

No. 23-1068

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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ASSOCIATION FOR EDUCATION FAIRNESS,

Plaintiff – Appellant,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION;  
DR. MONIFA B. MCKNIGHT,

Defendants – Appellees.

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On Appeal from the United States District Court  
for the District of Maryland  
Honorable Paula Xinis, District Judge

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**APPELLANT’S OPENING BRIEF**

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## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 23-1068Caption: Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., et al.

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Association for Education Fairness

(name of party/amicus)

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7. Is this a criminal case in which there was an organizational victim?  YES  NO  
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Christopher M. Kieser

Date: January 31, 2024

Counsel for: Association for Education Fairness

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## **JURISDICTIONAL STATEMENT**

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question), 42 U.S.C. § 1983 (cause of action for violation of constitutional rights); and 28 U.S.C. § 2201 (Declaratory Judgment Act). The district court granted the motion to dismiss on July 29, 2022, and denied a Rule 60(b) motion on December 16, 2022. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## **INTRODUCTION**

Beginning in 2016, Montgomery County Public Schools (MCPS) overhauled the admissions criteria for its four competitive magnet middle school programs. Members of the Board of Education and MCPS staff made clear that the new criteria were adopted to readjust the racial composition of the magnet programs, primarily by reducing enrollment of Asian-American students in favor of black and Hispanic students. The new criteria had the desired effect, and the district court held in 2021 that the Association for Education Fairness (AFEF) had plausibly alleged that MCPS' overhaul violated the equal protection rights of Asian-American applicants.

MCPS then changed the criteria again, ostensibly in response to the COVID-19 pandemic. Although the new criteria were different and relied upon a lottery to make final decisions, they retained the use of “local norming” assessments that would determine eligibility for the lottery. Unlike the first time, the second overhaul produced no public record of comments by officials and was instead devised by a “working group” whose deliberations were not public. Yet although the new criteria produced a similar racial balance as those previously challenged, the district court granted MCPS’ motion to dismiss, holding that the criteria did not adversely impact Asian Americans and that its implementation process was so decoupled from the first overhaul as to make an inference of continued discriminatory intent implausible.

The district court held the second challenge to too high a pleading standard. Although it is plausible that MCPS’ second overhaul might be divorced from the first, it is *also* plausible that it was intended—at least in part—to preserve the racial balance accomplished through the initial changes. That would be enough to reverse the district court under the standard that court initially applied in this case.

However, an intervening development in the law changed the requirements for showing disparate impact in an intentional discrimination case like this one. Because AFEF cannot plead disparate impact under the standard articulated in *Coalition for TJ v. Fairfax County School Board*, 68 F.4th 864, 879–82 (4th Cir. 2023), it simply seeks to preserve the arguments below for *en banc* or Supreme Court review.

### **STATEMENT OF ISSUES**

1. Did the AFEF plausibly allege that MCPS implemented admissions criteria for its magnet middle school programs to discriminate against Asian-American applicants by making it disproportionately harder for them to qualify for the admission lottery?

2. Did the district court abuse its discretion in denying AFEF's Rule 60(b) motion that presented data demonstrating how MCPS' criteria disproportionately disadvantages Asian-American applicants?

### **STATEMENT OF THE CASE**

Because this is an appeal from the grant of a motion to dismiss, the facts are taken from the operative First Amended Complaint (FAC).

## A. Background

The Montgomery County Board of Education operates MCPS, the largest public school system in Maryland and one of the largest nationwide. JA202 (FAC ¶ 13). MCPS offers a wide variety of competitive and noncompetitive magnet and choice programs at the elementary, middle, and high school level. *See generally* Metis Report (cited in JA203 n.3). As part of this, the district has long maintained competitive magnet middle school programs designed to provide gifted students from across the County access to an enriched academic program unavailable at their home middle schools. JA204 (FAC ¶¶ 21–23). The first of these programs began at Takoma Park Middle School 40 years ago, focusing on math, science, and computer science (STEM). JA204 (FAC ¶ 21). There are now four magnet middle school programs—a STEM and Humanities focused program in both the Upcounty and Downcounty regions. JA204 (FAC ¶¶ 21–22). In addition to Takoma Park (which now hosts the Downcounty STEM program), these programs are housed at Eastern Middle School (Downcounty Humanities), Roberto Clemente Middle School (Upcounty

STEM), and Martin Luther King Jr. Middle School (Upcounty Humanities). *Id.*

As Montgomery County became more diverse beginning in the 1990s, the racial composition of its magnet and choice programs became more controversial. JA204–05 (FAC ¶¶ 24–26). During that decade, MCPS instituted a race-based transfer policy for its noncompetitive elementary magnet program, but this Court invalidated it, holding that the “race-conscious nonremedial transfer policy . . . amounts to racial balancing.” *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Public Schs.*, 197 F.3d 123, 128 (4th Cir. 1999). Although MCPS discontinued the race-based transfer program after *Eisenberg*, JA203–04 (FAC ¶ 19), complaints about the racial composition of some of the district’s choice programs continued. In 2005, a parent group known as African American Parents of Magnet School Applicants asked MCPS to disband the magnet middle school programs on account of the lack of racial diversity. JA205 (FAC ¶ 25). The Board responded by implementing some outreach measures designed to increase the programs’ visibility to nonwhite applicants. *Id.*

But by the 2010s, white students were no longer the majority—or even plurality—of those selected for the magnet middle school programs. In 2013–14, Asian Americans made up nearly 46% of students in the magnet middle school programs—and were the only racial group that earned a higher proportion of magnet program seats than the group’s share of the population. JA205 (FAC ¶ 26). It was only then that the Board sought a “comprehensive study” of MCPS’ choice and special academic programs to determine whether “all students have equitable access to [magnet] programs, especially in light of the continuing growth of MCPS student enrollment and the changing demographics of the region.” JA206 (FAC ¶¶ 28–29). This kicked off a period of substantial change to the admissions criteria for the magnet middle school programs.

**B. MCPS Follows Metis Associates’ Recommendations, Overhauls Admissions Criteria**

To conduct the study, the Board awarded the contract to prominent consulting firm Metis Associates. JA206 (FAC ¶ 30). Metis produced a substantial report that was released to the public in March 2016. It concluded that “[t]here are significant racial and socioeconomic disparities in the enrollment and acceptance rates to academically selective programs, which suggest a need to revise the criteria and

process used to select students for these programs.” JA206 (FAC ¶ 31). Through charts and graphics, it depicted the underrepresentation of black and Hispanic students in the magnet middle school programs and the overrepresentation of Asian Americans. JA207 (FAC ¶ 33). To change this, Metis recommended that the Board implement “modifications to the selection process used for academically competitive programs . . . to focus these programs on selecting equitably from among those applicants that demonstrate a capacity to thrive.” JA207 (FAC ¶ 32). The firm suggested various admissions controls, including “broadening the definition of gifted to include non-cognitive measures such as motivation and persistence, using group-specific norms that benchmark student performance against school peers with comparable backgrounds, [and] offering automatic admissions for students in the top 5–10% of sending elementary or middle schools.” *Id.*

Then-MCPS Superintendent Dr. Jack Smith and the Board quickly moved to implement Metis’ key recommendation. At community events, MCPS officials displayed a graphic showing the district’s view of equity would require individual students to be judged according to different academic standards. JA209–10 (FAC ¶¶ 38–39). Several Board members

made it clear that the existing racial demographics at competitive magnet programs were unacceptable. They advocated for admissions controls designed to achieve racial balance:

- Referring to the high Asian American and low black and Hispanic enrollment at an MCPS competitive admission program, then-Board member Judith Docca stated at a Board meeting “[w]e just can’t let this happen.” JA211 (FAC ¶ 42). At a different Board member, she noted concern that “it looks like it’s because they are Latino or African American because they are not in the programs unless we’re saying they are just not as intelligent . . . . We need to do something about why some of our kids are not getting into the program when we know that they are bright.” JA211 (FAC ¶ 40).
- Then-Board member Patricia O’Neill noted the “substantial underrepresentation of students of color” in the competitive magnet programs and hoped “that programs will become more diverse and be more reflective of our student population.” JA213–14 (FAC ¶ 45).
- Then-Board member Christopher Barclay explicitly called for admissions controls designed to achieve racial balance. In his view, the Board’s goal should be “not simply . . . creating opportunity and

having that be blind and neutral but in fact ensuring there were controls so that in fact those choices could reflect the community that we live in and to address some of the disparities that exist.” JA212 (FAC ¶ 44). He warned that “[i]f we expand blindly we are going to end up in the same place ten years from now, fifteen years from now, or whatever, because privilege is not going to go away but our ability to create those controls is what is going to help us to define what we want those programs to look like.” JA213 (FAC ¶ 44).

In line with these comments, a united Board delegated to Superintendent Smith the discretion to overhaul admissions criteria for the magnet middle school program in line with the Metis Report’s recommendation. JA214 (FAC ¶ 46), JA233–34 (FAC ¶ 98).

Over the next three years, Superintendent Smith implemented changes to the admissions criteria for the magnet middle school programs. As part of what he referred to as the “field test,” Dr. Smith first implemented new admissions controls for the more populous Downcounty region, then expanded the overhaul to all four magnet program centers the following year.

- Prior to the overhaul, magnet program admissions were parent-initiated, and decisionmakers considered an applicant's grades, teacher recommendations, and his or her scores on the Cognitive Abilities Test (CogAT) and other assessments. JA214–15 (FAC ¶ 48).
- Under the field test, MCPS took the screening process out of the parents' hands and invited more than 4000 students the chance to sit for the CogAT based on their scores on other assessments—a large increase from the 700 to 800 students who had typically applied to the Downcounty magnet programs each year. JA 214–15 (FAC ¶¶ 48–49).
- MCPS also instituted two admissions controls: the peer group measure and local norming of CogAT scores. JA215–16 (FAC ¶ 51) (peer group); JA221–22 (FAC ¶ 67) (local norming).
- Through the peer group measure, decisionmakers in the magnet program admissions process “[c]onsidered the academic peer group at the home school in relation to the student's instructional need.” JA215 (FAC ¶ 51). Superintendent Smith called this consideration particularly “important,” and MCPS' Frequently Asked Questions

document noted that “[s]tudents who are high performing may or may not be invited to the program based on the availability of a peer group at their middle school.” JA215–16 (FAC ¶ 51). MCPS never publicly defined what it meant by an academic peer group. JA215 (FAC ¶ 51).

- MCPS divided its elementary schools into three “bands” based on the percentage of students at each school eligible for free or reduced-price lunch. JA221 (FAC ¶ 67). Then it “locally normed” applicants’ CogAT scores so that the CogAT percentiles used for admissions purposes were only the applicant’s percentile among students at schools in the same band. JA221–22 (FAC ¶ 67). In effect, each applicant’s CogAT score was only compared to students from elementary schools in the same socioeconomic band. *Id.*

### **C. Results of the Field Test**

The field test criteria did what the Board and Superintendent hoped it would do. As the first amended complaint depicted, the Asian-American share of invited students to the magnet programs plummeted. JA227–28 (FAC ¶ 82). The drop was particularly pronounced at three of the four locations. In the three years before the field test, Asian

Americans made up 45.6% of those invited to the Downcounty STEM magnet program at Takoma Park. JA227 (FAC ¶ 82). In the three years of the field test, Asian-American representation dropped to 31.5%. *Id.* And at both Upcounty programs, Asian-American applicants after the field test was implemented earned about *half* the share of the seats they had earned in the previous three years. JA228 (FAC ¶ 82).

The first amended complaint alleged that the peer group measure and local norming were responsible for this drop. *See, e.g.*, JA223–24 (FAC ¶¶ 73–74). The district court recognized that these allegations were plausible. It explained that because “Asian American students are clustered in a handful of high-performing, low-poverty elementary schools,” the complaint made plausible the allegation that “the peer group rule provides MCPS the flexibility to deny admission to those students defined as ‘highly able’ according to standardized tests and assessments.” JA183. In addition, “[w]ith local norming, high-performing students, including Asian Americans, who score in the highest percentiles nationally will, in all likelihood, rank lower if only compared to their local peers.” *Id.*

Although Asian-American parents expressed concern after the first year of the field test resulted in a sharp drop in the group's admitted share of Downcounty magnet program participants, JA218 (FAC ¶ 57), Board members elicited more worry that the overhaul hadn't done enough to achieve racial balance. At a 2018 Board meeting, Docca asked MCPS Director of Consortia Choice and Application Program Services Jeannie Franklin why the black share magnet program admits had not been higher after the field test controls were implemented—and Franklin said she, too, had expected more of an increase. JA218 (FAC ¶ 58). As the district court held, these facts plausibly suggested that MCPS “set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data.” JA183.

#### **D. The Lawsuit and Subsequent Criteria Changes**

AFEF, a nonprofit association whose members include dozens of Asian-American parents in Montgomery County, sued to enjoin the field test criteria as a violation of the equal protection rights of their members' children. JA014–092 (initial complaint). When AFEF filed the initial complaint, the field test had already been in effect for three admissions

cycles for the Downcounty programs and two for the Upcounty programs. MCPS moved to dismiss the complaint for lack of standing and failure to state a claim, but just as briefing on the motion to dismiss was concluding in December 2020, it filed a letter with the district court stating that it had modified the selection criteria for the upcoming 2021 admissions process due to the COVID-19 pandemic. JA097–98. MCPS later filed a second motion to dismiss arguing that the December 2020 changes rendered the case moot.

The district court denied both motions to dismiss. JA149–89 (September 2021 district court opinion). It held that (1) AFEF had standing to sue on behalf of at least one of its parent-members with children who planned to apply to the magnet programs in the coming years, JA174–75; (2) the December 2020 changes did not moot the case because MCPS retained the discretion to return to the field test criteria—and particularly to requiring the CogAT—when the pandemic subsided, JA178; (3) AFEF stated a plausible claim that the field test criteria were adopted for a discriminatory purpose, JA183; and (4) MCPS could not demonstrate at the pleading stage that the field test criteria satisfied the

strict scrutiny standard it would have to meet to be constitutionally permissible despite the discriminatory intent, JA189.

Yet because AFEF sought only prospective injunctive relief, it was wary of proceeding to discovery on a challenge only to the field test criteria, potentially expending resources for multiple years only to win a judgment enjoining criteria that were no longer in use. So once it became clear that MCPS intended to keep the new criteria, AFEF amended its complaint to challenge those. MCPS once again moved to dismiss.

**E. Post-COVID Lottery Admission and Second Motion to Dismiss**

Little is known about the deliberations that led MCPS to implement new magnet program admission criteria in the midst of the COVID-19 pandemic. According to MCPS' Jeannie Franklin, MCPS convened a working group to study a lottery early in 2020 and decided to implement one later that year when it became clear that students would not be able to sit for the CogAT during the pandemic. JA099–109 (Franklin Declaration); JA229 (FAC ¶ 84). But the working group's deliberations were not public—indeed, MCPS never presented the lottery plan to the public and it was never discussed at a meeting of the Board. JA229 (FAC ¶ 85). What we do know, however, is that Asian-American applicants did

no better under the lottery than under the field test. In fact, when it comes to admission to the two STEM magnet programs, Asian Americans did even *worse* than they had under the field test, which itself had caused a precipitous drop from the pre-Metis era. JA231 (FAC ¶ 88).

AFEF alleged that the culprit for the continued difficulty Asian Americans experienced was a familiar one: local norming. After all, although the current system utilizes a lottery to make final admissions decisions, *eligibility* for the lottery is based on students' scores on the Measure of Academic Progress (MAP) assessments in math and reading. JA230 (FAC ¶¶ 86–87). Only students who scored in the 85th percentile or higher on the MAP-M are eligible for the lottery for the STEM magnet programs, while only those with that score on the MAP-R can be entered into the lottery for the Humanities magnet programs. JA230 (FAC ¶ 86). But those percentiles are *locally normed*. So just as local norming of CogAT scores harmed Asian-American applicants by effectively requiring them to compete against each other, local norming here it makes it more difficult for Asian-American students to achieve the lottery threshold. JA230–31 (FAC ¶¶ 87, 89). And even for those who successfully get a spot in the lottery, they must compete against many students who would not

have qualified for the lottery had they been subject to the same standards.

The district court granted MCPS' motion to dismiss the amended complaint. JA239–64. Although it had held in its original opinion that AFEF plausibly alleged the admissions overhaul adversely impacted Asian Americans, the court reversed course in its opinion dismissing the amended complaint. Citing Judge Heytens' concurrence in the grant of a stay pending appeal in *Coalition for TJ v. Fairfax County School Board*, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022), the district court held that AFEF had *not* plausibly alleged disparate impact after all. JA253–54. The court followed Judge Heytens' intervening opinion to reason that no disparate impact exists where members of the group still earn more seats than members of other racial groups and more than the targeted group's share of the population. JA253. And although the court believed its disparate impact holding was enough to warrant dismissal on its own, it went on to hold that AFEF's allegations were insufficient to plausibly allege discriminatory intent as to the lottery, which it saw as divorced from the deliberations that led to implementation of the field test criteria. *See* JA259.

AFEF filed a Rule 60(b) motion to alter or amend the judgment after discovering previously unavailable information regarding how MCPS uses local norming of MAP scores to determine lottery eligibility. *See* JA265–74. The new documents showed that MCPS divided its elementary schools into five socioeconomic “bands” based on the free and reduced-price lunch rate at each elementary school—and that vastly different MAP scores were required to qualify for the lottery depending on which band an applicant’s elementary school fell into. *Id.* Those in the band with the lowest free and reduced-price lunch rate had to score in the 93rd percentile nationally in the MAP-M and 92nd in the MAP-R, respectively, while those in the band with the highest free and reduced-price lunch rate only had to score in the 60th percentile on the MAP-M and 70th on the MAP-R. JA266–67. The district court, however, denied the motion primarily on the ground that the new data would not have changed the result. JA278–79. This appeal followed. JA281.

#### **F. Subsequent Procedural History and *Coalition for TJ***

Soon after this appeal was docketed, both parties expressed their view that the case be held in abeyance pending *Coalition for TJ*, a similar case concerning the constitutionality of an admissions overhaul in

Fairfax County, Virginia, that was then pending in this Court. The parties disagreed only on the length of the abeyance period. AFEF sought to have the case held in abeyance pending the final disposition of an eventual petition for a writ of certiorari to the Supreme Court of the United States, while MCPS wanted the case held only for this Court's merits decision. This Court sided with MCPS and held the case in abeyance pending this Court's decision in *Coalition for TJ*. ECF No. 20.

In the meantime, several groups that had sought intervention below—and had their motion denied as moot when the district court granted the motion to dismiss the amended complaint—renewed this request in this Court. After substantial briefing, this Court decided to set the intervention motion for oral argument in September 2023. As a result, merits briefing in this case remained on hold even after this Court decided *Coalition for TJ* in May. By the time the Court denied the intervention motion on December 8, 2023, *see* ECF No. 52, the Supreme Court was set to consider a petition for certiorari in *Coalition for TJ*.<sup>1</sup> That petition is still pending at the Supreme Court, the petition having

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<sup>1</sup> The Supreme Court docket in *Coalition for TJ* is available here: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-170.html> (last visited Jan. 29, 2024).

been “relisted” for the fourth time after the Court declined to act on it following its January 19, 2024, conference.

### SUMMARY OF ARGUMENT

The dispositive question here is whether AFEF has plausibly alleged the current magnet program admissions criteria were enacted with discriminatory intent. That means that the criteria were chosen “at least in part ‘because of,’ not merely ‘in spite of,’ the policy’s adverse effects upon” Asian Americans. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). This determination “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Particularly important factors include: (1) the “impact of the official action;” (2) the “historical background of the decision;” (3) the “specific sequence of events leading up to the challenged decision;” and (4) the “legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 266–68.

The simplest distillation of AFEF’s position is that the district court got it right the first time. When it considered MCPS’ development and

implementation of the field test criteria in September 2021, the district court recognized that “no real dispute exists that the field test criteria disproportionately affected Asian American students.” JA182. It also held that the allegations made it plausible that MCPS “acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data.” JA183. To reach its conclusion on impact, the district court accepted that the proper measure of disparate impact was at least some form of comparison between a group’s performance before and after a criteria overhaul. *See* JA182. And to hold that the complaint plausibly alleged MCPS acted with discriminatory intent, the district court had to conclude that intentionally pursuing racial balance was discriminatory even in the absence of any *animus* towards Asian Americans. *See* JA181. These conclusions were all correct.

Yet this Court has since rejected key underpinnings of that initial district court opinion. In *Coalition for TJ*, a panel of this Court held that an admissions overhaul at selective Thomas Jefferson High School in Fairfax County, Virginia, did not adversely impact Asian-American

applicants even where the group's share of offers plummeted from 73% to 54%. See *Coalition for TJ*, 68 F.4th at 879–82. The panel held that disparate impact is a required element of an *Arlington Heights* intentional discrimination claim, *id.* at 882–83, and that the plaintiff could not demonstrate it because Asian Americans still earned more seats at the school than the group's proportion of the applicant pool, *id.* at 881–82. Under this precedent—binding on the panel here—AFEF cannot prevail. The district court's decision granting MCPS' motion to dismiss the amended complaint anticipated *Coalition for TJ*'s disparate impact holding. While AFEF argued below that the district court's reliance on Judge Heytens' previous concurrence was inadvisable, that concurrence is now effectively the law of the circuit after the *Coalition for TJ* majority adopted its reasoning last May.

As AFEF will detail below, its position that MCPS maintains its current lottery process—just as it did the field test—to further a goal of racial balancing at the expense of Asian-American applicants remains unchanged. However, due to *Coalition for TJ*, the purpose of this brief is simply to preserve that argument for *en banc* or Supreme Court review. Should the Supreme Court grant the pending petition for certiorari in

*Coalition for TJ*, AFEF respectfully requests that this Court hold this case in abeyance pending the Supreme Court's decision on the merits and then permit supplemental briefing on the effect of that decision.

### STANDARD OF REVIEW

This Court reviews de novo the district court's decision to grant the motion to dismiss for failure to state a claim. *Benjamin v. Sparks*, 986 F.3d 332, 351 (4th Cir. 2021). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). Like the district court, this Court must "accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff." *Id.*

The Court reviews the denial of a Rule 60 motion for abuse of discretion. *Morgan v. Tincher*, 90 F.4th 172, 177 (4th Cir. 2024). "A court 'abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an

error of law.” *Id.* (quoting *United States v. Dillard*, 891 F.3d 151, 158 (4th Cir. 2018)).

## ARGUMENT

### I. AFEF PLAUSIBLY ALLEGED THAT MCPS IMPLEMENTED THE MAGNET MIDDLE SCHOOL ADMISSION CRITERIA WITH A RACIAL PURPOSE

“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (controlling opinion of Powell, J.). Even where the government employs no explicit racial classification, the Supreme Court has long recognized that a policy “fair on its face, and impartial in appearance” may violate the Fourteenth Amendment’s equal protection guarantee if “it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.” *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). More recently, the Court has confirmed that the government must satisfy that “most exacting judicial examination”—strict scrutiny—“not just when [its policies] 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).

As the district court in this case has recognized, to trigger strict scrutiny, the amended complaint need not allege that MCPS focused on race to the exclusion of any other considerations. *See* JA181–82. Rather, the impermissible racial purpose need only be a “motivating factor”—it need not be “the ‘dominant’ or ‘primary’ one.” *Arlington Heights*, 429 U.S. at 265–66. Nor do the allegations have to demonstrate racial animus on the part of any MCPS official. “[T]he prohibition against ‘intentional discrimination’ applies regardless of whether the challenged policy was well intentioned.” JA181; *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (no racial animus required to engage in intentional discrimination). The “ultimate question” is whether MCPS implemented the challenged criteria “‘because of,’ and not ‘in spite of,’ its discriminatory effect.” *McCrory*, 831 F.3d at 220 (quoting *Feeney*, 442 U.S. at 279).

**A. AFEF’s Allegations Make It Plausible That the Lottery Was Implemented To Preserve and Continue the Racial Balance Achieved Through the Field Test—at the Expense of Asian-American Applicants**

When the district court considered the initial complaint challenging the field test criteria, it correctly recognized that the allegations made it plausible that MCPS “acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data.” JA183. In its *Arlington Heights* inquiry, the court noted that the history—specifically the Board’s decision to commission the Metis Report and follow its recommendations—and Board member comments pointed toward a desire “to readjust the racial composition of the magnet programs.” JA184. And it rejected MCPS’ attempt to recast the field test as mere consideration of demographic data or an attempt to pursue other, nonracial forms of diversity. *See* JA187–88. At the pleading stage, the court held, the complaint’s allegations made it plausible that MCPS “wished to engage in a form of racial balancing” which, in and of itself, “makes plausible [that] the field test was implemented with a discriminatory purpose.” JA185.

The district court correctly applied the principles of *Arlington Heights*, *Feeney*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and *McCrory* in that first opinion. Where it went astray was its later holding that MCPS' shift to a lottery during the pandemic decoupled the current criteria from MCPS and the Board's actions and intent in implementing the field test. As multiple district courts within this circuit have explained, a complaint need not plead sufficient facts to satisfy all four *Arlington Heights* factors to raise a plausible claim of intentional discrimination. See *Carcaño v. Cooper*, 350 F. Supp. 3d 388, 420 (M.D.N.C. 2018); *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 394 (D. Md. 2018). After all, defeating a motion to dismiss remains a "low bar." *Jehovah v. Clarke*, 798 F.3d 169, 180 (4th Cir. 2015). The background and events leading up to MCPS' choice to scrap the field test in favor of a lottery clear that low bar.

To conclude otherwise, one would have to ignore everything that happened beginning with the Board's decision to commission the Metis Report. As the district court recounted, MCPS poured "significant resources of time and money . . . into the Metis Report and the resulting field test criteria." JA177. That time and money was spent—again, at this

stage, plausibly—pursuing a goal of racial balancing through the field test’s facially neutral criteria. Even accepting that the COVID-19 pandemic prompted MPCS to shift from the field test to the lottery, one would have to bury his head in the sand to conclude that it is not at least *plausible* that MCPS retained this racial balancing goal that it had expended so much time and money pursuing in the recent past. That is especially true because the lottery utilizes local norming to make it more difficult for Asian-American students to qualify—which explains why Asian Americans have earned invitations to the magnet programs at a much lower rate than their assessment scores would suggest. JA231 (FAC ¶ 89).

It is true that—unlike before MCPS implemented the field test—there is no administrative history of the deliberations among the working group, Board members, or other MCPS officials leading up to the decision to use the lottery. But this is not fatal to an *Arlington Heights* claim at the pleading stage. After all, even after a full trial, this Court has found discriminatory intent without a single comment from a decisionmaker suggesting a racial motive. *See McCrory*, 831 F.3d at 229. And here, the lack of public deliberations contrasts starkly with the robust process the

Board and MCPS officials went through before implementing the field test criteria. That on its own makes it plausible that “[d]epartures from the normal procedural sequence,” *Arlington Heights*, 429 U.S. at 267, suggest continued discriminatory motive.

In short, the district court required far too much at the pleading stage. Under the standard the district court articulated in denying the first motion to dismiss, the court should have denied the second one as well. The allegations of the amended complaint make it plausible that the weighted lottery MCPS now uses to select students for its magnet middle school programs was implemented at least in part to maintain the racial effect of the field test. Put another way, it was plausibly chosen “to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data.”

**B. *Coalition for TJ* Does Not Require a Different Result**

Nor does *Coalition for TJ* alter this conclusion. Because that was an appeal from a grant of summary judgment, it came after full opportunity for discovery. While the *Coalition for TJ* court may have had a different view of the threshold for a showing of discriminatory intent,

see *Coalition for TJ*, 68 F.4th at 885–86, the panel there also held that the facts adduced from discovery did not demonstrate a “covert effort to ‘balance’ the racial makeup of TJ’s student body,” *id.* at 885. Yet ultimately this matters little because this case is still at the pleading stage. The district court already thought it plausible that “the County wished to engage in a form of racial balancing,” JA185, which was enough to permit the case against the field test to proceed. Hard evidence of an intent to maintain racial balance through the lottery may well emerge in discovery. See JA184 (“Although discovery will certainly bear out whether these comments bespeak an intent to racially balance the middle magnet programs, such an inquiry is intensely fact-driven and not capable of resolution at this stage.”). So might evidence of an intent to target Asian Americans specifically. Because the bar is so much lower at this stage of this case than it was in *Coalition for TJ*, that case does not dictate the outcome as to discriminatory intent.

## **II. THE WEIGHTED LOTTERY CONTINUED THE FIELD TEST CRITERIA’S ADVERSE IMPACT ON ASIAN AMERICANS—BUT *COALITION FOR TJ* CHANGED THE LEGAL STANDARD**

The data in the record from the use of the weighted lottery indicate that it produced much the same result for Asian-American students as

did the field test criteria. JA231 (FAC ¶ 88). On balance, somewhat fewer Asian-American applicants were invited to the STEM magnet programs under the weighted lottery, and a handful more were invited to the Humanities programs. *Id.* In all four programs, Asian Americans received substantially fewer seats than they had in the pre-Metis era. *Id.*

These allegations of disparate impact were so clear that the district court held that there was “no real dispute . . . that the field test criteria disproportionately affected Asian American students.” JA182. That is still true. The allegations in the amended complaint show that Asian Americans are still disadvantaged because they disproportionately must earn higher MAP scores in order to qualify for a spot in the lottery than children of other racial groups. JA230–31 (FAC ¶¶ 87–89). The data attached to AFEF’s Rule 60(b) motion drive home this point by showing the substantial gap between the scores that students in the low free and reduced-price lunch band—where most Asian American students attend elementary school—and those in the highest band must attain to qualify for the lottery. JA266–67. Under the standard the district court applied when it denied the first motion to dismiss, there is no question AFEF has plausibly alleged a continued disparate impact.

However, *Coalition for TJ* rejected the district court’s initial legal standard and held instead that no disparate impact exists so long as Asian Americans still earn more seats in the magnet programs than the group’s proportion of the applicant pool. 68 F.4th at 881–82. To be clear, the district court’s initial legal analysis was right, and *Coalition for TJ* was wrong. As Judge Rushing pointed out in dissent in that case, the majority there necessarily concluded that the school district “could not have discriminated against Asian students by reducing their success rate—even intentionally and with a discriminatory purpose—so long as Asian students remain no *less* successful than students of other races.” *Id.* at 903 (Rushing, J., dissenting). Because such a rule would permit MCPS and other districts to engage in racial balancing by proxy, it cannot be the proper way to measure disparate impact in an intentional discrimination case.

However, AFEF recognizes that *Coalition for TJ* is binding on this Court. Because Asian Americans earn more seats at the magnet programs than their share of the applicant pool, AFEF cannot show disparate impact under *Coalition for TJ*. And because that panel also held that a showing of disparate impact is a required element of an

*Arlington Heights* claim, *id.* at 882, AFEF cannot prevail. It can only preserve its disparate impact argument for en banc or Supreme Court review.<sup>2</sup>

### III. AFEF SEEKS TO PRESERVE ITS ARGUMENTS FOR EN BANC OR SUPREME COURT REVIEW

AFEF recognizes that it cannot prevail before the panel under the legal standard of *Coalition for TJ*. So long as that case remains binding, AFEF simply seeks to preserve its arguments for further review. That includes an argument that the district court abused its discretion when it denied AFEF's Rule 60(b) motion, because under the proper legal standard for disparate impact, the evidence presented demonstrates precisely how local norming adversely affects Asian-American applicants. Should the Supreme Court grant the pending petition for certiorari in *Coalition for TJ*—which it has now considered at four

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<sup>2</sup> Because the district court dismissed the amended complaint on the ground it failed to adequately plead discriminatory intent, it never reached whether the lottery criteria could survive strict scrutiny. Nor should this Court in the first instance. Were it to do so, however, it should take the same approach the district court took in its 2021 opinion and recognize that the strict scrutiny inquiry is “ill-suited for resolution on the pleadings.” JA189.

separate conferences—then this Court should hold this case pending a decision on the merits and permit supplemental briefing afterwards.

### CONCLUSION

AFEF respectfully submits the foregoing brief and seeks relief in accordance with Section III above.

### ORAL ARGUMENT STATEMENT

Oral argument is not necessary in this case. However, if the Supreme Court grants the petition for a writ of certiorari in *Coalition for TJ*, AFEF wishes to reserve the right to ask for oral argument.

DATED: January 31, 2024.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

No. 23-1068      **Caption:** Ass'n for Ed. Fairness v. Montgomery Cnty. Bd. of Ed.

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