No. 22-1280

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COALITION FOR TJ,

Plaintiff-Appellee,

vs.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellant.

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

BRIEF OF AMICUS CURIAE LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFF-APPELLEE

Daniel R. Suhr
Counsel of Record
Jeffrey D. Jennings
LIBERTY JUSTICE CENTER
440 N. Wells St., Suite 200
Chicago, Illinois 60654
(312) 263-7668
dsuhr@libertyjusticecenter.org
jjennings@libertyjusticecenter.org

June 21, 2022

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INTEREST OF AMICUS

Liberty Justice Center is counsel to plaintiffs in two cases in the Fourth Circuit applying an *Arlington Heights* analysis to racially motivated policies. In the first, LJC represents three families in Loudoun County Public Schools who are challenging a leadership program initially only open to students of color but now facially open to all students. *Menders v. Loudoun County School Board*, No. 22-1168 (4th Cir.). In the second, LJC represents the Catholic Diocese of Charleston and South Carolina Independent Colleges & Universities, Inc., the trade association for nonpublic institutions of higher learning in the Palmetto State, in a challenge to the South Carolina Constitution's Blaine Amendment. *Bishop of Charleston v. Adams*, No. 22-1175 (4th Cir.).

In both cases, the plaintiffs and defendants disagree about the standard set in *Arlington Heights*. And in *Menders* in particular, the school argued, and the district court ruled, that the goal of helping students of color did not constitute an intent to discriminate against

white students. As a result, LJC has a substantial interest on behalf of its clients in this Court's resolution of this case.[1]

SUMMARY OF THE ARGUMENT

Courts cannot apply one standard for *Arlington Heights* to laws they like and another to laws they do not. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring). Courts must play it straight and disregard any policy outcomes of their rulings when applying the *Arlington Heights* analysis.

Political actors of all stripes use the *Arlington Heights* approach to attack laws they do not like and believe were motivated by racial or religious animus (though *Arlington Heights* was a racial discrimination case, the Supreme Court subsequently adopted its factors for discerning religious animus in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)). For examples, challenges alleging racial or religious motivation have been brought against laws on immigration, election

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(E), a party's counsel did not author this brief, a party or a party's counsel did not fund the preparation of this brief, and no person (other than Amicus) contributed money to preparing or submitting this brief.

integrity, felon disenfranchisement, and redistricting; as well as policies barring public funding to faith-based schools, requiring diversity quotas (as in the Appellee's case), or targeting people of faith, especially over matters of sexuality.

A strict standard of proof and a presumption of good faith for governmental actors will frustrate challengers of all laws or government policies. A generous standard of proof and a skepticism of governmental motives will encourage challengers of all laws or government policies. But regardless, the courts cannot apply constitutional analysis that is strict to some laws motivated by racial or religious animus, while applying a generous analysis to others. We must have *equal* justice under law.

Nevertheless, many courts have applied *Arlington Heights* inconsistently. Some have set a low bar for finding that racial prejudice motivated a law. Others set the bar high, affording the government a measure of good faith. The difference between these two evidentiary standards plays out in whether a court requires disparate impact as an element of proving discriminatory intent. Another difference is whether a court applies strict scrutiny when the government discriminates against one race to help another race.

In response to this murky case law, this Court should use this case to develop its *Arlington Heights* jurisprudence in two ways. First, it should hold that disparate impact is not a dispositive factor in the *Arlington Heights* analysis. The case at bar illustrates why disparate impact cannot be dispositive given the strong circumstantial evidence that the Board actively sought to decrease Asian-American enrollment at Thomas Jefferson High School for Science & Technology ("TJ"). Second, it should hold that judicial scrutiny is not relaxed when inclusion of one race motivates the government to exclude others. Here, the Board actively sought to decrease the enrollment of Asian-Americans at TJ and its benign motive to increase other minorities' enrollment does not permit its discriminatory motives. The Court should affirm the district court's grant of summary judgment in favor of Plaintiff-Appellee.

ARGUMENT

The Court should clarify its *Arlington Heights* test so that disparate impact is not dispositive and so that it does not permit discrimination as a means to promoting racial inclusivity.

A. Courts have not applied *Arlington Heights* consistently.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the U.S. Supreme Court laid out a test for determining when a law that is neutral on its face nonetheless discriminates invidiously. 429 U.S.

252, 265-68 (1977). The Court announced relevant factors, including disparate impact, the law's historical background, the "specific sequence of events leading up to the challenged decision," and the "contemporary statements by members of the decisionmaking body." *Id.* at 266-67.

Yet lower courts have not been consistent in how they have applied this test. For example, some, including this Court, have set the bar low for finding racial prejudice behind facially neutral election integrity or voter identification laws. In *N.C. State Conference of the NAACP v. McCrory*, this Court explained that "[c]hallengers need not show that discriminatory purpose was the 'sole' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'" 831 F.3d 204, 220 (4th Cir. 2016); *see also Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1041 (9th Cir. 2020), *rev'd Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (noting that plaintiffs must show "racial discrimination was *a* motivating factor.").

Likewise, some courts see racial or religious prejudice behind immigration policy decisions, even if the evidence proffered was not directly connected to those decisions. *See New York v. United States DOC*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018) ("NGO Plaintiffs identify

several statements made by President Trump himself in the months before and after Secretary Ross announced his decision that, while not pertaining directly to that decision, could be construed to reveal a general animus toward immigrants of color."); *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276 (E.D.N.Y. 2018) (similar). Some older immigration statutes are equally vulnerable, even after numerous amendments. *See United States v. Carrillo-Lopez*, No. 3:20-cr-00026-MMD-WGC, 2021 U.S. Dist. LEXIS 155741, at *62 (D. Nev. Aug. 18, 2021).

In such cases with a low evidentiary bar, circumstantial or indirect evidence is sufficient, and courts pierce the veil of neutral explanations made on the record to find the racial animus lurking beneath. *See, e.g., La Union del Pueblo Entero v. Ross*, 771 F. App'x 323, 324-25 (4th Cir. 2019) (Wynn, J., concurring) ("[T]he district court should keep in mind that 'discriminatory intent *need not be proved by direct evidence*.'" (quoting *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (emphasis in original)).

This is for good reason. As this Court explained, "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Clarkton*, 682 F.2d

1055, 1064 (4th Cir. 1982). This Court continued: "Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record." *Id.* It then concluded: "It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this." *Id.*

Conversely, there are other times when courts, including this one, set the standard of evidence quite high, and judicial restraint is in full force. In *North Carolina State Conference of the NAACP v. Raymond,* this Court said: "To prevail on the merits of their constitutional challenges, these challengers must prove that [the law] was passed with discriminatory intent and has an actual discriminatory impact." 981 F.3d 295, 302 (4th Cir. 2020). And in conducting that analysis, "the district court *must* afford the state legislature a presumption of good faith" and show "judicial deference to the legislature." *Id.* at 303. *Accord Bos. Parent Coal. V. Sch. Comm. of Bos.*, No. 21-10330-WGY, 2021 U.S. Dist. LEXIS 189566, at *33 (D. Mass. Oct. 1, 2021) ("[W]here the governmental action is facially race neutral and uniformly applied, good faith is presumed in

the absence of a showing to the contrary that the action has a disparate impact . . .” (cleaned up)).

Accordingly, some courts applying a higher evidentiary bar for plaintiffs have also held that seeking to benefit one race to the exclusion of others somehow does not amount to discriminatory intent. For example, in Amicus’s case on behalf of parents in Loudoun County Public Schools (the school district adjoining the Fairfax school district at issue here), the parents challenge a student leadership program that was originally open only to students of color. The district court found it “not plausible” that “these initiatives are intended to be at the expense of white students or are intended to disadvantage white students.” *Menders v. Loudoun Cnty. Sch. Bd.*, No. 1:21-cv-669 (AJT/TCB), 2022 U.S. Dist. LEXIS 10157, at *18 (E.D. Va. Jan. 22, 2022). Instead, it reasoned that they “promote a more inclusive educational environment by addressing discrimination and the lingering effects of past discrimination.” *Id.*

But the contrast between the two evidentiary approaches is starkest when courts weigh disparate impact. In decisions setting the evidentiary bar high, disparate impact is worded as a requirement, not one of several factors that are considered holistically. In *Irby v. Virginia State Board of*

Elections, this Court said: "To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect." 889 F.2d 1352, 1355 (4th Cir. 1989); *see also, e.g., Bishop of Charleston v. Adams*, No. 2:21-cv-1093-BHH, 2022 U.S. Dist. LEXIS 24090, at *29-30 (D.S.C. Feb. 10, 2022) ("Plaintiffs' failure of proof about discriminatory impact dooms their claims. This is because courts in this context have generally required plaintiffs to prove both intentional discrimination against an identifiable group and an actual discriminatory effect on that group." (cleaned up)).

Yet in other instances the Court has said that disparate impact is just one factor to consider. For example, Judge Rushing recently explained that "under our precedent" "proof of disproportionate impact is but one factor to consider 'in the totality of the circumstances'; it is not 'the sole touchstone' of the claim." *Coal. For TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 U.S. App. LEXIS 8682, at *23 (4th Cir. Mar. 31, 2022) (Rushing, J., dissenting) (quoting *McCrory*, 831 F.3d at 231).

To be sure, *Raymond* and *Irby's* language describing disparate impact as a requirement is arguably dictum given that neither case rejected an equal protection challenge simply because of a lack of disparate impact.

Raymond held that none of the *Arlington Heights* factors revealed evidence of discriminatory intent. 981 F.3d at 305-10. And *Irby* held that there was a prima facie case of discriminatory intent but that the government there successfully rebutted it by showing that the school board election system had a benign explanation. 889 F.2d at 1356. Thus, Judge Rushing's synthesis of this Court's precedents is the better understanding of whether this Court requires disparate impact.

Nevertheless, the dictum in *Raymond* and *Irby* is not helpful to lower courts. This Court should use this case as a vehicle to develop its jurisprudence concerning *Arlington Heights* in two ways.

B. *Arlington Heights* does not require a finding of disparate impact.

First, the courts making disparate impact a dispositive factor, including the dictum in *Raymond* and *Irby,* are out of step with *Arlington Heights*. So too is the Board's argument that strict scrutiny only applies if there is disparate impact "and" the policy caused the impact. Opening Br. of Appellant 23. Instead, *Arlington Heights* specifically cautioned that disparate impact "may provide an important starting point" but that "impact alone is not determinative." 429 U.S. at 266. Instead, a court must look at "such circumstantial and direct evidence of intent as may be

available." *Id.* at 266. And the list of factors was not "exhaustive." *Id.* at 268.

Likewise, *Arlington Heights's* predecessor case, *Washington v. Davis*, described disparate impact as "relevant" in the "totality of the relevant facts." 426 U.S. 229, 242 (1976). The Court stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* In both *Davis* and *Arlington Heights*, the Court emphasized that discriminatory racial purpose behind a law and not its impact is what matters. *See Arlington Heights*, 429 U.S. at 265-66; *Davis*, 426 U.S. at 242. And later *Rogers* reiterated *Arlington Height's* reasoning that a court is to look at a "'totality of the relevant facts'" and not just disparate impact. 458 U.S. at 618 (quoting *Arlington Heights*, 429 U.S. at 265).

The case at bar demonstrates why disparate impact cannot be dispositive. As the Coalition for TJ's Response Brief lays out, Board members Abrar Omeish and Stella Pekarsky acknowledged "that Asian Americans are 'discriminated against in this process [of revising TJ admissions].'" Appellee's Resp. Br. 7, Dkt. No. 60 (citing JA 0119, JA0125). They also said that "'there has been an anti [A]sian feel'"

underlying revising the admission policy. Appellee's Resp. Br. 7, Dkt. No. 60 (citing JA 0119, JA0125). And they said the superintendent had made "racist" remarks by referring to the stereotype that Asian-Americans "pay to play" by investing in test preparations. Appellee's Resp. Br. 7, Dkt. No. 60 (citing JA 0119, JA0125).

Other school officials' comments expose the Board's racial balancing objective. Such an end is "patently unconstitutional." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)). Specifically, Board member Corbett Sanders "wrote that 'the Board and FCPS need to be explicit in how we are going to address the under-representation of Black and Hispanic students.'" *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 U.S. Dist. LEXIS 33684, at *8 (E.D. Va. Feb. 25, 2022). Board member Keys-Gamarra "said that 'in looking at what has happened to George Floyd, we now know that our shortcomings are far too great . . . so we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to T.J." *Id.* As the court below concluded, throughout the process of revising the admission policy, "Board members and high-level FCPS officials expressed their desire to

remake TJ admissions because they were dissatisfied with the racial composition of the school." *Id.* at 14.

These statements in addition to the rushed and irregular process that revised the admission policy are sufficient for this Court to hold that racial discrimination motivated the policy. The disparate impact is not necessary to that conclusion and is instead only further evidence of invidious discrimination.

In fact, the circumstantial evidence in this case is even stronger than the evidence in *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County,* 915 F.3d 256, 265 (4th Cir. 2019). There, this Court analyzed a religious discrimination statute (RLUIPA) and said that the *Arlington Heights* test should be used to decide whether religious discrimination motivated a city to deny a zoning permit to a church. *Id.* at 198. It then held that establishing disparities compared to other comparators "is not necessary to establish a nondiscrimination claim." *Id.* at 199. Thus, the district court erred by not considering the other *Arlington Heights* factors. *Id.* This Court reasoned that the remarks of the neighbors of the church at city meetings displayed "religious bias" and the irregular zoning approval process that followed those remarks was enough

circumstantial evidence of discriminatory intent. *Id.* at 263-64. Thus, the Court rejected the argument that a lack of disparate impact doomed the church's claim under *Arlington Heights*. *Id.* at 199.

So too here. The school officials' statements and the irregularities of revising the admission policy exposes the impermissible racial discrimination behind the revised policy. The derogatory statements about Asian-Americans came from the government decisionmakers themselves. Given that the neighbors' comments in *Jesus Christ is the Answer Ministries* were highly probative because they influenced the decisionmakers, the comments from the decisionmakers themselves are especially probative of their motivations. At bottom, the Coalition has provided convincing evidence of disparate impact in this case. But the Court should clarify that under *Jesus Christ is the Answer Ministries* there is enough circumstantial evidence here to show that invidious racial discrimination motivated the revised admissions policy regardless of its impact.

What is more, "[t]he Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.'" *United States v. Fordice*, 505 U.S. 717, 729 (1992) (quoting *Lane v. Wilson*, 307

U.S. 268, 275 (1939)). Thus, the fact that the government's goal to discriminate based on race fails to have the disparate impact that it hoped is not a reason to leave in place a law that racial discrimination motived. It is enough that the law discriminates in a more sophisticated way or there is disparate impact only at the margins. As *Arlington Heights* observed, a case with a "stark" disparate impact like in *Yick Wo v. Hopkins* is "rare." 429 U.S. at 266 (discussing 118 U.S. 356 (1886)).

Therefore, this Court should clarify its jurisprudence so that disparate impact is weighed properly in the *Arlington Heights* analysis. It should direct courts to follow *Jesus Christ is the Answer Ministries* and not *Raymond* and *Irby's* dictum.

C. *Arlington Heights* does not relax judicial scrutiny when the government pursues racial inclusion at the expense of other races.

Second, this Court should hold that *Arlington Heights* still applies even when the government has a goal of racial inclusion in enacting a policy of racial exclusion. Indeed, a program intended to benefit only specific races triggers strict scrutiny regardless of whether it was animated by benevolent or malevolent feelings toward the races involved. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). *Vitolo* shows that

white people can be victims of race-based discrimination because of their exclusions from a governmental program, even if the program was intended to provide a positive benefit to people of color whose racial groups had experienced past discrimination. *Id.* So too here with the Asian-Americans targeted for reduced enrollment numbers at TJ in this case.

The Supreme Court has said straightforwardly several times that it will not extend "relaxed judicial scrutiny" for explicit racial preferences that have a "benign" or "remedial" effect. *See Parents Involved in Cmty. Sch.*, 551 U.S. 701, 759-60 (2007) (plurality); *Shaw v. Reno*, 509 U.S. 630, 653 (1993); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989). This case presents a needed vehicle for this Court to definitively apply these precedents to a different doctrine, *Arlington Heights*: facially neutral laws motivated by a benign or remedial racist intention are just as unconstitutional as those motivated by racist animus or prejudice.

Indeed, the Board here sought to benefit African-American and Hispanic students by specifically trying to "decrease enrollment of the enrollment of the only racial group 'overrepresented' at TJ—Asian Americans." *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *15. Judge

Heytens's concurrence in granting a stay of the judgment below argues that the Board may use "race neutral means" to "increase racial (and other) diversity." *Coal. for TJ*, 2022 U.S. App. LEXIS 8682 *12 (Heytens, J., concurring). But that overlooks the Board's specific desire to decrease Asian-American enrollment to accomplish that end. Such a means is not "race neutral," nor does it permit the Board's discriminatory purposes towards Asian-Americans. As Chief Justice Roberts said in *Parents Involved in Community Schools*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." 551 U.S. at 748 (plurality). Accordingly, this Court should hold that the Board's desire to benefit some races did not give it a license to actively seek to exclude Asian-Americans from TJ as a means to its goal.

CONCLUSION

Courts cannot approach prior opinions or legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Precedent from this Court and others provides some passages useful for those who wish to be skeptical and strike down laws, and other passages for those who want to presume good

faith and uphold laws. But the rule of law is a law of rules. A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). This case presents this Court the opportunity to clarify the evidentiary standard in the *Arlington Heights* test so that it does not require disparate impact. The Constitution prohibits the government from engaging in invidious discrimination even when that discrimination fails to have the full disparate impact that the government hoped, or where others are the collateral damage of animus against one group. This Court should also hold that *Arlington Heights* does not allow for relaxed judicial scrutiny where the government purports to be pursuing racial inclusion. In reaching these holdings, the Court should affirm the district court's award of summary judgment to Plaintiff-Appellee.

Dated: June 21, 2022

Respectfully submitted,

/s/ Jeffrey D. Jennings
Jeffrey D. Jennings
Daniel R. Suhr
Counsel of Record
LIBERTY JUSTICE CENTER
440 N. Wells St., Suite 200
Chicago, Illinois 60654
(312) 263-7668
dsuhr@libertyjusticecenter.org

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and because it contains 3,554 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: June 21, 2022

/s/ Jeffrey D. Jennings
Jeffrey D. Jennings

Kiren Mathews

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Mr. Debo P. Adegbile: debo.adegbile@wilmerhale.com
Ms. Ginger Dawn Anders: Ginger.Anders@mto.com, christina.weber@mto.com
Ms. Annie Chiang: achiang@oag.state.va.us, kharrison@oag.state.va.us
Trevor Stephen Cox: TCox@HuntonAK.com, smeharg@huntonak.com, lmyers@hunton.com
Francisca D. Fajana: ffajana@latinojustice.org
Ms. Sydney Foster: sydney.foster@usdoj.gov, patrice.newsome@usdoj.gov, pamela.l.marshall@usdoj.gov
Ms. Sarah Hinger: shinger@aclu.org, eskelley@aclu.org, jjahangir@aclu.org, gperezleon@aclu.org
Xiaonan April Hu: april.hu@mto.com
Jeffrey Daniel Jennings: jjennings@libertyjusticecenter.org
Christopher M. Kieser: ckieser@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Gary Michael Lawkowski: glawkowski@dhillonlaw.com, gary.lawkowski@gmail.com
Arthur Luk: Arthur.Luk@arnoldporter.com, maocoa4@arnoldporter.com
Mica Louise Moore: mica.moore@mto.com
Daniel I. Morenoff: dan@americancivilrightsproject.org
Thornton Russell Nobile: rnobile@judicialwatch.org
Celia Howard O'Leary: coleary@southeasternlegal.org
Sona Rewari: srewari@huntonak.com, cbaroody@huntonak.com
Nicolas Y. Riley: nicolas.riley@usdoj.gov
Glenn Evans Roper: geroper@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Alison E. Somin: ASomin@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org

Daniel Robert Suhr: dsuhr@libertyjusticecenter.org
Robert E. Toone, Jr., Assistant Attorney General: Robert.Toone@state.ma.us, AdlawEfilings@state.ma.us, Sherrie.Costa@state.ma.us
Michaele Nicole Turnage Young: mturnageyoung@naacpldf.org, koliver@naacpldf.org
Donald B. Verrilli, Jr.: donald.verrilli@mto.com, Christina.weber@mto.com
Mrs. Erin Elizabeth Wilcox: ewilcox@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org

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