintiffs need not show harm at all of the specialized high schools

The district court gave no further explanation for its refusal to accept the evidence of harm at the two most selective and prestigious of the specialized schools. Nor is there any reason to conclude that Defendants' policy revisions can only be unconstitutional if they harm

Asian-American applicants at all eight of the specialized schools. To the contrary, harm to Asian-American applicants to even one school is constitutionally suspect. That is particularly true here, where the two affected schools are the oldest, most selective, and most prestigious of the specialized schools.

The only authority that the district court cited in this portion of its opinion is *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989). That case is distinguishable. Most importantly, *Sharif* was a disparate impact case under Title IX,[47] so statistical impact alone made up the plaintiff's prima facie case of discrimination. *See id.* at 360–61 (holding that Title IX claims do not require proof of discriminatory intent). Since the case alleged a statewide disparate impact, the court rejected the defendants' attempt to rebut that prima facie case with evidence focusing "on individual schools and counties." *Id.* at 362. Here, in contrast, Plaintiffs' claim is that Defendants implemented the revised Discovery criteria for a discriminatory purpose. The revised criteria

[47] The *Sharif* court also found an equal protection violation, but not due to discriminatory intent. Rather, the court held that the challenged "classification of scholarship applicants solely on the basis of SAT scores" was irrational. 709 F. Supp. at 364.

apply to all eight schools—and DOE expected a disparate impact on Asian-Americans at all eight schools—but the evidence of impact at the two most competitive schools bolsters Plaintiffs' claim of discriminatory intent under *Arlington Heights*. As discussed above, a full *Arlington Heights* analysis—including the opportunity to obtain discovery regarding Defendants' purpose—is necessary to determine if the challenged policy was enacted with discriminatory intent. Defendants are not entitled to summary judgment just because this identified harmful effect was concentrated at Stuyvesant and Bronx Science.

CONCLUSION

This Court should reverse the grant of summary judgment and direct that Plaintiffs be permitted to take discovery on Defendants' intent in altering the Discovery criteria.

DATED: January 13, 2023.

Respectfully submitted,

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s/Glenn E. Roper
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