**No. 22-1280**

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

COALITION FOR TJ,
*Plaintiff – Appellee,*

v.

FAIRFAX COUNTY SCHOOL BOARD AND DR. SCOTT BRABAND,
*Defendants – Appellants.*

---

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 1:21-cv-296-CMH-JFA
Honorable Claude M. Hilton, District Judge

# BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1280 Caption: Coalition for TJ v. Fairfax County School Board, et al.

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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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/ Russell Nobile Date: 6/20/2022

Counsel for: Amicus Judicial Watch, Inc.



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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Allied Educational Foundation
(name of party/amicus)

who is Amicus, makes the following disclosure:
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Signature: s/ Russell Nobile Date: 6/20/2022

Counsel for: Amicus Allied Educational Foundation



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## RULE 29(a)(4)(E) STATEMENT

This brief was authored by the undersigned counsel and no party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only Judicial Watch, Inc. and Allied Educational Foundation contributed money that was intended to fund preparing or submitting this brief.

## IDENTITY AND INTERESTS OF AMICI CURIAE

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch files amicus curiae briefs in cases involving issues it believes are of public importance, including cases involving race-based affirmative action programs in higher education. *See, e.g.*, Brief of Amicus Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner in the Supreme Court of the United States, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199; and Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner, *Fisher v. Univ. of Tx. at Austin*, 579 U.S. 365 (2016) (No. 14-981).

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an *amicus curiae* in the U.S. Supreme Court and other federal courts on many occasions.

*Amici* have an interest in jurisprudence concerning race-based education policies, particularly as they relate to the Fourteenth Amendment's Equal Protection Clause. *Amici* believe race-based admission practices are antithetical to the

Fourteenth Amendment and fundamentally at odds with text of the Equal Protection Clause. *Amici* respectfully submit this case presents an opportunity to address the fundamental problems of racial balancing policies targeting primary and secondary school admissions.

*Amici* have authority to file this brief pursuant to Fed. R. App. P. 29(a)(2), because all parties have consented to its filing. *Amici* believe this Court should affirm the trial court's judgment.

## ARGUMENT

### I. Ample Evidence Showed That the Enacted Admission Plan Was Developed and Adopted with Invidious Discriminatory Intent.

The Supreme Court has repeatedly stated that the equal protection prohibition against racial discrimination adversely affecting an individual is at the very core of the Equal Protection Clause. *See e.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in judgment); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (citation and internal quotation marks omitted)).

Defendants Fairfax County School Board and Dr. Braband (collectively "FCPS") contend that the "undisputed facts show that Board sought to broaden access to TJ for high-achieving students across all County middle schools, by breaking down socioeconomic and geographic barriers that had impeded students of all races." FCPS Br. 38. But the record and trial court's opinion show that this is simply not true. In fact, there was substantial evidence from public and private statements which, placed in "historical context," left "little doubt that [Defendants'] decision to overhaul the TJ admissions process was racially motivated." *See Coal. For TJ v. Fairfax Cty. Sch. Bd.*, 2022 U.S. Dist. LEXIS 33684, *19-22 (E.D. Va. Feb. 25, 2022).

One of the core purposes of the Equal Protection Clause is to guarantee that individuals will be free from discrimination based upon race. Allowing racial balances to determine who is admitted to primary and secondary schools will cause enormous conflict. *See Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 325 (2014) (Scalia, J., concurring) ("The Equal Protection Clause 'cannot mean one thing when applied to one individual and something else when applied to another color. If both are not accorded the same protection it is not equal'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-290 (1978); *see also Fisher*, 579 U.S. at 399-400 (Alito, J., dissenting)). Achieving racial diversity does not compensate for the constitutional injury inflicted on innocent individual applicants from non-preferred racial groups, and to race relations generally. *See Parents Involved in Cnty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring) (noting that racial exclusions are "precisely the sort of government action that pits the races against one another, exacerbates racial tension, and 'provoke[s] resentment[.]'").

### A. The Record of Invidious Intent Cannot Be Controverted By FCPS's Semantics.

The trial court described no less than six different instances in which FCPS and staff made clear their intent to rebalance the racial composition of TJ by enacting a new admissions policy. *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *17-23.

FCPS words and actions show that the process was infected with impermissible intent from the very inception. *Id.* at *29.

As the court recounted, less than two weeks following the death of George Floyd, TJ's principal Ann Bonitatibus emailed the entire TJ community proclaiming that the demographics of TJ "do not reflect the racial composition in FCPS." *Id.* at *20. The next day an FCPS Board member emailed a local legislature, describing her "anger and disappointment" regarding underrepresentation of Black and Hispanic students and predicting there would be "intentional action forthcoming" from FCPS. *Id.* The record showed that Board members admonished Superintendent Braband that any forthcoming policy change needed to be "explicit in how we are going to address the under-representation of Black and Hispanic students." *Id.* at *20. Later, at a public meeting, another Board member explained that "in looking at what has happened to George Floyd," FCPS must now "recognize the unacceptable low numbers of African Americans that have been accepted by TJ." *Id.* at *20-21.

The trial court explained that these comments, together with other FCPS's actions, must be considered in their historical context. *Id.* at *19. The impetus for the policy change arose following a new push by Governor Northam to require schools to develop diversity goals and reporting; a recent report showing a disturbingly low number of Black students admitted in TJ's Class of 2024; and social

unrest following George Floyd's murder. The record showed that the Board was under tremendous pressure from state officials to simply do something to alter the racial balance at TJ. *Id.* at *8-9, *21, and *28. Describing the intensity of the situation, Superintendent Braband testified that "[s]tate-level dynamics, one, reflected by the October 1 report, and, two, by the Secretary of Education's task force" suggested that "just doing the same thing we've always done was not going to be received well." *Id.* at *9. Viewing the statements in context, there was significant evidence that racial balancing motivated FCPS's actions. Notably, FCPS does not back away from these statements or otherwise correct the public record. Nor does it recount how other FCPS board members privately admonished any member regarding any racially-suggestive statements. Instead, FCPS criticizes the trial court for not accepting their version of events, arguing that such statements were merely one-off comments that should not be attributed to FCPS as a whole. But this is classic admissible evidence, Fed. R. Evid. 801(d)(2), and the kind of statements regularly used to show discriminatory intent.

In any event, if FCPS contends these statements should not be taken at face value or disputes their contextual meaning, then why did FCPS file its own cross-motion for summary judgment? If FCPS now contends that written and public comments cannot be taken at face value then it should not have contended under Fed. R. Civ. P. 56(a) that there were no triable issues of material fact. The trial court

rightly took these statements at face value and determined that racial balancing was a primary feature, not a byproduct, of the enacted plan.

FCPS has sought to recast its interests as race neutral, contending that its underlying interest was merely to "breakdown socioeconomic and geographic barriers that had made it difficult for substantial numbers of students of *all* races."[1] FCPS Br. 43 (emphasis in original). But geographic diversity is simply a proxy for racial balancing here. While such interests can sound plausible, they provide little substance, especially, here, given the historical context. For example, *amici* cannot find where FCPS identified any "geographic barriers" that were limiting Black and Hispanic admissions at TJ. Is it their view that standardized tests created such barriers? Of course, geographic barriers are not the same as geographic underrepresentation and, regardless, the social questions raised following George Floyd's murder in Minneapolis, Minnesota had nothing to do with geographic barriers or representation in Fairfax County, Virginia's schools. These post hoc explanations certainly conflict with the assurances provided to legislatures.

"Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'diversity.'" *See Parents Involved*,

[1] FCPS' attempt to recast its interests is the type of "camouflage" or "disguise[]" that less-than-candid education administrators resort to when defending their race-conscious programs. *See Gratz v. Bollinger*, 539 U.S. 244, 304-05 (2003) (Ginsburg, J., dissenting) (colleges and universities "may resort to camouflage" or "disguise[]" to protect their race-conscious programs from attack).

551 U.S. at 732 (plurality opinion). While Defendants may "use various verbal formulations to describe the interest they seek to promote[,]" no post hoc recharacterization of FCPS's interests changes the record in these proceedings. *See id.* That is because the substance of FCPS's original interest was made clear as early as June 2020: To change the racial balance at TJ in favor of Black and Hispanic students at the expense of Asian American students. The principle underlying the prohibition against racial balancing is one of substance, not semantics. *Parents Involved*, 551 U.S. at 732.

### B. FCPS's Arguments that It Never Analyzed the Effect of the New Policy Or that It Could Have Done a More Thorough Job of Racial Balancing Are Unavailing.

The record is clear that after it identified racial imbalances, FCPS set out to rebalance TJ's admissions to better "reflect FCPS's racial composition." FCPS contends, however, that it merely sought to improve racial diversity "along with other types of diversity." FCPS Br. 51. But the truth is that FCPS was not interested in improving TJ's diversity – TJ's student body was already diverse. Rather, FCPS sought to change the racial mix by increasing the representation of underrepresented, preferred minorities (Blacks and Hispanics) to the disadvantage of other minorities (Asian Americans). To that end, an FCPS Board member declared that it "need[ed] to be explicit in how [it was] going to address the under-representation of Black and Hispanic students." *Coal. For TJ*, 2022 U.S. Dist. LEXIS 33684, at *8.

The common refrain throughout FCPS's brief is that "no racially discriminatory purpose motivated the Plan's adoption." FCPS Br. 12 and 44-45. FCPS makes two peculiar arguments among several arguments in support of this refrain. First, it makes the incredible claim that it enacted the new policy without knowing the effect it would have on TJ's student admissions and, as a result, there can be no discriminatory intent. It is quite remarkable that FCPS contends it adopted a new admissions policy for the country's top public high school without any understanding as to the impact it would have on students. This claim is even more incredible considering that the policy change was prompted by the Board's response to the civil upheaval following George Floyd's murder and after intense pressure by state officials to improve the racial balance of TJ's admissions. It is certainly a far cry from the "explicit" response promised by FCPS Board members.

In support of this argument, FCPS repeatedly reminds the court that it "undertook no [demographic modeling or other analysis] of the kind [..] that would have been critically important had racial balancing been the goal." FCPS Br. 23, 35, 43, 51, and 55. It contends the fact that "it undertook no demographic analysis of the *Plan's* likely effects [...] is evidence that that the Board was not engaged in racial balancing." *Id.* at 55 (emphasis in original). This unusual argument raises more questions than it answers. First, violations of the Equal Protection Clause have never required proof that defendants conducted any analysis in order to be found to have

acted with invidious intent. Arguing that it arbitrarily adopted a policy change without considering the effects or otherwise admitting it failed to conduct adequate due diligence is hardly refutes allegations that it acted with discriminatory intent. In any event, the trial court certainly did not err in giving this argument less weight compared to the many public and private statements by FCPS. The evidence showed the process was infected from its inception with the intent to racially balance admissions. It certainly was reasonable for the court to conclude that FCPS achieved its objective, no matter how little due diligence FCPS claims to have exercised.

Under *Parents Involved*, schools can pay attention to the number of minority admittees in the past in order to determine the number that is needed to provide a "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." 551 U.S. at 726. "Working forward from some demonstration of the level of diversity that provides the purported benefits" is allowable; "working backward to achieve a particular type of racial balance" is constitutionally impermissible. *Id.* at 729. Given that FCPS admits it never analyzed the plan it enacted, it is hard for it to argue now that it was "working forward" to achieve any specific educational benefit. The evidence showed FCPS focused on racial balancing, not pedagogic concerns.

FCPS's other peculiar argument is that it could not have engaged in impermissible racial balancing since the most recent class admitted to TJ still "bears

little resemblance to the school system's demographics." FCPS Br. 42. But "[i]nvidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979). "Discriminatory intent is simply not amenable to calibration." *Id.* FCPS concedes that the enacted Plan rebalanced TJ's admissions, in part, but claims it was permissible under the Equal Protection Clause because it was enacted "in spite of" any discriminatory impact, not "because of." FCPS Br. 39 (citing *Feeney*, 442 U.S. at 279). But this argument contradicts its other contention that it could not have acted with discriminatory intent because it was ignorant as to how the new policy would affect the school's racial composition. FCPS cannot contend both that it was ignorant as to the effects of the policy and that it knowingly enacted the policy "in spite of" the impact it would have on Asian American applicants. Moreover, unlike *Feeney*, here there was evidence in the record that the policy was enacted "because it would accomplish the collateral goal of" reducing Asian American representation in TJ's admissions. *Feeney*, 442 U.S. at 279. It is "disingenuous to say that the adverse consequences of this [policy change] for [Asian American students] were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable." *Id.* Just because it failed to implement a full rebalancing makes no difference. *See generally Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000) (discussing "incompetent retrogressors" in the voting context).

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the trial court's ruling.

June 21, 2022

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the attached brief is proportionally spaced, has a typeface of 14 points and the brief, save portions exempted under Fed. R. App. P. 32(f), contains 2,529 words as calculated by Microsoft Word for Office 365.

June 21, 2022 *s/ Russ Nobile*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system, which sent notification of such filing to all registered CM/ECF users.

June 21, 2022 *s/ T. Russell Nobile*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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☐ Pro Bono ☐ Government

COUNSEL FOR: JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/Russ Nobile
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