

CASE NO. 22-1280

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

COALITION FOR T.J.,
Plaintiff-Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Defendant-Appellant

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

**BRIEF OF *AMICI CURIE* THE AMERICAN HINDU COALITION,
CHINESE AMERICAN CITIZENS ALLIANCE – GREATER NEW YORK,
THE FRIENDS OF LOWELL FOUNDATION, NO LEFT TURN IN
EDUCATION, PARENT LEADERS FOR ACCELERATED CURRICULUM
AND EDUCATION NYC, THE RICHMOND JEWISH COALITION, AND
UNITED AGAINST ANTISEMITISM – NOVA IN SUPPORT OF
PLAINTIFF-APPELLEE COALITION FOR TJ SEEKING AFFIRMANCE**

GARY M. LAWKOWSKI
Counsel of Record
Va. Bar ID No. 82329
Dhillon Law Group, Inc.
2121 Eisenhower Avenue, Suite 402
Alexandria, Virginia 22314
Telephone: 703-965-0330
Facsimile: 415-520-6593
GLawkowski@Dhillonlaw.com

SUE GHOSH STRICKLETT
D.C. Bar No. 429633
American Hindu Coalition
42618 Trade West Drive
Sterling, VA 20166
Telephone: 301-785-1041
sueghosh@stricklettgroup.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST¹

Amicus curiae are a collection of groups that represent parents within Fairfax County and around the country and have an interest in ensuring high-quality education based on merit that does not discriminate against students based on their racial, ethnic, or religious background.

The American Hindu Coalition is an apolitical national nonprofit organization that promotes the civil rights of American Hindus and Americans who subscribe to Hindu Enlightenment Principles, particularly in education and education activities. The American Hindu Coalition has a significant Virginia Chapter, with members and constituents who have children currently enrolled in Fairfax County elementary and middle schools who are aspirants for admission to Thomas Jefferson High School for Science and Technology in future admission cycles and are concerned about the impact of the Fairfax County School Board's admissions changes.

¹ No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E). There is no parent corporation or publicly held corporation that owns 10% or more of stock of any *amicus curiae* described below. *See* Fed. R. App. P. 26.1(a); 29(a)(4)(A). The parties have consented to the filing of this brief. *See* Joint Notice of Consent to File Brief of Amicus Curiae (Docket No. 40) (May 10, 2022).

The Chinese American Citizens Alliance - Greater New York (CACAGNY) is a chapter of the Chinese American Citizens Alliance, the oldest Asian American advocacy group in the country. CACAGNY's mission is to empower Chinese Americans, as citizens of the United States of America, by advocating for Chinese-American interests based on the principles of fairness and equal opportunity, and guided by the ideals of patriotism, civility, dedication to family and culture, and the highest ethical and moral standards.

The Friends of Lowell Foundation ("FOLF") is a non-profit organization based in San Francisco. FOLF was founded in 2021 to advocate for and protect academic merit-based education and high academic standards in public education in San Francisco. FOLF's membership consists of alumni, students, parents, and community supporters of Lowell High School in San Francisco. Lowell is the oldest public high school west of the Mississippi, and renowned since 1856 for an academic merit-based admissions program and curriculum that has provided generations of immigrant and socioeconomically disadvantaged students with a path to the American Dream. *See Friends of Lowell*, Friends of Lowell Found. (Accessed June 13, 2022), <https://www.friendsoflowell.org/>.

No Left Turn in Education is a national non-profit organization dedicated to reviving objective thinking in education by educating, empowering, and engaging students, parents, and members of the community. No Left Turn in Education is

particularly focused on emphasizing the role of parents as the primary custodian for their own children and seeks a future of education where every individual can pursue excellence. *See Mission, Goals & Objectives, No Left Turn in Education* (2021), <https://www.noleftturn.us/mission-goals-objectives/>.

Parent Leaders for Accelerated Curriculum and Education NYC (“PLACE-NYC”) is an organization based in New York City with a mission to advocate for challenging and rigorous education for every public school student, and access and opportunity for all to achieve their full potential.

The Richmond Jewish Coalition is an organization of Jews promoting solutions grounded in America's founding principles: ordered liberty in a civil society predicated on the rule of law, a free market, and equal opportunity for all. The Richmond Jewish Coalition strongly believes a public that understands and embraces these concepts will never stifle debate and will diminish acts of antisemitism and other manifestations of hatred. The Richmond Jewish Coalition believes in the innate moral compass of people to do the right thing for their families and communities when they are informed and encouraged to engage.

United Against Antisemitism – Northern Virginia (UAA-NOVA) is an organization of Jews and their allies who are committed to fighting antisemitism in all its forms. UAA-NOVA is committed to the principles of liberalism, especially freedom of thought and conscience, as well as equality of opportunity, as Jewish

communities and other minorities have always flourished in societies where these values are upheld. UAA-NOVA is particularly committed to engaging with K-12 schools to ensure teachers are properly trained on issues related to antisemitism, Jewish history, and the Holocaust and that Jewish students are educated in schools free from incidences of antisemitism.

INTRODUCTION

America is a land where we do not cut down the tall poppies; instead, we nurture them and let them grow into their full potential. The beckoning light of what John Winthrop called “a city upon a hill” shines brightest when it advertises the American dream, a vision where each person has an equal opportunity to pursue happiness to the best of their abilities, unencumbered by the racial, ethnic, religious, or class prejudices that afflict much of the world. As a nation, and as a school district, America and Fairfax County have never fully lived up to this promise. But it remains an aspirational goal: a place where you can strive to be the best version of yourself, where you will be judged primarily on merit.

Finding ways to improve educational opportunities for people who may have been historically underserved or overlooked is a laudable goal. But the solution cannot be to enhance equality by leveling down or by deliberately holding students back from reaching their potential based on their race or ethnic origin.

This is unfortunately what is happening with the Fairfax County School Board's (the "Board's") changes to the admissions procedures for Thomas Jefferson High School for Science and Technology ("TJ"). The Board's changes disregard the mission of TJ, along with its history of excellence, and depart from the cherished ideals of equality of opportunity. As the district court found, despite being formally neutral, the Board's changes are deliberately intended to achieve a preferred racial balance at the expense of high performing students, particularly high performing Asian students. As such, these changes violate the equal protection rights guaranteed to these students by the Fourteenth Amendment.

ARGUMENT

I. The Board's Changes to TJ's Admissions Criteria Disregard the Mission of TJ

The mission of TJ is to provide a unique learning environment for students who are academically gifted in areas of science, technology, engineering, or math, and who are otherwise academically underserved by their respective base schools. To wit, on its website, TJ defines its mission as follows: "The mission of Thomas Jefferson High School for Science and Technology is to provide students with a challenging learning environment focused on math, science, and technology." *Mission Statement*, Thomas Jefferson High Sch. for Sci. and Tech. (Accessed May 26, 2022), <https://tjhsst.fcps.edu/about>.

TJ is an academic-year Governor's School. *Academic-Year Governor's Schools*, Va. Dep't of Educ. (Accessed May 26, 2022), https://www.doe.virginia.gov/instruction/governors_school_programs/academic_year/index.shtml#tj. Governor's Schools in Virginia are "designed to assist divisions as they meet the needs of a small population of students whose learning levels are remarkably different from their age-level peers," with a foundation "center[ed] on best practices in the field of gifted education and the presentation of advanced content to able learners." *Governor's School Programs*, Va. Dep't of Educ. (Accessed May 26, 2022), https://www.doe.virginia.gov/instruction/governors_school_programs. In order to achieve these purposes, "[e]ach program stresses non-traditional teaching and learning techniques," such as "small-group instruction, hands-on-experiences, research, field studies, or realistic or artistic productions," which "are major elements in the institutional design at all [Governor's] schools." *Id.*

As the Virginia Department of Education notes, "[t]he 'Regulations Governing Educational Services for Gifted Students' mandate differentiated instructional opportunities for gifted students in grades K-12 in Virginia, and the Virginia's Academic-Year Governor's School (AYGS) Programs are an important component to offering differentiated instruction." *Id.* The premise of gifted programs and gifted education is that the Commonwealth does a disservice to

gifted students by not providing them with opportunities at a level and pace that is above that of their peers. Virginia's Regulations Governing Educational Services for Gifted Students define "gifted students" as those "who demonstrate high levels of accomplishment or who show potential for higher levels of accomplishment when compared to others of the same age, experience, or environment" and these "aptitudes and potential for accomplishment are so outstanding that they require special programs to meet their educational needs." 8 Va. Admin. C. 20-40-20. In order to "accommodate the accelerated learning aptitudes" of gifted students in their areas of strength, "appropriately differentiated curriculum and instruction" focuses on "gifted students' needs for (i) advanced content and pacing of instruction; (ii) original research or production; (iii) problem finding and solving; (iv) higher level thinking that leads to the generation of products; and (v) a focus on issues, themes, and ideas within and across areas of study." *Id.*

This focus sets TJ apart from other schools. TJ is an elite institution that is routinely ranked one of, if not the, top public high schools in the country. For the class of 2020, the average SAT score in math for a TJ student is over 170 points higher than the average score in Fairfax County, and the average critical reading score is over 140 points higher. *School Profile: Thomas Jefferson High School for Science and Technology 2021-2022*, Fairfax Cnty. Pub. Schs., (Accessed June 15, 2022), <https://tjhsst.fcps.edu/sites/default/files/media/inline-files/school->

[profile%202021-22_0.pdf](#). For the class of 2021, 99 percent of TJ seniors reported that they would be attending a four-year college or university after graduation, with schools such as Harvard University, Cornell University, and the University of Virginia listed among the most popular post-secondary destinations. *Id.* Because of these impressive statistics, there is often a conflation of correlation and causation between attending TJ and pursuing a four-year degree at a top college or university. While a TJ diploma may look good on a college application and many students graduate TJ well-prepared for college and well-rounded academically, it is not a college prep school or general education institution. The mission of TJ remains providing a challenging learning environment focused on math, science, and technology.

Critics of admission testing have pointed out that testing does not provide a holistic evaluation of students. To wit, the *Brief for Amici Curiae Professors of Social Science and Education Policy* notes “standardized tests cannot simply determine which students are ‘better’ or ‘more meritorious’ than others.” *Coal. for T.J. v. Fairfax Cnty. Sch. Bd.*, Brief for Amici Curiae Professors of Social Science and Education Policy in Support of Defendant-Appellant Fairfax County School Board Seeking Reversal, No. 22-1280, 2022 WL 1568329, at *17 (4th Cir. May 13, 2022) . This is true to large extent: a single standardized test does not and cannot tell whether a student is a good person, whether they have overcome

adversity, or whether they are improving over time. But standardized tests are good at identifying narrow and specific skill sets, such as present aptitude in math or science. And when people talk about “merit,” with respect to TJ, that is the aptitude they are primarily talking about because the mission of TJ is to provide math and science education for students with present math and science abilities that are greater than their peers.

Unfortunately, officials both here in Virginia and across the nation are lowering academic standards, often under the guise of purporting to help underserved communities. The result is that performance declines for everyone, including the very people the changes are supposed to help.

In 2020, the *Washington Post* editorial board lamented “Virginia officials have long boasted about requiring more of their students than what is mandated by the federal government. Their constituents should be asking them why they would want to abandon that principle.” *Opinion: Virginia Made a Mistake by Easing its Academic Standards*, Wash. Post (Feb. 8, 2020),

<https://www.washingtonpost.com/opinions/virginia-made-a-mistake-by-easing-its-academic-standards/2020/02/07/1aa11050-4922-11ea-9164->

[d3154ad8a5cd_story.html](https://www.washingtonpost.com/opinions/virginia-made-a-mistake-by-easing-its-academic-standards/2020/02/07/1aa11050-4922-11ea-9164-d3154ad8a5cd_story.html). Of particular concern was a reduction in standardized testing, lowering the threshold for students to pass standardized tests, and changes to how testing performance impacts school accreditation. The result has been that

Virginia students perform worse on national assessments and are learning less, including those students the changes in academic standards were ostensibly designed to help. See *Our Commitment to Virginians: High Expectations and Excellence for All Students*, Va. Dep't of Educ. (May 2022), https://www.doe.virginia.gov/statistics_reports/our-commitment-to-virginians.pdf.

Similar stories have played out across the country, including at other elite educational institutions. Like TJ, Lowell High School in San Francisco traditionally used a selective admissions process that included grade and test score cutoffs for most applicants. Nathan Heller, *What Happens When An Élite Public School Becomes Open to All?*, *The New Yorker* (Mar. 7, 2022), <https://www.newyorker.com/magazine/2022/03/14/what-happens-when-an-elite-public-school-becomes-open-to-all>. In 2020, Lowell temporarily switched to a lottery admissions process, which was made permanent in 2021. When “the first round of grades had been filed for the freshman, [the] teachers saw a big change from previous years,” with one reporting “I have three times as many students as usual failing,” while Lowell’s principal acknowledged that “the average freshman G.P.A.s that autumn fell ten per cent [sic] from what they had been before the pandemic.” *Id.*

Students have different strengths and weaknesses. Some students are exceptionally good at math and science, while others are very strong in history,

languages, or performing arts. Some students need a highly competitive environment to thrive, while others do not. One is not better than the other. In a large, pluralistic community such as Fairfax County, all strengths are needed for a vibrant society. The purpose of a school like TJ is to serve a subpopulation of academically advanced math and science students that require a specific learning environment to fulfill their potential. TJ's unique resources and courses propel them forward well beyond what is possible at most base schools. Keeping them engaged and fueling their talent can only enrich society, and help them take on future local, national, and global challenges. Withholding that experience from them, in a misguided pursuit of equity or some other social justice goal, is little more than attempting to cut the tall poppies.

II. The New Admissions Policy is Discriminatory

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 2. “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In order for plaintiffs to prevail, a decision does not need to be based “solely” on race, nor do racial concerns need to be the “dominant” or “primary” concern behind adopting a policy. *Id.* Instead, “[w]hen there is a proof that a discriminatory purpose has been a motivating factor

in the decision, this judicial deference is no longer justified.” *Id.* at 265-66. In *Arlington Heights*, the Court identified four factors that are relevant for identifying discriminatory intent in facially neutral policies: (1) “[t]he impact of the official action – whether it ‘bears more heavily on one race than another;’” (2) “[t]he historical background of the decision;” (3) “[d]epartures from the normal procedural sequence;” and (4) “[t]he 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, 267, 268 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

A. The Impact of the New Admissions Policy Bears More Heavily on Asian Students

The first *Arlington Heights* factor is whether a policy bears more heavily on one race than another. *Id.* at 266. The new admissions policy plainly bears more heavily on Asian students than others. Admissions data shows a dramatic decline in the number of Asian students admitted to TJ under the new admissions policy. Moreover, an examination of the scholastic and demographic statistics for middle schools in Fairfax County shows that this drop off was an inevitable result of the new admissions policy.

i. Admissions Data Shows that the New Admissions Policy Has a Disproportionate Impact on Asian Students

In 2021, the first year under the new admissions criteria, 54.36 percent of offers of admission went to students who identified as Asian. *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM*, Fairfax Cnty. Pub. Schs. (June 23, 2021), <https://www.fcps.edu/news/tjhsst-offers-admission-550-students-broadens-access-students-who-have-aptitude-stem>. In the five years before, the corresponding number never dipped below 65 percent, and averaged 71.07 percent, coming in at 73.0 percent in 2020, 72.87 percent in 2019, 65.2 percent in 2018, 74.9 percent in 2017, and 69.4 percent in 2016. *TJHSST Offers Admission to 486 Students*, Fairfax Cnty. Pub. Schs. (June 1, 2020), <https://www.fcps.edu/news/tjhsst-offers-admission-486-students>; *FCPS' TJHSST Offers Admission to 494 Students*, Fairfax Cnty. Pub. Schs. (May 31, 2019), <https://www.fcps.edu/news/fcps-tjhsst-offers-admission-494-students>; *TJHSST Offers Admission to 485 Students for the Class of 2022*, Fairfax Cnty. Pub. Schs. (Apr. 9, 2018), <https://www.fcps.edu/news/tjhsst-offers-admission-485-students-class-2022>; *FCPS Offers Admission to TJHSST to 490 Students*, Fairfax Cnty. Pub. Schs. (May 16, 2017), <https://www.fcps.edu/news/fcps-offers-admission-tjhsst-490-students>; *FCPS' Thomas Jefferson High School for Science and Technology Offers Admission to 483 Students*, Fairfax Cnty. Pub. Schs. (Apr. 8, 2016). Within one year, as a result of the changes to TJ's admissions policies, the percentage of

offers of admissions received by Asian students declined by nearly 24 percent from the five-year average. While the number of Asian students offered admission increased in 2022 to around 60 percent, it is still more than 10 percentage points below the five-year average, and five percentage points below the lowest admissions numbers over the five years preceding the admissions change. *See* Hannah Natanson, *Fairfax Releases Demographic Data on Thomas Jefferson Class of 2026*, Wash. Post (May 25, 2022), <https://www.washingtonpost.com/education/2022/05/25/tj-class-of-2026-data/>. By contrast, the admissions numbers for every other racial demographic category listed by Fairfax County increased. This is a disproportionate impact on Asian students.

In his concurring opinion granting a stay in this case, Chief Judge Heytens stated “[t]o me, the more obvious relevant comparator for determining whether this race neutral admissions policy has an outsized impact on a particular racial group is the percentage of applicants versus the percentage of offers.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *3 (4th Cir. Mar. 31, 2022) (Heytens, C.J., concurring). Using this metric, the disproportionate impact of the change in admissions policy is even more stark. Every year from 2016-2021, Asian students made up more than half of students who apply for admission to TJ. From 2016-2020, Asian students accounted for an average of just under 54

percent of applications to TJ, while receiving an average of just over 71 percent of admissions offers – meaning the number of offers to Asian students averaged just over 17 percent higher than the number of applications between 2016-2020. In 2021, this gap was reduced to 3.77 percent – a more than 78 percent decrease.

In his concurring opinion granting a stay in this case, Chief Judge Heytens also suggested that there can be no disparate impact as long as Asian students are offered admission at a rate above the percentage of Asian applicants. *See Coal. for TJ*, 2022 WL 986994 at *3 (4th Cir. 2022) (Heytens, C.J., concurring). While the Chief Judge’s approach is understandable, it appears to conflate disparate impact under statutes like the Fair Housing Act and disproportionate impact under the *Arlington Heights* analysis of Equal Protection Claims. Plaintiff-Appellee’s claim in this case is based on a disparate treatment allegation under the Equal Protection Clause. Disparate treatment claims under the Equal Protection Clause are different from disparate impact claims under various civil rights statutes; the former requires proof of discriminatory intent, while the latter only requires a Plaintiff to show a disproportionately adverse effect on minorities that is not justified by a legitimate rationale. *See Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 524 (2015). Disproportionate impact is one relevant factor under *Arlington Heights* for showing that a facially neutral law was adopted with discriminatory intent. The result is two separate tests that, while conceptually

related, do two different things. The purpose of a disparate impact analysis under laws like the Fair Housing Act is to make a claim based solely on the disproportionate effect on a minority community. The purpose of a disproportionate impact analysis in an Equal Protection claim is to show that a decision maker acted with improper motive; disproportionate impact is one relevant factor under *Arlington Heights*, but does not *ipso facto* establish an Equal Protection Claim.

Plaintiff-Appellees in this case advance an Equal Protection claim. They are not claiming that the impact on Asian students, standing alone, is unconstitutional. They are instead pointing to the disproportionate impact of the policy on Asian students as on factor suggesting that the Board acted with discriminatory intent.

Looking at the percentage of Asian students admitted relative to the percentage of applicants and concluding there is no violation as long as Asian students are admitted at a higher rate than their share of the applicant pool makes sense under a disparate impact analysis for purposes of other civil rights laws. It does not make sense under a disproportionate impact analysis under the Equal Protection Clause, where the resulting effect is relevant as a proxy indicating discriminatory intent.

ii. Asian Students Are Differently Situated Based on Their Distribution in Fairfax County Public Middle Schools

The impact of the admissions change was predicable in part because of the distribution of Asian students in the Fairfax County Public School system. Asian students are not equally represented in each middle school. For the 2020-2021 school year, the population of Asian students ranged from a high of 49.29 percent of the student body at Carson Middle School to a low of 4.74 percent of the student body at Whitman Middle School. *Compare School Profile: Carson Middle School Demographics*, Fairfax Cnty. Pub. Schs. (Accessed June 3, 2022),

https://schoolprofiles.fcps.edu/schlprfl/f?p=108:13::NO::P0_CURRENT_SCHOOL_ID,P0_EDSL:171,0

with School Profile: Whitman Middle School

Demographics, Fairfax Cnty. Pub. Schs. (Accessed June 3, 2022),

https://schoolprofiles.fcps.edu/schlprfl/f?p=108:13::NO::P0_CURRENT_SCHOOL_ID,P0_EDSL:221,0

As Plaintiff-Appellees note in their Memorandum in

Support of Preliminary Injunction, the size of the population of Asian students in

Middle Schools that traditionally sent large numbers of students to TJ inevitably

means that the new admissions procedures will result in fewer Asian students

receiving offers of admission. See Coal. for TJ v. Fairfax Cnty. Sch. Bd.,

Memorandum in Support of Motion for Preliminary Injunction, No. 1:21-cv-

*00296-CMH-JFA, 2021 WL 5755685, at *10-*12 (E.D. Va. Aug. 26, 2021) (ECF*

No. 16).

Moreover, as described above, TJ is a school that is dedicated to excellence in science and math. As the results of Virginia's Standards of Learning tests show, science and math aptitude vary widely across Fairfax County Middle Schools. To wit, in 2018-2019, 97 percent of students at Longfellow Middle School passed their Eighth Grade Science SOL, while 46 percent had an advanced pass, the highest numbers in the county. *See* SOL Test Pass Rates & Other Results, Va. Dep't of Educ. (Accessed June 3, 2022), https://www.doe.virginia.gov/statistics_reports/sol-pass-rates/index.shtml. By contrast, Whitman Middle School had a pass rate of only 60 percent, with only 2 percent of students obtaining an advance pass rate. *Id.* Math scores tell a similar story: in 2018-2019, Franklin Middle School led the county with an advanced pass rate of 48 percent and an overall pass rate of 93 percent, while Whitman Middle School had the lowest advanced pass rate, 6 percent, with a 67 percent overall pass rate. *Id.* Four out of five schools with the highest advanced pass rates for grade eight science SOLs also have one of the five highest populations of Asian students in the county, while three of the top five schools with the highest advanced pass rates in grade eight mathematics SOLs also have one of the five highest populations of Asian students.

The new admissions criteria not only discriminate against Asian students by forcing them to compete against each other in schools where there are larger Asian

populations, but also discriminate against Asian students by effectively placing them into an admissions bracket with a higher baseline level of competition. This does a disservice to the individual students involved. Ignoring this reality does a disservice to the core mission of TJ: providing a unique educational environment to individual students whose science and math learning levels are “remarkably different from their age-level peers.”

The prior admissions criteria allowed for this possibility. The new criteria make it much harder. Not long ago, the advocates concerned that minority and low-income students were being overlooked in the TJ admissions process sought to place greater weight on the admissions test over more intangible factors such as extracurricular activities and personal essays. *See* Emma Brown, *Jefferson H.S., Fairfax Schools Shut Out Blacks and Latinos, Complaint Alleges*, Wash. Post (Jul. 24, 2012), https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-alleges/2012/07/23/gJQAPOIO5W_story.html (“Advocates for gifted students have been pressing the School Board to remedy that problem [that the admissions criteria are failing to identifying the best and brightest in math and science] by overhauling the TJ admissions process, giving more weight to applicants’ test scores and less to written essays.”). A “remarkable” student at a poor performing school could demonstrate their abilities on a test that provided a one-to-one

comparison with students from other schools. Likewise, a “remarkable” student further down the class rankings at a high performing school could demonstrate that they were equally proficient as the top students at other schools.

Class rank is an apples-to-oranges comparison when schools have different performance records and different levels of competition. This is bad policy any time. It is unconstitutional where, when in this case, it is done purposefully to limit the number of students from one racial or ethnic group.

B. The Historical Background and the Administrative History of the Admissions Change Evinces an Intent to Engineer a Preferred Demographic Mix

The historical background and administrative history of the admissions change reveal that the changes were animated by a desire to artificially manufacture the demographic makeup of TJ. As the Washington Post notes, debates around the process for admission to TJ persisted for decades in the context of increasing black and Hispanic enrollment. *See* Hannah Natanson, *How Should a Premier Magnet School Boost Black and Latino Enrollment? A Suggested Lottery Spurs Fierce Debate*, Wash. Post (Oct. 3, 2020),

https://www.washingtonpost.com/local/education/how-should-a-premier-magnet-school-boost-black-and-latino-enrollment-a-suggested-lottery-spurs-fierce-debate/2020/10/02/ccd10348-04b1-11eb-a2db-417cddf4816a_story.html; Emma

Brown, *Jefferson H.S., Fairfax Schools Shut Out Blacks and Latinos, Complaint*

Alleges, Wash. Post (Jul. 24, 2012),

[https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-](https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-alleges/2012/07/23/gJQAPOIO5W_story.html)

[alleges/2012/07/23/gJQAPOIO5W_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-alleges/2012/07/23/gJQAPOIO5W_story.html). These debates moved back to the forefront in 2020, driven in part by national outcry following the murder of George Floyd and the release of admissions statistics showing fewer than ten black students were admitted to the Class of 2024. *Id.* In this context, the district court opinion ably recounts how “the Board’s actions in historical context leave[] little doubt that its decision to overhaul the TJ admissions process was racially motivated,” including showing that “[t]he impetus to overhaul TJ admissions came from several sources, all of which confirm that the Board and high-level FCPS actors set out to increase and decrease the representation of certain racial groups at TJ to align with districtwide enrollment data.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6, *7 (E.D. Va. Feb. 25, 2022).

C. The Board Departed from Its Normal Procedures to Exclude Parents from its Decision Making Process

Parents have a central and fundamental role in providing for the education of their children. “The child is not the mere creature of the [S]tate; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). Accordingly, it is the “liberty of parents and guardians to direct

the upbringing and education of children under their control.” *Id.* at 534-35. This is particularly true in Virginia, where “[a] parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent’s child.” Va. Code § 1-240.1.

In this case, the Board departed from its normal procedure in ways that denied parents their right to weigh in on the education of their children. As noted above, debate over the admissions criteria for TJ is nothing new; there have been decades-long calls to reform the admissions process. Moreover, TJ admits, and has admitted, students on a regular, predictable schedule going back decades. There are no emergency circumstances that could justify a departure from regular order on a longstanding and highly contentious issue such as this. Yet, that is exactly what the Board did. Rather than make its changes to the admissions process at a regular Board meeting, the Board voted, without any prior public notice of a vote, to remove the admissions exam at an October 6 “work session” where the Board does not “typically” take votes. *See Coal. for TJ*, 2022 WL 579809, at *8. It then followed this action up at a meeting on December 17, where it voted to adopt a new admissions plan that “had not been presented publicly in any meeting before it was voted on,” and which was posted to the public “a half hour before the closed session began.” *Id.* at *8, *9. The result led one Board member to state she “could not recall a messier execution of Board-level work in her nine years on the Board.”

Id. at *9. This was not a normal procedure, and it operated to limit the ability of parents to determine available educational opportunities for their children.

CONCLUSION

Our schools are at their best when they encourage all students to reach their full potential by striving towards excellence. This includes students who have historically been underserved or overlooked. But the solution cannot be leveling down, or deliberately holding students back based on race. For the foregoing reasons, this Court should affirm the district court's ruling granting summary judgment to the Plaintiff-Appellees.

Dated: June 21, 2022

Respectfully submitted,

/s/Gary M. Lawkowski

Gary M. Lawkowski

D.D.C. Bar ID: VA125

DHILLON LAW GROUP, INC.

2121 Eisenhower Avenue, Suite 402

Alexandria, Virginia 22314

Telephone: 703-965-0330

Facsimile: 415-520-6593

GLawkowski@Dhillonlaw.com

Counsel of Record for Amici Curiae

RULE 32(g)(1) COMPLIANCE

Consistent with Rule 32(g), I certify that the foregoing brief contains 4,949 words, in compliance with Federal Rule of Appellate Procedure 29(a)(4)(G), and that this brief complies with the type style requirements of Rule 32(a)(6), because it has been prepared in Microsoft Word using Times New Roman, 14-point font.

Dated: June 21, 2022

By: /s/Gary M. Lawkowski
Gary M. Lawkowski

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a brief of *amicus curie* the American Hindu Coalition, the Chinese American Citizens Alliance – Greater New York, the Friends of Lowell Foundation, No Left Turn in Education, Parent Leaders for Accelerated Curriculum and Education NYC, the Richmond Jewish Coalition, United Against Antisemitism – Northern Virginia in Support of the Plaintiff-Appellee Coalition for TJ Seeking Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send a notification of such filing to all counsel of record in this action.

Dated: June 21, 2022

By: /s/Gary M. Lawkowski
Gary M. Lawkowski

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Pro Bono Government

COUNSEL FOR: Please see attached.

as the (party name)

- appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/Gary M. Lawkowski (signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Gary M. Lawkowski Name (printed or typed)

703-965-0330 Voice Phone

Dhillon Law Group Firm Name (if applicable)

Fax Number

2121 Eisenhower Ave., Suite 402

Alexandria, VA 22314 Address

glawkowski@dhillonlaw.com E-mail address (print or type)

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Gary Lawkowski**

COUNSEL FOR:

- The American Hindu Coalition;
- The Chinese American Citizens Alliance – Greater New York;
- The Friends of Lowell Foundation;
- No Left Turn in Education;
- Parent Leaders for Accelerated Curriculum and Education NYC;
- The Richmond Jewish Coalition; and
- United Against Antisemitism – Northern Virginia.

Kiren Mathews

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Notice will be electronically mailed to:

Donald B. Verrilli, Jr.: donald.verrilli@mto.com, Christina.weber@mto.com
Robert E. Toone, Jr., Assistant Attorney General: Robert.Toone@state.ma.us, AdlawEfilings@state.ma.us, Sherrie.Costa@state.ma.us
Sona Rewari: srewari@huntonak.com, cbaroody@huntonak.com
Ms. Ginger Dawn Anders: Ginger.Anders@mto.com, christina.weber@mto.com
Mr. Debo P. Adegbile: debo.adegbile@wilmerhale.com
Trevor Stephen Cox: TCox@HuntonAK.com, smeharg@huntonak.com, lmyers@hunton.com
Ms. Sydney Foster: sydney.foster@usdoj.gov, patrice.newsome@usdoj.gov, pamelal.marshall@usdoj.gov
Christopher M. Kieser: ckieser@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Nicolas Y. Riley: nicolas.riley@usdoj.gov
Ms. Sarah Hinger: shinger@aclu.org, eskelley@aclu.org, jjahangir@aclu.org, gperezleon@aclu.org
Mrs. Erin Elizabeth Wilcox: ewilcox@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Glenn Evans Roper: geroper@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Celia Howard O'Leary: coleary@southeasternlegal.org

Ms. Annie Chiang: achiang@oag.state.va.us, kharrison@oag.state.va.us
Arthur Luk: Arthur.Luk@arnoldporter.com, maocoa4@arnoldporter.com
Xiaonan April Hu: april.hu@mto.com
Alison E. Somin: ASomin@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Mica Louise Moore: mica.moore@mto.com
Michaele Nicole Turnage Young: mturnageyoung@naacpldf.org, koliver@naacpldf.org
Francisca D. Fajana: ffajana@latinojustice.org
Thornton Russell Nobile: rnobile@judicialwatch.org
Gary Michael Lawkowski: glawkowski@dhillonlaw.com, gary.lawkowski@gmail.com

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