IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ, Plaintiff, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant.	No. 1:21-cv-00296-CMH-JFA

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

Until recently, Thomas Jefferson High School for Science and Technology ("TJ") selected students from Fairfax County and surrounding areas using a standardized, race-blind admissions examination. But last year, Defendant Fairfax County School Board overhauled the admissions process, eliminating the exam and replacing it with what amounts to a geographic quota system and a "holistic" evaluation method. The available evidence demonstrates that the Board's primary purpose was to alter the racial balance of the TJ student body, replacing "overrepresented" Asian-Americans with students of other races.

Plaintiff Coalition for TJ brought this civil rights lawsuit to challenge the new admissions policy as a violation of the Equal Protection Clause. After this Court denied the Coalition for TJ's first motion for a preliminary injunction in May due to time constraints, the new admissions policy went into effect for the Class of 2025. It worked as intended. The percentage of Asian-American students offered admission to TJ dropped nearly twenty percentage points, from seventy-three percent in the Class of 2024 to fifty-four percent in the most recent class.[1] Even though TJ admitted sixty-four more students in the Class of 2025 than it had under the previous admissions policy, it accepted fifty-six *fewer* Asian-American students than the prior year. Asian-American students were the only demographic to experience any drop in admissions offers; every other demographic group, including white students, saw increases of at least five percentage points.[2] Students from

[1] FCPS, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM*, https://tinyurl.com/yx42ubx8.

[2] *Id*.

Carson, Longfellow, Kilmer, and Rocky Run middle schools—all with large Asian-American populations—were among the hardest hit.[3]

The application process for the TJ Class of 2026 will begin in just a few months, on October 25.[4] The application deadline is November 19, with applicants notified of admissions decisions on or before April 29, 2022.[5] The application process and selection criteria published by Fairfax County Public Schools ("FCPS") for the Class of 2026 is identical to the previous year's process, which resulted in a precipitous drop in Asian-American students accepted to TJ. The period for discovery in the instant case is scheduled to conclude on October 15, ten days before the TJ application process opens, and summary judgment briefing is unlikely to be concluded prior to the application deadline of November 19.

Plaintiff Coalition for TJ now renews its request for a preliminary injunction to protect its members with children who will apply for the TJ Class of 2026 under an admissions system that makes it demonstrably more difficult for them to gain acceptance. In denying the Coalition's previous motion for a preliminary injunction before admissions decisions were released this past spring, this Court understandably relied on the difficulty of ordering the Board to conduct an entirely new admissions process at the eleventh hour. The Court also expressed confidence that this case could be decided before TJ admitted its Class of 2026. That no longer appears likely. The period for discovery in the instant case is scheduled to conclude on October 15, ten days before the TJ application process opens, and summary judgment briefing is unlikely to be concluded prior

[3] Carson MS had 78 students accepted in 2018 and 42 students accepted in 2021. Kilmer MS had 37 students accepted in 2018 and less than 10 in 2021. Longfellow MS had 62 students accepted in 2018 and 28 in 2021. Rocky Run MS had 33 students accepted in 2018 and 24 in 2021.

[4] FCPS, *THJSST Freshman Application Process*, https://tinyurl.com/myez4a6n.

[5] *Id.*

to the application deadline of November 19. Therefore, to avoid a repeat of the same circumstances that led the Court to deny the Coalition's first motion for a preliminary injunction, the Coalition now renews its request for an injunction to maintain the pre-controversy status quo until this case proceeds to a final decision.

The preliminary injunction factors weigh in the Coalition's favor. The Coalition is likely to succeed on the merits of its claim that the Board's actions violate the Equal Protection Clause. As this Court noted in May, "everybody knows the [new TJ admissions] policy is not race neutral, and that it is designed to affect the racial composition of the school."[6] That is all that is necessary to prove discriminatory intent. And once the Coalition demonstrates intent, the burden shifts to the Board to show that its actions satisfy strict scrutiny by being narrowly tailored to serve a compelling government interest. The Board to this point has not tried to justify the admissions changes under strict scrutiny and would fail in any event—the Supreme Court has not recognized any interest compelling enough to justify racial discrimination at a K-12 public school. The Board's actions are likely unconstitutional.

The remaining factors also favor a preliminary injunction. Coalition members with children who will apply to TJ for the class of 2026 will suffer irreparable harm in the absence of an injunction—they will be forced to compete in an admissions environment that makes it more difficult for them to gain admission into TJ because of their race. And the balance of equities and the public interest favor the Coalition, too. It is always in the public interest to vindicate

[6] The Coalition would cite the transcript of the May 21 hearing, but it is not yet available. Judge Hilton's quote is recounted in several media articles. *See, e.g.*, Matthew Barakat, *Suit Alleging Admissions Discrimination at Thomas Jefferson HS Moves Forward*, NBC Washington (May 21, 2021), https://tinyurl.com/adz4k3bc.

constitutional rights, and the early date of this motion allows the Board to make alternative arrangements for returning to the previous admissions process this cycle.

For the reasons set forth below, this Court should grant the Coalition's motion for a preliminary injunction.

FACTUAL BACKGROUND

TJ is the nation's top-ranked public high school.[7] An Academic-Year Virginia Governor's School[8] located in Alexandria and operated by Fairfax County Public Schools (FCPS), TJ educates approximately 1,800 students gifted in science, technology, engineering, and math. Graduates of TJ go on to excel in careers in medicine, engineering, business, and research, providing an enormous contribution to the community due in large part to TJ's rigorous curriculum and strong reputation.

Since TJ's founding in 1985, Fairfax County's population has grown from approximately 600,000 residents to over one million residents today.[9] Its demographics have shifted too, from approximately 86% white, 6% Black, 3% Hispanic, and 4% "Asian and American Indian" in 1980

[7] U.S. News & World Report, https://tinyurl.com/y9xsu6dm.

[8] Virginia Dep't of Education, *Academic-Year Governor's Schools*, https://tinyurl.com/rta8bm98. The information and data cited in this memorandum are judicially noticeable facts that can be readily obtained from government websites. *See Fusaro v. Cogan*, 930 F.3d 241, 246 n.3 (4th Cir. 2019) (taking judicial notice of Maryland's list of registered voters); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of population statistics publicly available on the official redistricting website of the Virginia Division of Legislative Services); *United States v. Garcia*, 855 F.3d 615 (4th Cir. 2017) (taking judicial notice of facts contained on government website).

[9] Fairfax County Office of Research and Statistics, *1985 Fairfax County Profile* at II-13 (1985), https://tinyurl.com/v8u2ytcs.

to approximately 61% white, 10% Black, 16% Hispanic, and 19% Asian and Pacific Islander today.[10]

Prior to the challenged changes to the TJ admission process, selection for a seat at TJ was solely merit-based. To be eligible to attend TJ, students were required to meet residency requirements, have completed or be enrolled in Algebra I, have a core GPA of at least 3.0, and pay a $100 application fee, which could be waived for those with financial need. Compl. ¶ 26; Answer ¶ 26. The primary method for determining admission to TJ was a standardized test, typically administered each fall. The TJ admissions test consisted of Quant-Q, ACT Inspire Reading, and ACT Inspire Science components. Applicants scoring highly enough to become semi-finalists were then asked to submit teacher recommendations, complete a problem-solving essay, and respond to three writing prompts. Compl. ¶ 27; Answer ¶ 27.

This merit-based admissions process resulted in a student body that is approximately 80% non-white and approximately 72% Asian-American, as of the 2019-2020 school year.[11] For the Class of 2024, the last class admitted under the old admissions policy, about 73% of those offered admission were Asian-American, 3% Hispanic, 17% white, and 6% multiracial/other. Compl. ¶ 23; Answer ¶ 23.[12]

In September 2020, the Superintendent of FCPS, Scott Brabrand, presented the first version of a plan to radically overhaul the merit-based TJ admissions process. *See* Complaint ¶ 31; Answer

[10] *Id*. at II-12; Demographic Reports 2019, County of Fairfax, Virginia, at II-6, https://tinyurl.com/567hz4mw.

[11] FCPS, *TJ School Profile*, https://tinyurl.com/47r67jxx.

[12] Press Release, FCPS, *TJHSST Offers Admission to 486 Students* (June 1, 2020), https://www.fcps.edu/news/tjhsst-offers-admission-486-students. According to FCPS, the "multiracial/other" category includes students who checked "multiracial" on their application or students whose ethnic designation numbered 10 or fewer, which includes Black students. *Id.*

¶ 31 (admitting that Brabrand presented this plan in September). Circumstances indicate that the primary purpose of the proposed overhaul was to racially balance the student body at TJ—at the expense of Asian-American students. TJ's principal repeatedly told students and families that they "do not reflect the racial composition in FCPS"[13] and that the school district was making "efforts to ensure that we are more demographically representative of the region."[14] Superintendent Brabrand was equally forthcoming about the Board's racial balancing intentions: "TJ should reflect the diversity of Fairfax County Public Schools, the community, and of Northern Virginia," he told the Board in September 2020.[15]

Superintendent Brabrand's initial proposal included eliminating the TJ admissions test and implementing a region-based lottery, among other modifications.[16] Under that proposal, each FCPS middle school or non-FCPS jurisdiction was assigned to one of five "regional pathways," with each regional pathway capped at sending 70 students to TJ per year. This plan would have a dramatic effect on Asian-American students. For example, under that plan, two middle schools—Kilmer Middle School and Longfellow Middle School—were grouped into the same regional pathway.[17] These schools are both majority Asian-American, and in 2018 (the last year for which school-level data is publicly available) sent a combined 99 students to TJ. Limiting those two schools, not to mention the other four schools in the proposed regional pathway, to a total of 70

[13] Ann N. Bonitatibus, Message from the Principal, June 7, 2020, https://tinyurl.com/bdzj8su2.

[14] *FCPS School Board Work Session – 9-15-20 – TJ Admissions Review*, YouTube (Sept. 15, 2020), https://tinyurl.com/pz4dc2fx at 33:25.

[15] *Id*. at 4:31-5:04.

[16] The Board's Answer invites the Court to look to the proposal itself. Answer ¶ 31. The Coalition agrees. *See* FCPS, *TJ Admissions Merit Lottery Proposal School Board Work Session Sept. 15, 2020*, https://tinyurl.com/43xv5r6t ("Merit Lottery Proposal").

[17] Merit Lottery Proposal at 16.

seats at TJ would undoubtedly have decreased the number of Asian-American students accepted into TJ. According to FCPS' own projections at the time, had these proposed changes been applied to the TJ Class of 2024, Asian-American student enrollment would have dropped from 73% to 54%.[18] All other racial groups would have seen increases under the proposed system.[19]

Superintendent Brabrand's proposal ultimately was not adopted, but many of its principles showed up in the plan the Board eventually chose. At an October 6 "work session," the Board voted to eliminate the longstanding admissions exam only a month before it was scheduled to be administered for the class of 2024. Complaint ¶ 33; Answer ¶ 33. The Board then adopted the challenged policy on December 17. Complaint ¶ 36; Answer ¶ 36. The challenged policy differs from Superintendent Brabrand's proposal in two key ways: (1) rather than a lottery, the challenged plan contemplates a "holistic review" that considers "experience factors," and (2) rather than Brabrand's "regional pathways," the Board's plan guarantees TJ admission offers to students at each FCPS middle school amounting to 1.5% of its eighth grade class. Complaint ¶ 36; Answer ¶ 36.[20] Coupled with the concentration of Asian-American students at four middle schools with histories of sending high numbers of students to TJ—Rachel Carson Middle School, Kilmer Middle School, Rocky Run Middle School, and Longfellow Middle School—it was obvious that this plan would have a substantial adverse effect on Asian-American applicants.[21] Although the

[18] *Id*. at 20. As discussed below, reducing Asian-American admission to 54% is precisely what happened under the plan that was ultimately adopted.

[19] *Id.*; Black enrollment would have increased from 1% to 7%, Hispanic enrollment would have increased from 3% to 8%, enrollment of students identifying as two or more races would have increased from 5% to 6%, and white enrollment would have increased from 18% to 25%.

[20] *See School Board Chooses Holistic Review as New Admissions Policy for TJHSST*, FCPS News Release, Dec. 18, 2020, https://tinyurl.com/yd5zwrmd.

[21] A November 2020 FCPS white paper modeled several potential racial outcomes for various proposals, none of which is precisely what the Board settled on—but all show significant adverse

opaque "holistic review" made the precise effect difficult to measure, it also gave FCPS officials more leeway to favor students from "underrepresented" middle schools, making it even more difficult for Asian-American students to gain admission to TJ.

The Coalition filed this lawsuit to vindicate the rights of its members with children who want to apply to TJ in the coming years. ECF No. 1. Seeking to halt use of the challenged admissions process before admissions offers went out in the spring of 2021, the Coalition filed a motion for a preliminary injunction. ECF No. 15. The Board concurrently moved to dismiss. ECF No. 21. This Court denied both motions—effectively holding that the Coalition had pleaded a plausible equal protection claim but declining to enjoin the Board's admission plan for 2021 because it would have been too hard to implement a new plan on an expedited timeline. ECF No. 50. The Court expected that the case would be resolved before the next round of admissions, but it is now clear that the same equitable considerations that led the Court to deny the Coalition's first motion may come into play again for the 2022 admissions cycle—particularly if this case cannot be resolved on summary judgment. And even assuming the case will be resolved on cross-motions for summary judgment, since discovery does not close until October 15, dispositive briefing is unlikely to be completed until December. ECF No. 51. To protect the interests of its members with children now applying to TJ, the Coalition now renews its request for a preliminary injunction. Akella Decl. ¶¶ 6–8; McCaskill Decl. ¶¶ 6–7.

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impacts on Asian-American students. *None* of these proposals saw Asian-Americans obtain as many seats as under the old process, and most of them showed substantial decreases. *See* Office of Research and Strategic Improvement, Thomas Jefferson High School for Science and Technology: Improving Admissions Processes (Nov. 2020), *available at* https://tinyurl.com/ysc4vcb9. The white paper also noted that "[t]he School Board expressed interest in selecting students by school as opposed to by region," *id.* at 24, which is close to what actually occurred. The paper suggested "caps" by middle school, which would have limited Rachel Carson MS (which is about 46% Asian-American) to 16 seats (compared to 78 under the previous process). *Id.*; *see also* Complaint ¶ 50; Answer ¶ 50.

Since the Coalition's original motion, there has been an important change that strengthens the renewed motion—we no longer have to speculate about the extent to which the new TJ admissions process disadvantages Asian-American students. Asian-Americans were the only racial group that received *fewer* offers to TJ compared to the previous year, even though 64 more total offers were extended. And we now know that Asian-American representation in the TJ admitted class fell from 73% to 54%— uncannily, the exact magnitude of change predicted under Superintendent Brabrand's original proposal. The extent of the observed impact heightens the urgency for preliminary relief.

PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, the Coalition must show that (1) it is likely to succeed on the merits; (2) it will likely suffer irreparable harm in the absence of an injunction; (3) the balance of hardships weighs in its favor; and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). Each preliminary injunction factor must be "satisfied as articulated." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). But "[b]ecause preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017).

Importantly, even though the challenged admissions procedures have already been implemented for one cycle, the injunction sought is prohibitory, not mandatory. A mandatory injunction alters the status quo and is subject to heightened requirements. *Sun Microsystems, Inc.*

v. Microsoft Corp (In re Microsoft Corp. Antitrust Litig.), 333 F.3d 517, 525 (4th Cir. 2003) *abrogated on other grounds by eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In contrast, prohibitory injunctions "aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *Pashby*, 709 F.3d at 319. The status quo is simply "the last uncontested status between the parties which preceded the controversy." *Id*. at 320 (cleaned up). Here, the "last uncontested status" is the admissions process in place before the challenged changes. As the Fourth Circuit has recognized, "it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but . . . [s]uch an injunction restores, rather than disturbs, the status quo ante." *Aggarao v. MOL Ship Mgmt. Co*., 675 F.3d 355, 378 (4th Cir. 2012) (cleaned up).

ARGUMENT

I. The Coalition Is Likely to Succeed on the Merits of Its Equal Protection Claim

The Supreme Court has long recognized that enactments "are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). So while the challenged admissions procedures are facially race-neutral, the Board's actions are still presumed unconstitutional if the Board was motivated at least in part by a racially discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). The Court may sustain such a discriminatory action only if the Board proves that it was narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 129 (4th Cir. 1999).

Here, the evidence is clear that the Board was at least in part (if not primarily) motivated by an improper racial purpose. The TJ admissions changes therefore must pass strict scrutiny. Because they cannot do so, the Coalition is likely to succeed on the merits.

A. The Board Acted With a Racially Discriminatory Purpose

The Supreme Court has developed a framework to root out racially discriminatory motivations masquerading as facially race-neutral policies. *Arlington Heights* instructs courts to consider: (1) the disparate impact of the policy on a particular racial group; (2) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (3) irregularities in the passage of legislation; and (4) legislative and administrative history. 429 U.S. at 266–67. These factors are non-exhaustive, and because "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence," courts are instructed to consider the broader context surrounding a policy's selection. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

Importantly, challengers need not allege or prove that "the challenged action rested *solely* on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265 (emphasis added). And a racially discriminatory purpose need not amount to racism or racial animus. *McCrory*, 831 F.3d at 233 (targeting voters based on race, even to accomplish partisan and not racial ends, constitutes racial discrimination); *see also Garza v. Cty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (explaining that intentional discrimination does not require any finding that the decisionmakers "harbored any ethnic or racial animus"). It is enough that the Board acted "at least in part 'because of,' not merely 'in spite of,' [the policy's] adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011)

("Racially discriminatory purpose means that the decisionmaker adopted the challenged action at least partially because the action would benefit or burden an identifiable group.").

Here, the disparate impact of the policy change is clear. Just as clear is that the Board "adopted the challenged action at least partially because it would benefit" white, Black, and Hispanic students and "burden" Asian-American students. *Doe*, 665 F.3d at 548. Whether one considers the process through the lens of *Arlington Heights* or simply uses common sense, the conclusion is inescapable that the Board intended the racial result that occurred for the Class of 2025.

1. Changes to TJ's admissions policy have already had an adverse impact on Asian-American students—and will continue to do so absent an injunction

When the Coalition first moved for a preliminary injunction, it had to rely on FCPS projections, some of its own modeling, and observation of the demographics of the most heavily harmed middle schools to demonstrate a likelihood of disparate impact. No longer. Now, we know that Asian-American representation in TJ's admitted class dropped by more than a quarter after the new process was implemented. We also know that Asian-Americans were offered almost 60 *fewer* seats at TJ even while the Board expanded the number of total offers from 484 to 550. This information is publicly available in a FCPS press release.[22] Because the same admissions process will be utilized for the Class of 2026, there is no reason to believe that the numbers will substantially change unless this Court enters a preliminary injunction. Such a substantial disparate impact weighs strongly in favor of a finding of discriminatory intent. *Cf. McCrory*, 831 F.3d at 230–31 (explaining that even a small disparate impact weighs in favor of discriminatory intent).

[22] *See* FCPS, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM*, *supra* n.1.

2. The historical background of the decision reinforces that the Board acted to distribute benefits and burdens based on race

The second *Arlington Heights* factor is the historical background of the challenged decision. As the Coalition alleged, the backdrop for the rapid changes to TJ's admissions process was the Virginia General Assembly's 2020 requirement that each Academic Year Governor's School "set diversity goals for its student body and faculty, and develop a plan to meet said goals in collaboration with community partners at public meetings." 2020 Va. Acts ch. 1289, item 145.C.27(i);[23] *see also* Compl. ¶ 29; Answer ¶ 29. The law required these schools, including TJ, to submit reports to the Governor by October 1, 2020, detailing, among other things, "admission processes in place or under consideration that promote access for historically underserved students." 2020 Va. Acts ch. 1289, item 145.C.27(i); *see also* Compl. ¶ 29; Answer ¶ 29. Reporting requirements included "racial/ethnic make-up and socioeconomic diversity of its students, faculty, and applicants." 2020 Va. Acts ch. 1289, item 145.C.27(i); *see also* Compl. ¶ 29; Answer ¶ 29.

Although these reporting requirements were minimal, they ultimately triggered the Board to ditch the longstanding TJ admissions process, to the detriment of Asian-American students. After Superintendent Brabrand, Board member Karen Keys-Gamarra, and TJ Principal Ann Bonitatibus attended a "working group" designed to address diversity, equity, and inclusion at Virginia's Governor's Schools, *see* Compl. ¶¶ 38–39; Answer ¶ 39, key players began agitating for racial balance. In a June 7, 2020, email to the TJ community,[24] Bonitatibus lamented that TJ's racial balance did not represent the racial demographics of FCPS. Compl. ¶ 40; Answer ¶ 40. Then

[23] The entire bill is available here: https://budget.lis.virginia.gov/get/budget/4186/HB30/. The relevant provision is located on page 183.

[24] Ann N. Bonitatibus, Message from the Principal, June 7, 2020, https://tinyurl.com/bdzj8su2 ("Message From the Principal").

in September, Brabrand proposed the "regional pathways" plan that grouped heavily Asian-American middle schools that historically did well in TJ admissions together so as to limit their access to TJ. *See* Merit Lottery Proposal. Not coincidentally, that plan was projected to cut Asian-American enrollment at TJ by more than a quarter, to the benefit of all other racial groups—and particularly white students. *Id.* Working from there, the Board eliminated the admissions exam and adopted a system that effectively limits the number of students who can access TJ from each middle school.

The rush to change the TJ admissions procedures in light of the 2020 General Assembly directive supports an inference that the new plan was adopted for the sake of racial balance. Although the General Assembly did not require Governor's Schools to actually *change* anything about their admissions processes, the timing of Superintendent Brabrand's proposal and the Board's ultimate actions suggests an urgency to change TJ's admissions process that was prompted by the state diversity guidelines. It follows that the Board's new procedure was "developed or selected because it would assign benefits or burdens on the basis of race." *Doe*, 665 F.3d at 553. This factor supports a finding of discriminatory intent.

3. Irregularities in the decisionmaking process support a finding of discriminatory intent

Even aside from the historical background, the Board's decision itself was fraught with procedural irregularities that suggest improper discriminatory motive. The October 6, 2020, vote to eliminate the longstanding TJ admissions exam was done at a "work session" rather than a regular Board meeting. Compl. ¶ 33; Answer ¶ 33. The Board does not usually take votes at work sessions, and the publicly released description in advance of that particular session did not suggest that the Board would suddenly eliminate the exam scheduled for the following month. Compl. ¶¶ 33–34; Answer ¶¶ 33–34. Holding the vote during a work session also precluded public

comment on the issue,[25] despite its extraordinary impact. *Id.* What is more, at the regular Board meeting two days later, the Board not only failed to ratify its work session vote, but—with no affirmative votes, seven votes against, and five abstentions—defeated a measure that would have required Superintendent Brabrand to solicit "public engagement" and "community input and dialogue" on "how best to determine merit, design an admissions process aimed at ensuring the demographics at TJ are more representative of our regional student demographics, and how to communicate the TJ opportunity to our communities" before presenting an updated admissions proposal in December. Compl. ¶ 35 & n.26; Answer ¶ 35.

Similar irregularities taint the Board's adoption of the challenged admissions policy on December 17. Indeed, Board member Megan McLaughlin stressed that she was "really upset that we're doing this so quickly that at 4:30 this afternoon there was nothing posted. No motions, no amendments, no follow-ons. Not for me, not for the public to be able to review and read."[26] She lamented that "[t]his is not how we do the board work. This is not public transparency."[27]

The Supreme Court and the Fourth Circuit have stressed that "'[d]epartures from the normal procedural sequence,' . . . may demonstrate 'that improper purposes are playing a role.'" *McCrory*, 831 F.3d at 227 (quoting *Arlington Heights*, 429 U.S. at 267). The *McCrory* court specifically mentioned a rushed process with a lack of public input as factors supporting an inference of improper motive, even where a legislative body follows its own rules. *See id.* at 228. At the very least, the Board's actions—including (1) hold the vote to eliminate the exam at a "work

[25] The Coalition does not mean to suggest that there was no public comment *ever*, but the Board does not dispute that it eliminated the admissions exam without receiving public comment on October 6.

[26] FCPS School Board Meeting, 12-17-2020, https://tinyurl.com/yxyujss3 at 2:17:02.

[27] *Id*.

session" with no warning or public notice; (2) refusing to subject the proposed admissions plan to further public engagement; and (3) adopting the final plan in such a rushed and haphazard manner that a member of the Board criticized the process—suggests that a discriminatory purpose was afoot.

4. Public statements confirm that the Board acted with impermissible racial intent

Finally, Board members and other FCPS officials have made multiple public statements—primarily in Board meetings in late 2020—that are "direct evidence of intent," *Arlington Heights*, 429 U.S. at 266, and that support the Coalition's claim that the challenged admissions changes were enacted with a racially discriminatory purpose: namely, reducing the number of Asian-Americans admitted to TJ.

On June 7, 2020, TJ's Principal, Ann Bonitatibus, emailed the TJ community, asserting that TJ "is a rich tapestry of heritages; however, we do not reflect the racial composition in FCPS."[28] In case her meaning was unclear, Principal Bonitatibus went on to specify the desired racial balancing: "Our 32 black students and 47 Hispanic students fill three classrooms. If our demographics actually represented FCPS, we would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms."[29] Two months later, Superintendent Brabrand complained that some prospective TJ students spent "thousands upon thousands" of dollars on test prep for the TJ admission test, negatively stereotyping TJ's Asian-American students as attempting to "buy their way" into admission to TJ.[30] Virginia Secretary of Education Atif Qarni reinforced Brabrand's

[28] *See* Message from the Principal.

[29] *Id*.

[30] Fairfax County NAACP, *Town Hall on Systemic Racism*, Facebook (Aug. 5, 2020) at 1:28:31, https://tinyurl.com/phesrpn2.

stereotypes in a listening session the next month, comparing test preparation by TJ students, who are majority Asian-American, to the use of illegal "performance enhancement drugs."[31]

During his first presentation of the admissions change proposal in September 2020, Superintendent Brabrand highlighted the "need to recognize" that "TJ should reflect the diversity of Fairfax County Public Schools, the community and of Northern Virginia," noting that "the talent at Thomas Jefferson currently does not reflect the talent that exists in FCPS."[32] FCPS Chief Operating Officer Marty Smith echoed Brabrand's discriminatory assertions by stating that "the diversity at TJ doesn't currently reflect the diversity of Northern Virginia and the talent at TJ does not reflect the talent in Fairfax County Public Schools."[33] Showing a slide that illustrated 15 years of TJ admissions data by race, including the trend of more Asian-American students winning seats at TJ, Smith stated: "[i]t's important to note that some of the gaps that we've seen over time for some of our groups of students have only gotten wider with regard to the applicant pool."[34] All of these statements placed considerations of racial balance squarely at the forefront of the conversation regarding TJ's admissions process.

At that same Board work session, Principal Bonitatibus made clear that racial balancing was the goal of the proposed TJ admissions process changes. She noted that while TJ is a "wonderfully diverse school," FCPS was making "efforts to ensure that we are more demographically representative of the region."[35] In fact, the opportunity to racially balance TJ, or

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[31] *Virginia Education Secretary Compares Test Prep to Using Illegal 'Performance Enhancement Drugs,'* from Listening Session with TJ Students held Sept. 8, 2020, YouTube (Sept. 13. 2020), https://www.youtube.com/watch?v=w5RcAhRyB6g&ab_channel=AsraNomani.

[32] *FCPS School Board Work Session – 9-15-20 – TJ Admissions Review*, *supra* n.14, at 4:31-5:04.

[33] *Id*. at 7:31.

[34] *Id*. at 7:58.

[35] *Id*. at 33:25.

"the notion that the school could be more representative of its region," was one of the reasons she was attracted to the principal position at TJ.[36] Bonitatibus stated that "we are all united in believing that there is a statistically significant enough difference in the disparities that we're seeing that action does need to be taken . . . . And I am fully supportive of FCPS' efforts to advance the representative demographics at our school."[37] Given the context of the discussion, there is no doubt that Bonitatibus' use of terms such as "diversity," "representation," "disparities," and "representative demographics" referred to the Board's attempts to racially balance the student body at TJ.

When the Board voted to eliminate the TJ admissions test at a work session on October 6, 2020, racial balancing was again at the forefront of the discussion between Superintendent Brabrand and the Board. Brabrand noted that the proposed changes to the TJ admission test "eliminat[es] the testing component that squeezed out talent and squeezed out diversity in our system."[38] Bonitatibus repeated the familiar refrain of a desire for a "student body that more closely aligns with the representation in FCPS."[39] Board member Abrar Omeish stated that a key point was to "make sure there's representation" that "should be proportional to the population numbers" of Fairfax County.[40]

During this discussion, the TJ admissions test—by which Asian-American and other students earned their places at TJ—was repeatedly referred to as biased, resulting in the admission

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[36] *Id*. at 1:28:40.

[37] *Id*. at 1:29:37.

[38] Fairfax County Public Schools, *FCPS School Board Work Session TJ Admission 10-6-20*, YouTube (Oct. 6, 2020), at 6:57, 10:12, https://tinyurl.com/36wa99eh.

[39] *Id*. at 29:41.

[40] *Id*. at 1:03:30.

to TJ of "students who have been [in] Test Prep since second grade."[41] This language is a direct attack on Asian-American families whose children hope to apply to TJ,[42] demeaning students' hard work and families' sacrifices as "pay to play."[43] Board member Keys-Gamarra even appeared to recognize this stereotype, saying:

> And I want to say, just as we are concerned about certain communities feeling that we are maligning them by talking about tests, we must be very careful and we must be cognizant of how demeaning these types of comments are and that many people consider these comments to be rooted in racism. I'm not saying it's intentional, but we need to be mindful.[44]

At the very least, these statements demonstrate that the intent behind the changes to TJ's admissions process was to make it harder for Asian-Americans to get into TJ in order to increase the representation of students of other races. Or, as this Court said in May, "everybody knows the policy is not race neutral, and that it is designed to affect the racial composition of the school." The final *Arlington Heights* factor thus also weighs in favor of a finding of discriminatory intent.

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[41] *Id*. at 3:40:00.

[42] The test prep stereotype is a well-known trope about Asian-American students. So well known, in fact, that Princeton Review's algorithm charged students in heavily Asian-American zip codes more for test prep classes. *See* Julia Angwin, Surya Mattu & Jeff Larson, *Test Prep Is More Expensive—for Asian Students*, The Atlantic (Sept. 3, 2015), https://tinyurl.com/nmupmuw3. *See also* Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 12–14, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (U.S. No. 20-1199), https://tinyurl.com/ae8d7r4c (citing evidence that Asian American students applying to highly selective colleges are often negatively stereotyped as narrowly focused on maximizing their standardized test scores at the cost of personal development and extracurricular achievement; including a Princeton Review guidebook that encourages Asian American students applying to selective colleges "to avoid being an Asian Joe Bloggs" and to "distance [themselves] from stereotypes about Asians").

[43] *FCPS School Board Work Session*, *supra* n.38, at 39:00.

[44] *Id*. at 2:58:53.

B. There Is No Diversity Exception to *Arlington Heights*

Previously, the Board has protested that this case has nothing to do with anti-Asian bigotry, but instead claims that the new policy was simply intended to increase the diversity of TJ. *See* Br. in support of MTD at 18–24. Yet that misses the point. There is no "diversity exception" to *Arlington Heights* that would allow the Board to implement a policy designed to burden one racial group in order to benefit others. Admission to TJ is a zero-sum game, and the evidence demonstrates that the Board did not change the rules of the game "in spite of" its adverse impact on Asian-Americans, but instead did so *because* the rule change would have the desired racial effect. *See Feeney*, 442 U.S. at 279.

Any diversity exception would swallow the *Arlington Heights* rule. It would permit a school district to implement a racial proxy that would all but guarantee racial balance, so long as it was facially race-neutral and the district maintained it was merely seeking diversity. Such a rule would provide an end-run not only around *Arlington Heights* and *Feeney*'s definition of racial discrimination, but the Supreme Court's more recent declaration that racial balancing is "patently unconstitutional." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013). Simply put, "[t]o allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because" it is facially race-neutral, "is inconsistent with the Supreme Court's holdings." *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring).

That does not mean that *any* action taken for the sake of racial diversity is presumptively unconstitutional. Mere motive to increase the representation of a particular racial group does not render an action racially discriminatory under *Arlington Heights*. There are plenty of actions the Board might take to increase the number of white, Hispanic, and Black students at TJ that would

not discriminate against anyone—such as further increasing the size of TJ, dedicating resources to target underserved students to improve their chances at admission, or other "affirmative efforts to ensure that all groups have a fair opportunity" to compete in the admissions process. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Instead, the Board changed the rules of the admissions game so that similarly situated applicants to TJ will not have a similar chance to get in—and it did so specifically to make it harder for students at schools with more Asian-American students, in order to create the Board's desired racial balance. The Equal Protection Clause prohibits this sort of racial tinkering with the outcome of the admissions process.

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The demonstrated disparate impact on Asian-Americans of the TJ admissions changes and the wealth of direct and circumstantial evidence surrounding the development and enactment of the changes leave little doubt that the Board chose the new admissions policy "because it would assign benefits or burdens on the basis of race." *Doe*, 665 F.3d at 553. As a result, the Board's actions must pass strict scrutiny. *See Lewis*, 662 F.3d at 348 (majority opinion) ("If the government is found to have acted with a discriminatory purpose, strict scrutiny review places the burden on the government to prove that its actions are narrowly tailored to achieve a compelling government interest.") (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)); *see also Fisher*, 570 U.S. at 310 (holding that a law that distributes benefits or burdens based on race is inherently suspect and must be subject to the most "searching examination"). As the Coalition demonstrates below, the challenged policy cannot do so.

C. The TJ Admissions Policy Changes Cannot Survive Strict Scrutiny

The Coalition has shown that the challenged admissions changes were motivated by an impermissible racial purpose, and so the burden shifts to the Board to prove that the changes are

narrowly tailored to further a compelling government interest. *Adarand*, 515 U.S. at 227; *Eisenberg*, 197 F.3d at 129. "This most exacting standard 'has proven automatically fatal' in almost every case," and it is fatal here. *Fisher*, 570 U.S. at 316 (Scalia, J., concurring) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring)).

1. The Board has no compelling interest in racially balancing TJ

The Supreme Court has recognized only two interests as potentially compelling enough to justify race-conscious actions in the school context: (1) remedying the effects of past intentional discrimination, and (2) obtaining the benefits that flow from diversity in higher education. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–23 (2007). Neither interest exists here. First, FCPS dismantled its previously segregated public school system decades ago, eliminating any interest it might have had in remedying past discrimination. *See id*. at 721 ("Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis."). Second, the diversity rationale for higher education recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), does not apply to K-12 education. *See Parents Involved*, 551 U.S. at 724–25 (noting that *Grutter* "relied upon considerations unique to institutions of higher education" and criticizing lower court rulings that assumed *Grutter* applied outside that context).

With the two recognized compelling government interests inapplicable, the Board's changes to TJ's admissions policy can only survive strict scrutiny if it can identify some other, as-yet unrecognized, compelling governmental interest. There is no such interest at play here. Instead, the evidence shows that the Board's primary goal in implementing the new admissions process was to racially balance the student body at TJ according to the racial demographics of Fairfax County and the surrounding area. *See supra* at 11–19. Far from being a compelling interest, racial balancing for its own sake is "patently unconstitutional." *Fisher*, 570 U.S. at 311 (quoting *Grutter*,

539 U.S. at 330). And the Board cannot transform racial balancing into a compelling interest "simply by relabeling it 'racial diversity.'" *Id*. (quoting *Parents Involved*, 551 U.S. at 732 (plurality opinion)). Even taking it at its word, the Board has not pursued a constitutionally permissible interest in its attempt to remake the TJ student body by race.

The Board cannot avoid the racial balancing label by simply declaring that its policy furthers racial diversity. Much like the school districts in *Parents Involved*—which tried "various verbal formulations" to deflect from the intent to racially balance schools through race-based transfers, *see* 551 U.S. at 725, 732 (plurality opinion)—the relevant actors here appear to define "diversity" in relation to the surrounding demographics. That is, the decisionmakers sought (and obtained) more Black, Hispanic, and white students because those groups were "underrepresented" at TJ compared to Northern Virginia and Fairfax County, while Asian-Americans were "overrepresented." Even under the theory of Justice Kennedy's concurrence in *Parents Involved*, which asserted that racial diversity, "depending on its meaning and definition," might be a permissible goal, *see id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment), that goal may only be pursued through generic measures such as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race," *id.* at 789. The Board's targeted strike on Asian-American enrollment at TJ fits none of these descriptions and is different in kind.

Moreover, *Parents Involved* has no controlling opinion on the compelling interest point,[45] but any attempt to justify the Board's race-based actions under strict scrutiny would fail under both the Chief Justice's plurality opinion and Justice Kennedy's concurrence. Applying the plurality's view, the TJ admissions changes effect an impermissible desire to racially balance TJ. And under Justice Kennedy's view, the changes go far beyond the mere acknowledgment of race and generic promotion of diversity. The Board has not simply tinkered with district lines or recognized neighborhood demographics. Instead, the TJ admission policy changes are transparently aimed at producing the Board's desired racial result—the reduction of Asian-American students admitted to TJ—and in fact achieved that goal. The Board's use of effective racial proxies thus transforms this case from one where the decisionmaker simply "considers the impact a given approach might have on students of different races" to one that is tantamount to "a crude system of individual racial classifications." *Parents Involved*, 551 U.S. at 789.

The Board simply has no interest in diversity that could justify the harsh racial proxies it enacted. The evidence shows that those involved with the decisionmaking process were obsessed with racial balancing, far beyond even the "critical mass" theory that the Supreme Court discussed in *Grutter.*[46] *See* 539 U.S. at 329–34. But the Board lacks a compelling interest in adjusting the

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[45] Some courts have referred to Justice Kennedy's opinion as controlling, but it is not. As the Second Circuit has explained, the rule from *Marks v. United States*, 430 U.S. 188 (1977), that the opinion deciding the case on the narrowest ground is controlling applies only where a "fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." *United States v. Leonard*, 844 F.3d 102, 108 (2d Cir. 2016) (quoting *Marks*, 430 U.S. at 193). In *Parents Involved*, five justices agreed that the school districts' race-based assignment systems were not narrowly tailored to further any conceivable compelling interest. The compelling interest discussion was therefore unnecessary to the judgment and simply produced "no law of the land." *United States v. Alcan Aluminum Corp*., 315 F.3d 179, 189 (2d Cir. 2003). Both opinions are merely persuasive authority and the question remains open.

[46] *See, e.g.*, "TJ should reflect the diversity of Fairfax County Public Schools, the community, and of Northern Virginia," Fairfax County Public Schools, *FCPS School Board Work Session—9-14-*

"specified percentage of a particular group merely because of its race or ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (controlling opinion of Powell, J.). Since the Board has no interest compelling enough to justify its decision to change the TJ admissions process in a way that discriminates against Asian-American students, it cannot satisfy strict scrutiny, and the Coalition is likely to succeed on the merits of its Equal Protection claim.

2. The Board's plan is not narrowly tailored

Even if the Board could identify a compelling interest that might justify its racially discriminatory changes to the TJ admissions process, it still must prove that the changed admissions policy is "necessary" to accomplish that interest. *Fisher*, 570 U.S. at 312 (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)). The Board fails here, too. Though narrow tailoring generally does not require the government to exhaust "every conceivable race-neutral alternative," the "court must ultimately be satisfied that no workable race-neutral alternatives" exist. *Id*. Or in Justice Kennedy's words, the plan must be a "last resort" to accomplish the Board's interests. *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment). In this case, the plans to alter TJ's admissions policy involved racial balancing from the very outset.[47] Far from being a "last resort," the race-conscious policy is closer to being the Board's first resort.

In evaluating whether a racial classification is narrowly tailored, courts in this circuit consider factors such as

> (1) the efficacy of alternative race-neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force[;] (4) the

20—TJ Admissions Review, YouTube (Sept. 15, 2020), at 4:31-5:04, https://tinyurl.com/4m9fb4nx (statement by Scott Brabrand); FCPS was making "efforts to ensure that we are more demographically representative of the region," *id*. at 33:25 (statement by Ann Bonitatibus).

[47] *See FCPS School Board Work Session – 9-15-20 – TJ Admissions Review*, *supra* n.14.

> flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993) (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). While these factors were developed to assess the constitutionality of remedial programs, they can provide helpful guidance in this context as well.

Particularly under the first, fourth, and fifth *Paradise* factors, the Board cannot demonstrate that the challenged admissions process is narrowly tailored to further any potential interest it might have. The first *Paradise* factor weighs in favor of the Coalition because in revising the TJ admissions policy last fall, the Board did not even consider any options that were not designed to racially balance TJ before choosing the current discriminatory policy. From the outset, proposals to change the TJ admissions process involved geographic proxies designed to pack Asian-American students into regional pathways with limited seat allocation. The process the Board ultimately adopted, with its guarantee that each middle school in FCPS receive seats to TJ equivalent to 1.5 percent of its eighth-grade class, had the same effect, significantly reducing the number of Asian-American students admitted to TJ due to restricting access from heavily Asian-American middle schools.

The second *Paradise* factor also weighs in favor of the Coalition because the challenged admissions changes are permanent. The challenged process is not a temporary fix, nor a limited departure from standard procedure, such as due to challenges during COVID-19. The Board has already announced its intention to apply the same discriminatory admissions policy to the Class of 2026 this fall. The Coalition has no reason to believe the Board will not apply this admissions policy to every future class as well, unless this Court issues an injunction.

The final *Paradise* factor—the burden of the policy on innocent third parties—is especially significant in this case. Asian-American children are collateral damage in the Board's push to racially balance TJ. With the challenged admissions policy in place, students of all races *except* Asian-Americans increased their percentage of seats at TJ this year and will continue to gain admission at these higher rates. This burden is no longer hypothetical; the decimation of Asian-American students among the ranks of those offered admission to TJ for the Class of 2025 is unambiguous. Asian-American students alone bear the burden of the Board's racial balancing maneuvers, and that burden is assigned solely based on the students' race.

Even if this Court were to find that the Board had identified a compelling interest, the Board's racial gerrymandering is not narrowly tailored to achieve that interest. The Coalition is therefore likely to succeed on the merits of its Equal Protection claim.

II. Coalition Members' Children Will Continue to Suffer Irreparable Harm if a Preliminary Injunction Is Not Granted

The challenged admissions process has already caused irreparable harm to the Coalition members' children who were denied admission to TJ this fall because of their race. The Board will apply the same admissions policy to Coalition members' children who apply to TJ this fall. Without a preliminary injunction, those Coalition members' children will suffer irreparable harm, as will each wave of applicants until this discriminatory admissions process is struck down. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the deprivation of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (the "denial of a constitutional right . . . constitutes irreparable harm"). This Court must issue an injunction if the Coalition can show that it is "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22. That harm must be "neither remote nor speculative, but actual and imminent," *Direx Israel, Ltd. v. Breakthrough Med.*

Corp., 952 F.2d 802, 812 (4th Cir. 1991) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)), and one for which monetary damages cannot compensate. *Hughes Network Sys. v. InterDigital Commc'ns Corp*., 17 F.3d 691, 694 (4th Cir. 1994). There is nothing speculative about this harm; it happened to the Class of 2025, and it will happen again. The race-based changes to TJ's admissions subject Coalition members' children to a racially discriminatory process instead of a fair and lawful one, reducing their chances of admission to TJ by virtue of what is effectively a racial proxy. For example, Coalition member Srinivas Akella's child R.A., an eighth grader at Carson MS who will apply to TJ this fall, will be denied the opportunity to compete for admission to TJ on an equal footing because of his race. Akella Decl. ¶¶ 4–8. Applicants in future years may be affected as well, like Coalition member Ying Y. McCaskill's child S.M., a seventh grader at Carson MS who plans to apply to TJ as a member of the Class of 2027. McCaskill Decl. ¶¶ 4–7.

It is firmly established that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Parents Involved*, 551 U.S. at 719 (majority opinion). It does not matter that some of the students identified in the complaint may get into TJ anyway (or perhaps, that they would not get in under any standard): the relevant injury "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Children of Coalition members in FCPS middle schools, and particularly those at Carson, Longfellow, Kilmer, and Rocky Run Middle Schools, will suffer just such an injury in future years as long as the challenged process remains in effect.[48] Absent a preliminary injunction, admissions offers for the Class of 2026, and possibly the

[48] FCPS, *TJHSST Freshman Application Process*, https://tinyurl.com/5p976tck.

following year as well, will have been extended before this lawsuit is fully resolved and the right of Coalition members' children to participate in a lawful admissions process will be permanently foreclosed. That is not an injury that could be compensated with money damages.

TJ is also a unique educational opportunity that cannot be replicated through attendance at another FCPS high school. As the only Academic-Year Governor's School in Fairfax County, TJ is purposefully designed to educate gifted students at levels above and beyond the traditional high school level. TJ offers courses, laboratories, externships, and co-curricular opportunities that are not offered at any other FCPS high school, and 99% of TJ seniors go on to a four-year college or university.[49] Denying students the chance to compete for the opportunity to attend TJ on a level playing field because of their race is an injury that cannot be remedied by attendance at any other FCPS high school, or through money damages.

III. The Balance of Equities and Public Interest Weigh in Favor of an Injunction

The final two preliminary injunction factors—the balance of equities and the public interest—merge when the government is the defendant. *J.O.P. v. U.S. Dep't of Homeland Sec.*, 338 F.R.D. 33, 58–59 (D. Md. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Vindicating constitutional rights is always in the public interest. *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011). And the early date of this motion will alleviate the understandable problems the Board would have had were it asked to return to the previous policy, including the TJ admissions exam, last May. As a result, the strong public interest in favor of enforcing constitutional rights and the hardship that the children of Coalition members would suffer from competing in a discriminatory admissions system while the litigation proceeds significantly

[49] Thomas Jefferson High School for Science and Technology 2020 2021, https://tinyurl.com/ymc4jdya.

outweighs any hardship the Board might suffer. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (quoting *Giovani Carandola, Ltd. v. Bason*, 147 F. Supp. 2d 383, 395 (M.D.N.C. 2001)) ("[The government is] in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction."). A preliminary injunction is therefore appropriate.

IV. No Security Should Be Required

Although a district court may not ignore Rule 65(c)'s bond requirement altogether, it "retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 332 (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999)). "The burden of establishing the bond amount rests with the party to be restrained . . . ." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:20-CV-98, 2020 WL 2312030, at *4 (E.D. Va. May 8, 2020) (citation omitted). Here, the Board cannot show that the issuance of a preliminary injunction would cause them significant harm. No bond or other security should be required; at most, only a nominal bond would be appropriate. *See id.* at *7.

CONCLUSION

For the reasons discussed above, this Court should grant a preliminary injunction to protect the children of Coalition members who must go through the admissions process while this litigation is pending.

DATED: August 26, 2021.

Respectfully submitted,

s/ Alison E. Somin

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**Pro Hac Vice*

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for Defendant is registered with the Court's CM/ECF system and will receive a notification of such filing via the Court's electronic filing system.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ, Plaintiff, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant.	No. 1:21-cv-00296-CMH-JFA

DECLARATION OF SRINIVAS AKELLA

I, Srinivas Akella, declare as follows:

1. The facts set forth in this declaration are based on my knowledge and, if called as a witness, I can competently testify to truthfulness under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am an Asian-American resident of Fairfax County, Virginia.

3. I have a child enrolled in Fairfax County Public Schools.

4. My son, R.A., is a 8th grader at Rachel Carson Middle School in Herndon, Virginia.

5. R.A. was admitted to the Advanced Academic Program in 2nd grade and has been identified as a gifted learner. R.A. is currently enrolled in Pre-Calculus and excels in a number of

math and science activities, including Math Counts, Math Olympiad, American Computer Science League, Science Bowl, Math Bowl, American Mathematics Competitions, and Java Programming.

6. This fall, R.A. intends to apply for admission to Thomas Jefferson High School for Science and Technology (TJ) as part of the Class of 2026.

7. I believe the new TJ admission policy instituted in December 2020 and challenged in this lawsuit discriminates against Asian-American applicants.

8. If allowed to remain in place, I believe the new admissions policy will discriminate against R.A. when he applies for admission to TJ this fall.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on this _23_ day of August, 2021, at Herndon, Virginia.

Srinivas Akella 08/23/2021

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ, Plaintiff, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant.	No. 1:21-cv-00296-CMH-JFA

DECLARATION OF YING Y. MCCASKILL

I, Ying Y. McCaskill, declare as follows:

1. The facts set forth in this declaration are based on my knowledge and, if called as a witness, I can competently testify to truthfulness under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am an Asian-American resident of Fairfax County, Virginia.

3. I have three children enrolled in Fairfax County Public Schools: one is currently in the 11th grade, one is currently in the 9th grade, and one is currently in the 7th grade.

4. My 7th grade child, S.M., attends Rachel Carson Middle School in Herndon, Virginia.

5. S.M. was admitted to the Advanced Academic Program in 2nd grade and has been identified as a gifted learner. She participates in Math Olympiad and other math contests, where she scores highly.

6. When she is old enough, S.M. intends to apply for admission to TJ as part of the Class of 2027.

7. If allowed to remain in place, I believe the new admissions policy will discriminate against future Asian-American applicants, like S.M.

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 24th day of August, 2021, at Fairfax, Virginia.

Ying Y. McCaskill

Kiren Mathews

From: cmecf@vaed.uscourts.gov
Sent: Thursday, August 26, 2021 1:04 PM
To: Courtmail@vaed.uscourts.gov
Subject: Activity in Case 1:21-cv-00296-CMH-JFAVAED Coalition for TJ v. Fairfax County School Board et al Memorandum in Support

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U.S. District Court

Eastern District of Virginia -

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Case Number: 1:21-cv-00296-CMH-JFA
Filer: Coalition for TJ
Document Number: 59

Docket Text:
Memorandum in Support re [58] MOTION for Preliminary Injunction filed by Coalition for TJ. (Attachments: # (1) Declaration of Srinivas Akella, # (2) Declaration of Ying Y. McCaskill)(Somin, Alison)

1:21-cv-00296-CMH-JFA Notice has been electronically mailed to:

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