UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1303

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff – Appellant,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA OLIVER-DAVILA; MICHAEL O'NEIL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS,

Defendants – Appellees,

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants – Intervenors – Appellees.

No. 22-1144

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff – Appellant,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA OLIVER-DAVILA; MICHAEL D. O'NEILL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS, Superintendent of the Boston Public Schools,

Defendants – Appellees,

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants – Intervenors – Appellees,

KAY H. HODGE; JOHN MATTHEW SIMON,

Respondents.

On Appeal from the United States District Court
for the District of Massachusetts
Honorable William G. Young, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Boston Parent Coalition for Academic Excellence Corp. hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 42 U.S.C. § 1983 (cause of action for violation of the Constitution or federal law); and 28 U.S.C. § 2201 (Declaratory Judgment Act). Federal jurisdiction arose because Plaintiff alleged that Defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff also alleged that it has members with standing in their own right to challenge Defendants' imposition of a ZIP Code quota for admission to Boston's Exam Schools for the 2021-22 school year.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. In appeal No. 21-1303, the Court has jurisdiction to review the district court's final judgment issued on April 15, 2021. Addendum 049. In appeal No. 22-1144, the Court has jurisdiction to review the district court's final order denying Plaintiff's Rule 60(b) motion for relief from the judgment, issued on February 24, 2022. Addendum 105.

STATEMENT OF THE ISSUES

1. Whether—considering only the stipulated record, including attached exhibits—the Boston School Committee violated the equal protection rights of the parent-members of the Boston Parent Coalition for Academic Excellence when it replaced the established, citywide admissions process for Boston's Exam Schools with a ZIP Code quota designed to achieve racial balance, especially when at least five children of those parent members would have been admitted under a citywide competition.

2. Whether the district court abused its discretion when it denied the Boston Parent Coalition for Academic Excellence's Rule 60(b) motion after the disclosure of initially-withheld racist text messages between two of the seven members of the Boston School Committee.

3. Whether, in the alternative, the district court abused its discretion in refusing to reopen the case and allow discovery in light of the Boston School Committee Defendants' misrepresentations regarding the racist text messages between two of the seven members of the Boston School Committee.

INTRODUCTION

Boston's "Exam Schools" are three of the most highly-regarded public high schools in America. Including Boston Latin—recognized as the nation's oldest public school—these schools are academically rigorous and highly sought by parents and students alike. But the Boston School Committee was dissatisfied—not with the academic performance of the schools—but with the racial composition of the students. To remedy this "problem," the School Committee overhauled admissions to the Exam Schools. The process was overtly and transparently designed to racially balance the Exam Schools by using ZIP Codes as a proxy for race, thereby making it significantly more difficult for Asian-American and white students to gain admission. The process was so transparent that the School Committee Chairperson didn't bother to hide his disdain for Asian Americans, mocking the names of Asian-American parents who had come to a meeting to oppose admissions changes. Things were worse in private—it turns out that "[t]hree of the seven School Committee members harbored some form of racial animus." Addendum 096. It is no wonder that the district court found that "the race-neutral criteria were chosen precisely because of their effect on racial demographics." *Id.*

That finding alone should have triggered strict scrutiny, which applies "not just when [government actions] 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). And a crude ZIP Code quota designed to achieve racial balancing and passed by a School Committee infected with racial animus cannot pass such a demanding inquiry. The School Committee lacks any interest compelling enough to justify racial discrimination, and its actions were not narrowly tailored to achieve any interest it might have had. Judgment should have been entered in favor of the Boston Parent Coalition for Academic Excellence.

Correcting that error on appeal would not involve upending Exam School admissions. The ZIP Code quota as used for 2021-22 admissions is no longer in effect. The Amended Complaint named 14 specific students, at least five of whom would have gained admission to one of the Exam Schools absent the School Committee's discrimination. This Court need only reverse the judgment below and remand with instructions for the district court to order the School Committee defendants to admit these five students. Because these students were deprived of seats at the

Exam Schools because of their race, the judgment below should be reversed.

I. STATEMENT OF THE CASE

A. Exam Schools and Admissions Changes

Boston Public Schools (BPS) operates three Exam Schools that serve students in grades 7-12—Boston Latin School, Boston Latin Academy, and John D. O'Bryant School. App. 166 (Joint Agreed Statement of Facts (ASF) ¶ 7). Founded in 1635, Boston Latin is the oldest currently operating school in the United States. App. 167 (ASF ¶ 8). All three schools are consistently among the best public schools in the nation according to U.S. News & World Report, and they are currently ranked as the top three high schools in Boston. *Id.* (ASF ¶ 11). Together, they enroll almost 6,000 students. *Id.* (ASF ¶ 12).

Students who are Boston residents may apply to the Exam Schools while they are in sixth grade or eighth grade (with corresponding entrance in seventh or ninth grade). *Id.* (ASF ¶ 13). Before the 2021-22 entrance year, admissions to the Exam Schools were based on an applicant's grades in English Language Arts and Math as well as performance on a standardized test. App. 168 (ASF ¶ 15). BPS averaged

each applicant's grades and assigned a point value to that average, then added the standardized test score to calculate an applicant's composite score. *Id*. Each applicant ranked the three Exam Schools in order of preference, and admissions were then conducted via ranked-choice until all the available seats at each school were filled.[1] *Id*.

For the 2021-22 entrance year—the only one challenged in this case—the School Committee changed the admissions process for the Exam Schools in two ways. First, citing the COVID-19 pandemic, it eliminated the standardized test. App. 177 (ASF ¶ 50). This change is not challenged here. Second, eligible applicants were ranked according to their GPA. App. 178–79 (ASF ¶¶ 54–55, 57). However, only the first 20% of seats at each Exam School were filled through a citywide competition. App. 179 (ASF ¶ 57). Once 20% of the seats at each school were filled, applicants who did not receive one of those seats were tossed into the second process, which allocated a number of seats to each Boston ZIP Code based on the proportion of school-age children that reside in that

[1] Ranked-choice admission means that the highest scoring students are assigned to their first-choice school unless the first-choice school is already filled. BPS continued on down the list of students by composite score until all three schools were filled. *See* App. 168 (ASF ¶ 15).

ZIP Code. *Id*. (ASF ¶¶ 58–60). Competition for these seats then took place exclusively within each of the 29 ZIP Codes (and one the School Committee created for homeless applicants and those in state custody), with students assigned seats allocated to each ZIP Code on a ranked-choice basis according to their GPA. App. 180 (ASF ¶ 61).

B. Process Leading to Change for 2021 Exam Schools Admissions

As early as the summer of 2019, before the advent of the novel coronavirus, BPS staff was analyzing potential changes to Exam School admissions. At the forefront of those discussions was transforming the racial composition of the schools. App. 171–72 (ASF ¶ 27); *see also* App. 1710–11 (Ex. 31 to ASF). In the fall of 2019, BPS established a committee to review proposals for a potential new examination to use for Exam School admissions, potentially for school year 2021-22 admissions. App. 172 (ASF ¶ 28). In July 2020, the School Committee accepted Superintendent Brenda Cassellius' recommendation to establish an advisory Exam School Admissions Criteria Working Group. *Id.* (ASF ¶ 31). The Working Group was to "develop and submit a recommendation to the Superintendent on revised exam school admissions criteria for SY21-22 [School Year 2021-22] entrance in light of the impact of the

COVID-19 pandemic on the prospective applicants during the latter half of SY19-20 and potential impact on SY 20-21." App. 1713 (Ex. 32 to ASF at 1).

Although the Working Group's deliberations were not available to the public, it considered data provided by BPS staff, much of it comprised of simulations of the racial composition of the Exam Schools under various potential alternative admissions criteria. *See* App. 174–75 (ASF ¶ 41 (listing Exs. 44–54 to ASF)). These simulations revealed an almost singular focus on changing the racial composition of the Exam Schools. *See, e.g.*, App. 1757–94 (Exs. 45–54 to ASF). The Working Group completed an "Equity Impact Statement" using the "BPS Equity Planning Tool," *see* App. 176 (ASF ¶ 47), which explicitly states that BPS "must make a hard pivot *away from a core value of equality* – everyone receives the same – to equity: those with the highest needs are prioritized." App. 1936 (Ex. 64 to ASF (emphasis added)). Ultimately, with the support of Superintendent Cassellius, the Working Group submitted its recommended ZIP Code quota plan to the School Committee on October 8, 2020. App. 176 (ASF ¶ 46).

Comments made by members of the Working Group before the School Committee on October 8 show that race—and particularly racial balancing—was the Working Group's overriding focus. For example, the Working Group's initial statement said the Group began by "identify[ing] the desired outcomes for the recommendation"—which it described chiefly in terms of racial balancing—and proceeded "to work towards an admissions process that" would reflect that balance. App. 405 (Ex. 5 to ASF); *see also* App. 1473 (Ex. 18 to ASF). Working Group member Samuel Acevedo—BPS' Opportunity and Achievement Gap Task Force Co-Chair—told the School Committee that one of the two "imperatives" facing the Working Group was "rectifying historic racial inequities afflicting exam school admissions for generations." App. 422 (Ex. 5 to ASF). The Working Group presentation also included a slide discussing previous litigation that had restricted BPS' use of race on previous occasions, as well as multiple slides with racial data relating to standardized testing and Exam School applications. *See, e.g.*, App. 1475–76, 1481 (Ex. 18 to ASF).

Another Working Group member was president of the NAACP-Boston Branch, Tanisha Sullivan. App. 173 (ASF ¶ 32). On behalf of the

Working Group, she told the School Committee that racial gaps in assessment score and GPA between white and Asian-American students on one hand and Black and Hispanic students on the other "played a significant role in what we will ultimately recommend." App. 414–15 (Ex. 5 to ASF). The slides presented then showed the "Projected Shift" in the racial composition of the entering class at the Exam Schools under the Working Group's recommendation. App. 1486 (Ex. 18 to ASF). The chart showed a clear gain for Black and Hispanic students and a corresponding loss for Asian-American and white students. *Id.*

School Committee member Lorna Rivera endorsed the Working Group's racial balancing mission. She pointed out "the issue of just really naming it, you know, and really considering race and ethnicity." App. 433 (Ex. 5 to ASF). Recognizing that her position was "controversial," she went on to say that the School Committee needs to "be explicit about racial equity, and we do need to figure out again how we could increase those admissions rates, especially for Latinx and black students." App. 433–44 (Ex. 5 to ASF). Rivera continued—she said she "always wonder[s] about this when I see the percentages of Asian and white students versus the percentages of black and Latinx students when those cohorts are so

different" and observed that "[w]e know that many Asian students also take education very differently and have a lot of support. That's not so true often in our black and Latinx communities." App. 453 (Ex. 5 to ASF). School Committee member Alexandra Oliver-Davila was even more explicit, saying that she "want[s] to see those schools reflect the District. There's no excuse, you know, for why they shouldn't reflect the District, which has a larger Latino population and black African-American population." App. 462 (Ex. 5 to ASF).

The School Committee met again on October 21 to consider the Working Group's recommendation. Members of the Working Group and the School Committee continued to highlight their intent to racially balance the Exam Schools. Working Group member Sullivan said explicitly that the Working Group's recommendation would "allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." App. 653 (Ex. 7 to ASF). School Committee member Rivera supported the Working Group's plan as a first step but "it doesn't go far enough because white students would continue to benefit from 32 percent of the seats according to this plan. Look at the data, it's not a huge change for Asian and white families." App. 943 (Ex. 7 to ASF). And

Oliver-Davila again called for racial balancing, calling it "criminal" and "racist" that Black and Hispanic admission percentages had not increased and stating that "all of our schools should reflect the student body that we have. . . . [I]t should not be acceptable to have schools that don't represent that, just not acceptable." App. 974–76 (Ex. 7 to ASF). Unsurprisingly, the slides presented at the meeting emphasized racial statistics and outcomes more than other considerations. See App. 1475, 1481, & 1486 (Ex. 18 to ASF).

Aside from the explicit endorsement of racial balancing, the October 21 meeting also featured School Committee chairperson Michael Loconto being caught on a hot mic ridiculing the names of Asian-American parents who had signed up to speak to oppose the ZIP Code quota. App. 181 (ASF ¶ 66). Rather than reacting with the shame the incident deserved, School Committee members Rivera and Oliver-Davila laughed about the incident over text message as it occurred, with Oliver-Davila saying "What did I just miss? Was that ML saying Shannana and booboo???" and Rivera responding "I think he was making fun of the Chinese names! Hot mic!!!" App. 2025 (Ex. 72 to ASF). Rivera then wrote that she "almost laughed out loud" and was "[g]etting giddy here!" *Id.*

Aside from the laughter, both women expressed sympathy for Loconto rather than outrage towards his comments. *Id.* Loconto apologized for his actions and resigned from the School Committee the next day. App. 166 (ASF ¶ 5). Oliver-Davila became acting chairperson. *Id.*

Ultimately, the School Committee approved a plan—as described in the previous section—almost identical to what the Working Group had proposed. App. 176–77 (ASF ¶ 48).

C. Later Revelations

Although the BPS Defendants (the School Committee, members, and Superintendent Cassellius) stipulated that Exhibit 72 contained "[a] true and accurate transcription of text messages between Boston School Committee Members, Vice-Chairperson Alexandra Oliver-Davila and Lorna Rivera during the October 21, 2020 Boston School Committee meeting," App. 181 (ASF ¶ 67), that turned out to be false. Rather, in responding to public records requests from future Boston Parent Coalition for Academic Excellence member Darragh Murphy *and* the Boston Globe, the City produced edited transcripts of the exchanges between Oliver-Davila and Rivera that night. That much was revealed on June 7, 2021, when the Boston Globe revealed previously undisclosed,

leaked text messages between Oliver-Davila and Rivera during the October 21 meeting. App. 2357–62; *see also* Addendum at 078 (district court's indicative ruling). Eleven days later, the BPS Defendants produced screenshots of texts—rather than transcripts that had been edited—that included several portions of text messages that previously had been withheld. App. 2673–74 (affidavit of attorney Kay Hodge); App. 2936 (affidavit of attorney Catherine Lizotte).

The district court reviewed the withheld messages and correctly called them "racist." Addendum 095. In one instance, after Oliver-Davila texted Rivera "[b]est sc mtg [School Committee meeting] ever I am trying not to cry," Rivera responded, "Me too!! Wait til the white racists start yelling [a]t us!" Oliver-Davila then responded "[w]hatever . . . they are delusional." Addendum 072. In another exchange, Oliver-Davila texted "I hate WR," short for West Roxbury, to which Rivera responded "[s]ick of westie whites" and Oliver-Davila confirmed "[m]e too I really feel like saying that!!!!" Addendum 073.

It was later revealed that in-house counsel for the School Committee defendants were involved in redacting the additional racist text messages, although counsel stated that she had simply forgotten

about the redactions when she advised outside counsel regarding the stipulation. *See* App. 2934 (Lizotte Affidavit ¶ 40).

D. The Coalition, the 14 Students, and the Racial Impact of the Changes

Boston Parent Coalition for Academic Excellence (the Coalition) is a Massachusetts non-profit established for the purpose of "promot[ing] merit-based admissions to Boston Exam Schools" and promoting "diversity in Boston high schools by enhancing K-6 education across all schools in Boston." App. 2082 (First Amended Verified Complaint (Complaint) ¶ 4). Membership is open "to students, alumni, applicants and future applicants to the Boston Exam Schools, as well as to members of their respective families, who are in agreement with the purposes and objectives of the Boston Parents and meet such other criteria as may be set by the organization's by-laws and board of directors." *Id.* (Complaint ¶ 5). The Coalition filed this lawsuit in February 2021 on behalf of 14 parent-members and their sixth graders who were at that point applying to the Exam Schools. App. 2082–88 (Complaint ¶ 6). Of the 14 students, eight are Asian American and six are white. *Id.* Ten of the students reside in West Roxbury—the very area Oliver-Davila and Rivera expressed

hostility towards in their racist text messages. *Id.* One is from Chinatown. *Id.*

As noted above, simulations predicted that the recommended ZIP Code quota would adversely affect Asian-American and white students. Compared to a citywide competition using only GPA, BPS staff modeling showed that Asian-American and white students combined would receive *65 fewer seats*, while Black and Hispanic students combined would receive 71 more seats under the Working Group's recommendation. App. 1778 (Ex. 48 to ASF). This simulation accurately predicted the ultimate aggregate racial outcome, with the total share of Asian-American and white students admitted to the Exam Schools falling from 61% to 49% after the School Committee's quota plan was implemented. App. 2902 (Ex. N to Coalition's Rule 60(b) brief).[2]

That disparate impact manifested itself at the individual level, where six of the 14 students named in the complaint failed to gain

[2] Because judgment was entered before admissions decisions were made, actual admissions data could not have been included in the stipulated record. However, the Coalition attached this data to its Rule 60(b) motion in the form of BPS public record documents. These documents are included in the Appendix, and in any event, the Court may take judicial notice of the data contained in them. *See Aguilar v. U.S. Immigration & Customs Enforcement Div.*, 510 F.3d 1, 8 n.1 (1st Cir. 2007).

admission to any of the Exam Schools. App. 2885 (declaration of Darragh Murphy ¶¶ 4–5). Five of these students would have been admitted under a citywide plan that did not use ZIP Code quotas. App. 2885–86 (Murphy Decl. ¶ 6). Four of these students—students 6, 8, 10, and 13—reside in West Roxbury, where the *average* GPA of students admitted to the Exam Schools was 11.51 out of a possible 12.[3] App. 2886 (Murphy Decl. ¶ 7), App. 2892 (Ex. I to Coalition's Rule 60(b) brief). Student 10, for example, is Asian American and had a GPA of 10.5, but was not admitted even though Student 10's GPA was greater than the average GPA of *all* admitted students (10.49). *See* App. 2892 (Ex. I to Coalition's Rule 60(b) brief). The fifth student is from Chinatown and received no offers despite a 9.5 GPA. West Roxbury (ZIP 02132) and Chinatown (02111) were both hit disproportionately hard even compared to a random distribution—West Roxbury students would have expected 85 seats if offers were doled out randomly, but received only 69, while Chinatown students received only seven offers rather than the expected 19. *See infra* p. 35.

[3] BPS translated every student's GPA to a 12-point scale, with 12 representing an A+, 11 an A, 10 an A-, and so on.

E. Procedural Posture

The Coalition initially sought a preliminary injunction that would have enjoined the use of the ZIP Code quota and required BPS to hold a citywide competition. Having received various documents—including text messages between School Committee members—via public records requests, and faced with the district court's decision to collapse the preliminary injunction motion with the trial on the merits, *see* App. 003 (ECF No. 27), the Coalition chose to forego discovery and proceed on a stipulated record.[4] Soon after, the district court entered judgment in favor of the BPS Defendants, holding that the ZIP Code quota was not enacted with racially discriminatory intent. Addendum 001–049. The Coalition immediately appealed, App. 2287, and unsuccessfully sought an injunction pending appeal in this Court. *See Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Cmte. of City of Boston*, 996 F.3d 37 (1st Cir. 2021).

Before briefing began on the merits of the appeal, the Boston Globe published its June 7, 2021, exposé of the racist text messages between

[4] The district court granted permissive intervention to several advocacy groups. The intervenors objected to portions of the stipulated record, but the district court properly treated these as part of the record.

Oliver-Davila and Rivera. The Coalition then sought Rule 60(b) relief from the judgment in the district court, App. 2290, and this Court consequently stayed the briefing schedule while the motion was pending. On July 9, the district court withdrew its initial opinion on the ground that it was "factually inaccurate." App. 2612 (ECF No. 121). Briefing then continued on the Rule 60(b) motion before the district court issued an indicative ruling in October noting that it would deny the motion, both on the ground that the racist text messages could have been discovered in discovery and that they would not have changed the result in any event. Addendum 050–104. The court issued a final order denying the Rule 60(b) motion on February 24, 2022. Addendum 105. The Coalition filed a second notice of appeal, App. 3287, and this Court granted the Coalition's motion to consolidate the two appeals for the purposes of briefing and argument.

STANDARD OF REVIEW

The district court's April judgment was based on a stipulated record. When facing "a joint motion requesting a decision on a stipulated record . . . the district court may 'decide any significant issues of material fact that [it] discovers' in the stipulated record." *Thompson v. Cloud*,

764 F.3d 82, 90 (1st Cir. 2014) (quoting *Boston Five Cents Sav. Bank v. Dep't of Housing & Urban Dev.*, 768 F.2d 5, 11–12 (1st Cir. 1985)). This Court reviews any such factual findings for clear error, but "review[s] the district court's legal conclusions de novo." *Id.*

With respect to the Rule 60(b) motion for relief from the judgment, this Court reviews the ultimate decision for abuse of discretion, but still reviews legal conclusions de novo and must reverse if "the district court's exercise of discretion is premised on an erroneous legal principle." *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 100 (1st Cir. 2001).

SUMMARY OF ARGUMENT

First, both initial projections and actual data from the use of the ZIP Code quota confirm that it had an adverse impact on white and Asian-American applicants to the Exam Schools. While white and Asian-American students still earned almost half of the available offers—down from 61% in the year before the quota went into effect—the quota made it disproportionately more difficult for these students to gain admission. That alone is sufficient to demonstrate that the "impact of the official action" was such that "it 'bears more heavily on one race than another.'" *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266

(1977) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Were continued success of a group relative to the general population (or applicant pool) sufficient to defeat an assertion of disparate impact, a school district would have carte blanche to enact measures designed to limit the enrollment of any racial group until the group's aggregate share of the admitted class fell to the district's target. That would permit de facto racial balancing—which the Supreme Court has declared "patently unconstitutional." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013). It would also run roughshod over the guarantee at the heart of the Equal Protection Clause—"that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted)).

Second, even on the original stipulated record—without the additional racist text messages from School Committee members Oliver-Davila and Rivera—the Coalition has demonstrated the requisite intent to trigger strict scrutiny. Most shockingly, three of the seven ultimate decisionmakers expressed racial animus towards Asian-American

students. Then-School Committee Chair Michael Loconto was blatant in his mocking of the names Chinese-American parents who signed up to speak in opposition to the ZIP Code quota, while his racist comments excited Oliver-Davila and Rivera. Beyond the animus, the Working Group that devised the quota plan explicitly sought racial balance, and School Committee members explicitly supported the quota because of its racial effect. It is no wonder that the district court belatedly recognized that the ZIP Code quota's "race-neutral criteria were chosen precisely because of their effect on racial demographics." Addendum 096 (district court's indicative ruling). That is the very definition of discriminatory intent under Supreme Court precedent. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Third, the School Committee cannot carry its heavy burden to show that the ZIP Code quota was narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Supreme Court has never extended the diversity rationale endorsed in *Grutter v. Bollinger*, 539 U.S. 306 (2003), to the K-12 arena. To the contrary, it has expressly held that those cases were unique to higher education and that a different interest must support

racial discrimination in K-12 schools. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724–25 (2007). The decisonmakers' obsession with racial balance makes it exceptionally difficult for the School Committee to put forth a new interest—after all, far from a compelling state interest, racial balancing is "patently unconstitutional." *Fisher*, 570 U.S. at 311. So does the demonstrated animus on the part of three School Committee members. And in any event, the quota was not narrowly tailored to achieve anything other than balancing.

Fourth, even if the Court disagrees that the Coalition should prevail under the stipulated record, it should either consider the additional racist text messages between Oliver-Davila and Rivera now or it should remand for full discovery. While the Coalition views these additional texts as further evidence of animus on the part of these members, the texts convinced the district court that three members of the School Committee harbored animus. If the Coalition cannot prevail on the original record, it should have been entitled to relief from judgment based on the new text messages. After all, the Coalition reasonably relied upon the School Committee's stipulation that the text message chain between Oliver-Davila and Rivera was "true and accurate," which later turned out to be

false. It was an abuse of discretion for the district court to hold that the Coalition's reliance on this stipulation was inexcusable or amounted to a failure to do due diligence.

In the end, this Court should reverse the judgment below and remand the case with instructions for the district court to order the five students mentioned in the Verified Amended Complaint be admitted to the Exam Schools. In the alternative, it should vacate the judgment and remand either for the application of strict scrutiny or for discovery.

ARGUMENT

"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (controlling opinion of Powell, J.). Even where the government employs no explicit racial classification, the Supreme Court has long recognized that a policy "fair on its face and impartial in appearance" may violate the Fourteenth Amendment's equal protection guarantee if "it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Yick Wo v. Hopkins*, 118 U.S. 356,

373–74 (1886). More recently, the Court has confirmed that the government must satisfy that "most exacting judicial examination"—strict scrutiny—"not just when [its policies] contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). Thus, if the record demonstrates that the Boston School Committee improperly considered race in enacting the ZIP Code quota plan for Exam School admission for the 2021-22 school year, the burden then shifts to the School Committee to demonstrate that the quota was narrowly tailored to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

To trigger strict scrutiny, the School Committee need not have focused on race to the exclusion of any other considerations. Rather, the impermissible racial purpose need only be a "motivating factor"—it need not be "the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Determining whether an impermissible racial purpose motivated the decisionmakers "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Relevant factors

include: (1) the "impact of the official action;" (2) the "historical background of the decision;" (3) the "specific sequence of events leading up to the challenged decision;" and (4) the "legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 266–68. Ultimately, the dispositive question is whether the School Committee chose the ZIP Code quota "at least in part 'because of,' not merely 'in spite of,' [the quota's] adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

The procedural posture of this case means there is still a question whether this Court should decide the appeal based only on the stipulated record, or whether it should consider the subsequently-discovered racist text messages between Oliver-Davila and Rivera. Yet the Court need not resolve that question for the Coalition to prevail on appeal. There are three ways the Coalition can prevail. First, the Court could—and should—hold that the stipulated record overwhelmingly demonstrates discriminatory intent and reverse the judgment on that basis. Separately, the Court could either hold that (1) the district court abused its discretion in denying the Rule 60(b) motion and the addition of the

racist text messages changes the outcome, requiring reversal, *or* (2) the district court abused its discretion in denying the Rule 60(b) motion and the judgment should therefore be vacated and the case remanded for discovery.

I. The ZIP Code Quota Plan purposefully—and successfully—had an Adverse Impact on Asian-American and White Applicants to the Exam Schools

Irrespective of the dispute over the proper record, the disparate impact inquiry remains the same and constitutes an "important starting point" of the *Arlington Heights* inquiry. *Arlington Heights*, 429 U.S. at 266. By any measure, the School Committee's choice to implement a ZIP Code quota rather than a citywide competition for Exam School seats adversely impacted Asian-American and white applicants. That is true even ignoring the School Committee's decision to eliminate the traditional examination requirement and rely on GPA as the sole academic indicator to determine admission. Indeed, five of the 14 students named in the Amended Complaint ultimately became victims of the ZIP Code quota when they were denied admission to any Exam School despite GPAs high enough for admission under a citywide competition.

BPS' own projections are an important starting point. The simulations considered by the Working Group and the School Committee anticipated a substantial disparate impact, both compared to the previous year's baseline *and* a hypothetical citywide competition using only GPA. The "Projected Shift" chart presented to the School Committee shows that the ZIP Code quota was expected to reduce the proportion of admitted students who were white from 39% for the 2020 entering class to 32% for 2021, while simultaneously reducing the proportion of students who were Asian American from 21% to 16%. App. 1486 (Ex. 18 to ASF). Courts evaluating similar discrimination claims in the K-12 context have often found such a year-over-year decline sufficient by itself to show a sufficient disparate impact under *Arlington Heights*. *See Ass'n for Educ. Fairness v. Montgomery Cty. Bd. of Educ.*, 560 F. Supp. 3d 929, 952 (D. Md. 2021); *Coal. for TJ v. Fairfax Cty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022), *stayed pending appeal*, No. 12-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022).

But there is much more here. Using only GPA, BPS also simulated the projected effects of using a ZIP Code quota compared to a citywide competition. In Exhibit 47, BPS used data from the preceding year to

identify a projected 2,257 student applicant pool. App. 1774. Then in Exhibit 48, BPS used that applicant pool to simulate the effect of various quotas on the racial composition of the admitted students. It found that, compared to a citywide competition using only GPA, filling 80% of the seats through the ZIP Code quota would result in 65 fewer Asian-American and white students gaining admission. App. 1778. This projection isolated the effect of the ZIP Code quota by eliminating the examination variable and using a constant applicant pool. It shows not only that the decisionmakers expected a clear adverse impact on white and Asian-American applicants, but that the ZIP Code quota was designed to cause that impact.

These projections ultimately came true. Perhaps the best way to see this is to compare the actual outcomes in the 20 ZIP Codes where Asian-American and white population is at least 55% with those in the seven ZIP Codes where the combined Black and Hispanic population is at least 55%.[5] As shown in the tables below, the average GPA of the students

[5] The census data is located in Exhibit 21 to the ASF (App. 1505–1591) and is presented in more convenient form at App. 2070–71. The GPA and offer data by ZIP Code is located at App. 2892, 2898, & 2900.

admitted from the former group of ZIP Codes[6] under the quota plan was substantially higher than the average GPA of the students admitted from the latter group. The average GPA of the admitted students from the predominantly white and Asian-American ZIP Codes where GPA data was available ranged from 10.32 to 11.56, while the corresponding range for the predominantly Black and Hispanic ZIP Codes was 9.51 to 10.67. And out of the 292 total students admitted with a GPA of below 10, 210 of them came from one of these seven ZIP Codes with the fewest white and Asian-American students.[7] [8] This shows that the ZIP Code quota made it disproportionately more difficult for white and Asian-American students to access the Exam Schools.

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[6] BPS did not produce GPA data for ZIP Codes where fewer than 10 students were admitted, so only 10 of the 20 ZIP Codes with at least 55% combined white and Asian-American population are listed in the first table.

[7] This fact comes from aggregating the percentages in App. 2892 (approximately 30 percent of the 974 offers were issued to students with a GPA below 10).

[8] Forty (40) of these students came from the special ZIP Code created for homeless students and those under DCF custody. App. 2892. No racial data is available for these students. Only 42 of them came from another ZIP Code.

Predominantly White/Asian-American ZIP Codes

ZIP Code	Percent White/Asian (Census)	Students Admitted	Proportion (approximate number) with GPA below 10	Average GPA Admitted
02115	75%	10	20% (2)	10.38
02116	84%	13	0% (0)	11.10
02118	61%	27	0% (0)	10.92
02122	55%	48	0% (0)	11.04
02127	82%	35	34% (12)	10.48
02129	82%	35	0% (0)	11.56
02130	63%	54	0% (0)	11.19
02132	84%	69	0% (0)	11.51
02134	78%	11	18% (2)	10.32
02135	79%	29	24% (7)	10.36

Predominantly Black/Hispanic ZIP Codes

ZIP Code	Percent Black/Hispanic (Census)	Students Admitted	Proportion (approximate number) with GPA below 10	Average GPA Admitted
02119	80%	50	66% (33)	9.51
02121	92%	67	61% (41)	9.79
02124	71%	109	30% (33)	10.53
02125	55%	59	31% (18)	10.67
02126	93%	51	63% (32)	9.57
02128	59%	75	37% (28)	10.25
02136	71%	67	37% (25)	10.32

The five students named in the Amended Complaint who were denied admission to any Exam School were victims of this racial proxy. Student 10, for example, is Asian American and resides in West Roxbury

(02132). This student's 10.5 GPA would have guaranteed the student admission if he or she resided in any of the seven ZIP codes with the fewest Asian-American and white students. With a GPA above the average for admitted students citywide, there is no question Student 10 would have been admitted under a citywide competition. The data leaves no doubt that the School Committee's quota adversely affected Asian-American and white students—as intended.

This data demonstrating actual impact—unavailable last April because BPS had not yet made admissions offers—directly responds to this Court's initial concern with statistical significance. After all, statistical significance refers to the possibility that the difference observed between *two populations* is the product of random chance rather than the result of a policy change. *See* Harvard Law Review Association, *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1532, 1535 (1995) ("Statistical significance evaluates the probability that an observed difference between two populations would have occurred randomly if the populations compared were the same."). The above analysis does not depend on comparing two separate application pools, but instead shows the effect of the ZIP code quota as compared to a

hypothetical citywide competition using only GPA. The data removes all doubt that the quota caused the year-to-year decline.

This Court also expressed skepticism that the proffered comparison between the ZIP code quota and a hypothetical citywide competition using only GPA was proper. The panel questioned why the proper baseline should not have been "a plan based on random selection." *Boston Parent*, 996 F.3d at 46. But the actual data has mooted this concern as well—even if a plan based on random selection were the proper baseline, the ZIP Code quota still disproportionately burdened Asian-American and white students. There were 1666 total applicants to the Exam Schools in 2021, of which 974 were admitted—a proportion of 58.5%. App. 2894. Under a random selection, each ZIP Code would expect to have about 58.5% of its students admitted to the Exam Schools. But it turns out that the predominantly (55% or greater) white and Asian-American ZIP Codes did substantially worse than they would have if admission had been random. The following tables show that students from these ZIP Codes would have received about 66 more seats under a random distribution, while students from predominantly Black and Hispanic ZIP

Codes would have received about 57 fewer seats.[9] Chinatown (02111) and West Roxbury (02132) lead the way in this negative category, with students receiving a total of 28 fewer seats than expected.

ZIP Code	White/Asian Combined Population	Students Applied	Expected Students Admitted	Actual Students Admitted	Gain/Loss vs. Expected
02111	87%	33	19	7	-12
02113	90%	10	6	2	-4
02114	83%	15	9	7	-2
02115	75%	23	13	10	-3
02116	84%	20	12	13	+1
02118	61%	65	38	27	-11
02122	55%	98	57	48	-9
02127	82%	55	32	35	+3
02129	82%	73	43	35	-8
02130	62%	101	59	54	-5
02132	84%	146	85	69	-16
02134	78%	23	13	11	-2
02135	79%	47	27	29	+2
TOTALS	**N/A**	**709**	**413**	**347**	**-66**

ZIP Code	Black/Hispanic Combined Population	Students Applied	Expected Students Admitted	Actual Students Admitted	Gain/Loss vs. Expected
02119	80%	54	32	50	+18
02121	92%	83	49	67	+18
02124	71%	181	106	109	+3
02125	55%	89	52	59	+7
02126	93%	52	30	51	+21
02128	59%	148	87	75	-12
02136	71%	111	65	67	+2
TOTALS	**N/A**	**718**	**421**	**478**	**+57**

[9] Data for these tables comes from Census data discussed above as well as application and admissions data located at App. 2898 & 2900.

In any event, comparison to random selection is inappropriate for two reasons. First, *Arlington Heights* instructs courts to consider the "impact of the official action." 429 U.S. at 266. Here, the official actions were to eliminate the examination and then to replace the citywide competition with a ZIP code quota for 80% of the available seats. The Coalition does not challenge the removal of the examination, so the relevant action is the School Committee's decision to replace the citywide competition with a ZIP Code quota. It is only possible to judge the impact of that action by comparing it to a hypothetical citywide competition.

Second, measuring disparate impact against a random distribution of offers would effectively immunize racial balancing from *Arlington Heights* scrutiny. Yet the Supreme Court has called racial balancing "patently unconstitutional." *Fisher*, 570 U.S. at 311. It follows that using a proxy to obtain racial balance—once that intent is proven—must also be unconstitutional—or at least subject to strict scrutiny. After all, the *Arlington Heights* inquiry exists to ensure that the government cannot avoid strict scrutiny by pursuing racial discrimination covertly. *See Miller*, 515 U.S. at 913. Permitting the School Committee to avoid strict scrutiny simply because the racial composition of admitted students

mirrors that of the applicant pool would eviscerate this principle and create a substantial exception to the *Arlington Heights* framework. Simply put, the existence of impermissible intent does not depend on a group's over-or-underrepresentation relative to the population or the applicant pool.

In the end, disparate impact is just one of the factors of the intent inquiry. *See Boston Parent*, 996 F.3d at 45. It is not—as in a Title VII disparate impact case—almost the entire case. *See Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (explaining that a "threshold showing of a statistically significant disparity . . . and nothing more" is required to make out "a prima facie case of disparate-impact liability"). The Coalition therefore need not show overwhelming impact. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–32 (4th Cir. 2016) (warning against requiring "too much" showing of disparate impact in an intentional discrimination case). By any measure, the ZIP Code quota adversely affected Asian-American and white applicants to the Exam Schools. That clear disparate impact weighs in favor of an ultimate finding of discriminatory intent.

II. The Stipulated Record Establishes the School Committee's Impermissible Racial Purpose

The remaining three factors relevant to whether the School Committee acted with a racial purpose are the historical background of the decision, the sequence of events leading to it, and the legislative or administrative history, including the public comments of decisionmakers. *Arlington Heights*, 429 U.S. 266–67. All weigh in favor of a finding that the School Committee chose the ZIP Code quota "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" Asian-American and white applicants. *Feeney*, 442 U.S. at 279.

A. Historical Background Shows Multiple Previous Efforts at Racial Balancing

As this Court has documented,[10] BPS and the Exam Schools have a complicated history when it comes to race—and a history of using explicit racial classifications to achieve a desired balance. In 1974, a federal district court held that BPS was violating the rights of Black students by maintaining a dual (segregated) school system. The district court thus maintained jurisdiction for the purpose of enforcing the desegregation

[10] The historical background is drawn from this Court's discussion in *Wessmann v. Gittens*, 160 F.3d 790, 792–93 (1st Cir. 1998).

order. Despite the lack of particular evidence relating to the Exam Schools, the district court found them complicit in the dual system and ordered BPS to implement a set-aside guaranteeing 35% of Exam School seats to Black or Hispanic students. This Court upheld that set aside in *Morgan v. Kerrigan*, 530 F.2d 401, 425 (1st Cir. 1976).

BPS was declared unitary in 1987. As a result, the district court no longer retained jurisdiction over BPS's student assignments. Nevertheless, the School Committee chose to maintain the set-aside until it was forced to admit a white student, Julia McLaughlin, to Boston Latin after a district court issued a preliminary injunction holding the set-aside likely unconstitutional. *See McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996). Even after this setback, the School Committee and BPS officials immediately began researching various proposals meant to preserve racial balance, ostensibly "without offending the Constitution." *Wessmann*, 160 F.3d at 793. The School Committee's ultimate plan—implemented for the 1997-98 school year—was to select 50% of the student body using a purely merit-based formula considering the applicant's test score and GPA. *Id.* But for the other half, the plan allocated seats "on the basis of 'flexible racial/ethnic guidelines.'"

Id. This Court invalidated *that* policy as well, and ordered the School Committee to admit to Boston Latin a white student, Sarah Wessmann, who would have been admitted absent the School Committee's racial balancing. *See id.* at 809.

As a result of these decisions, Exam School admissions were merit based for roughly the past two decades until the School Committee implemented the ZIP Code quota. But the School Committee's history of tinkering with the admissions process to obtain a desired racial balance—only to be rebuked by the courts—puts the current racial balancing effort in context. Those cases likely taught the School Committee that it is hard to satisfy strict scrutiny—a lesson the Supreme Court reinforced in *Parents Involved*, which invalidated race-based school assignments in two K-12 school districts. The ZIP Code quota was an attempt to avoid strict scrutiny and obtain the same result through a facially-neutral proxy. But this is precisely why Supreme Court precedent requires the government to satisfy strict scrutiny even of facially-neutral actions when "they are motivated by a racial purpose or object." *Miller*, 515 U.S. at 913.

The relationship between the School Committee's prior explicit racial discrimination and its current policy designed to limit white and Asian-American enrollment at the Exam Schools is critical to understanding this case. The Supreme Court has been crystal clear on two points—that the equal protection guarantee applies *equally* to all individuals regardless of race, and that even arguably "benign" racial discrimination must satisfy strict scrutiny. *See Bakke*, 438 U.S. at 289–90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); *Fisher*, 570 U.S. at 308–09. If those two things are true, and it is also true, as the Court said in *Miller*, that the same principles apply to facially-neutral actions designed to achieve the same result, it follows that the ZIP Code quota must satisfy strict scrutiny. Put simply, "[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 the policy is facially neutral "is inconsistent with the Supreme Court's holdings." *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (*Lewis I*) (Jones, J., concurring).

Because the historical background raises a strong inference that the ZIP Code quota is designed to achieve the same result as prior explicitly discriminatory plans, it should weigh in favor of a finding of discriminatory intent.

B. Working Group and School Committee Comments Demonstrate That Three Decisionmakers Possessed Racial Animus

Decisionmakers may act with discriminatory intent even if they do not harbor *animus* towards any particular person or group on account of race. Election cases demonstrate that animus is far from the only reason someone might want to engage in racial discrimination. For example, the Fourth Circuit in *McCrory* held that the Republican-controlled legislature changed the State's election laws not because "any member of the General Assembly harbored racial hatred or animosity toward any minority group," but instead to "target[] voters who, based on race, were unlikely to vote for the majority party." *McCrory*, 831 F.3d at 233. Similarly, the Ninth Circuit in *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), held that the Los Angeles County Board of Supervisors intentionally discriminated against Hispanic voters by diluting their voting strength in order to protect incumbent supervisors.

See also id. at 778 (Kozinski, J., concurring in part and dissenting in part) ("Nothing in the majority opinion . . . suggests that the County supervisors . . . harbored any ethnic or racial animus toward the Los Angeles Hispanic community."). Aside from protecting the incumbent party or specific incumbent legislators, decisionmakers might want to preserve a particular racial balance at a school. These legislators—like those in *McCrory* and *Garza*—would simply use a racial proxy as a means to achieving that end. *See Coal. for TJ*, 2022 WL 579809, at *5; *Ass'n for Educ. Fairness*, 560 F. Supp. 3d at 953.

That certainly happened here—more on that later. But the record here contains explicit racial animus on the part of then-School Committee Chair Michael Loconto, who was caught on a hot mic at a School Committee meeting mocking the names of Chinese-American parents who had signed up to speak in opposition to the proposed ZIP Code quota. App. 181 (ASF ¶ 66). Loconto's "racist comments directed at the City's Asian American community," Addendum 045 (district court's April 15 opinion), provoked sufficient public outrage that Loconto issued a public apology and resigned from the School Committee the next day. App. 166 (ASF ¶ 5). Yet far from distancing themselves from Loconto's

racism, Rivera and Oliver-Davila thoroughly enjoyed it. Oliver-Davila joined in with further mocking: "What did I just miss? Was that ML saying Shannana and booboo???" For her part, Rivera expressed excitement: "I think he was making fun of the Chinese names! Hot mic!!!" Rivera further said she "almost laughed out loud" and was "[g]etting giddy here!" App. 2025 (Ex. 72 to ASF). Thus, out of the seven decisionmakers, the original record revealed one making racist comments in public and two more contemporaneously expressing their excitement about those comments.

In its April opinion, the district court downplayed the Oliver-Davila and Rivera texts, writing that they "do not demonstrate that the members of the School Committee supported the Chairperson's racist mocking." Addendum 045. Instead, the district court interpreted the texts as expressing Oliver-Davila's and Rivera's "concern about the remarks and speculation about the backlash from the comments." *Id.* Certainly, there was some of that. But the members' reaction reveals something else that the district court ignored—Oliver-Davila and Rivera thought Loconto's racism was funny and exciting, not something to condemn. Even ignoring the later revelations that the two members

harbored outright racial prejudice against a *different* racial group, these texts show support for Loconto's racist sentiment against Asian-American parents. *Cf. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2018) (finding that a seven-member commission acted with anti-religious animus where two members made explicit statements on the record and there was "no objection to these comments from other commissioners").

Even absent any other evidence, the fact that *three of the seven* decisionmakers exhibited racial animus against Asian Americans as they were debating a plan that would make it more difficult for Asian-American students to gain access to the Exam Schools is damning. Yet the district court found in October that even on a record where three members showed clear animus, the School Committee would still be entitled to a presumption that it acted in good faith. Addendum 096. Even if some evidence of animus were required to prevail in an *Arlington Heights* case, the Coalition knows of no authority for the proposition that *a majority* of the decisionmaking body must be on the record expressing animus. On the contrary, plaintiffs won two prominent *Arlington Heights* cases recently without so much as one comment from a decisionmaker

displaying racial animus. *McCrory*, 831 F.3d at 229 & n.7; *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 608 (2d Cir. 2016) (affirming district court judgment finding discriminatory intent where local residents expressed opposition to up-zoning that was "not overtly race-based" but "in light of (1) the racial makeup of Garden City, (2) the lack of affordable housing in Garden City, and (3) the likely number of minorities that would have lived in affordable housing at the Social Services Site . . . officials' abrupt change of course was a capitulation to citizen fears of affordable housing, which reflected race-based animus"). That makes sense—after all, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976).

In short, layered on top of the ZIP Code quota's disparate impact on white and Asian-American students, we have clear evidence of racial animus against Asian Americans on the part of almost half of the School Committee members. If this were not enough, the remaining evidence discussed below easily pushes the Coalition's case over the finish line.

C. Working Group and School Committee Proceedings Demonstrate That the ZIP Code Quota Was Implemented To Further a Racial Balancing Goal

Even beyond the racial animus displayed by Loconto, Rivera, and Oliver-Davila, the remainder of the proceedings that led to the ZIP Code quota's enactment were permeated with discussions of race and racial balancing. Although the Working Group's deliberations were not made public, the record includes data and simulations the members considered in formulating the Working Group's recommendation to the School Committee. *See, e.g.*, App. 1757–94. This makes sense—after all, the Working Group had to complete an "Equity Impact Statement" using the "BPS Equity Planning Tool," which explicitly states that BPS "must make *a hard pivot away from a core value of equality* – everyone receives the same – to equity: those with the highest needs are prioritized." App. 1936 (emphasis added). Unsurprisingly, in its public statements to the School Committee, the Working Group made its racial balancing aims clear, even saying that its recommendation was reverse engineered after "identify[ing] the desired outcomes for the recommendation." App. 505. The Working Group's presentation included the "Projected Shift" chart, showing the modeling that ultimately predicted the racial effect of the

ZIP Code quota. App. 1486. Driving home the point, another Working Group member told the School Committee that the Working Group's recommendation would "allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." App. 653.

The School Committee adopted the Working Group's proposal with only two minor alterations. App. 176 (ASF ¶ 48). School Committee members were explicit in voicing support for the Working Group's racial balancing aims. Rivera talked in explicitly racial terms and lamented that the proposal did not go far enough because white students were still projected to receive 32% of the Exam School seats, while Oliver-Davila said it was "criminal" that Black and Hispanic admission percentages had not increased and that "all of our schools should reflect the student body that we have. . . . [I]t should not be acceptable to have schools that don't represent that, just not acceptable." App. 974–76. The evidence in the record shows that racial balancing was the *primary* purpose of the ZIP Code quota.

The district court ultimately came around to this view after it saw the later-revealed racist text messages from Rivera and Oliver-Davila. The court commented in October that the ZIP Code quota "is not the

celebrated result of transcending racial classifications that this Court once found it to be." Addendum 096. But even before the additional racist text messages, it was already clear that "the race-neutral criteria were chosen precisely because of their effect on racial demographics." *Id.* That—especially combined with racial animus on the part of decisionmakers—should have been enough for the Coalition to prevail even without the additional texts. That is especially true now that we have actual data that confirms the projections of disparate impact on white and Asian-American students, which affected specific members of the Coalition mentioned in the Amended Complaint.

Yet even after the district court saw the full record, it still concluded that the Coalition could not demonstrate the required discriminatory intent to trigger strict scrutiny. That was an error of law. Contrary to the district court's view, this case is a far cry from *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71 (1st Cir. 2004).

Anderson involved a challenge to a BPS student assignment plan for elementary and middle schools. In part as a reaction to *Wessmann*'s invalidation of BPS' racial classifications for Exam Schools admission, BPS ditched its prior race-conscious assignment system and installed a

new one. *See Anderson*, 375 F.3d at 76. Under the new plan, every student ranked schools in order of preference and received a randomly drawn number, and each school's seats were filled in accordance with several preferences: half the available seats at each school were set aside for students close enough to the school to be in the "walk zone," while first priority at the remaining seats was given to students either in the walk zone or with a sibling in attendance, with the random numbers breaking ties. *Id.* at 77. Any students who lacked a school within their walk zone were treated as if they were within the walk zone for their two highest-ranked schools. *Id.* at 76.

Parents of white students challenged the plan. They pointed out that the decisionmakers had decided to limit the walk zone preference in part because of the "potentially resegregative impact of removing the racial guidelines of the Old Plan and simultaneously leaving the 100% walk zone preference in place." *Id.* at 81. Indeed, there was no doubt that BPS sought to encourage diversity in instituting its new plan. But this Court held that "the mere invocation of racial diversity as a goal is insufficient to subject the New Plan to strict scrutiny." *Id.* at 87. And in that particular case, the Court thought the record was clear that

"defendants' use of the word 'diversity'" was not "simply a subterfuge for 'racial balancing.'" *Id.* To make matters worse for the *Anderson* plaintiffs, the plan had no discernable disparate impact, as 80% of white students received their first-choice school compared to 77% of Black students. *Id.* at 90.

This case has almost nothing in common with *Anderson*. To begin with, none of the decisionmakers in *Anderson* expressed even a hint of racial animus. Here, even on the narrowest record, three of the seven decisionmakers revealed anti-Asian American animus as the ZIP Code quota was being debated and approved. But beyond that, the plan in *Anderson* treated everyone equally—each student, Black or white, received a preference for his or her walk zone schools, and every student received the same preference for sibling attendance, so it was no surprise that about as many white students as Black students received their first pick. The ZIP Code quota is the opposite of that, as it treated students with the same GPA wildly different based on their ZIP Code, which was used as a "virtually admitted proxy for race." *Lewis I*, 662 F.3d at 354 (Jones, J., concurring).

Anderson exemplifies why merely reciting diversity as a goal is insufficient to trigger strict scrutiny. When the means chosen treat all students equally, the policy does not discriminate against anyone. The policy in *Anderson* was not only facially race neutral, it was race neutral *in fact* because it extended the same preferences to everyone. It was no surprise, then, that it resulted in most students of all races attending their first-choice school. Had the policy in *Anderson* extended a walk-zone preference only to students in certain ZIP Codes to promote racial balancing, that would have been a different case, more akin to this one, with geography used as a proxy for race in doling out preferential treatment.

It is much the same with other school-assignment cases usually cited for this principle, such as *Lewis v. Ascension Parish Sch. Bd.*, 806 F.3d 344 (5th Cir. 2015) (*Lewis II*), *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524 (3d Cir. 2011), and *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013). None of these cases involved admissions to selective schools—like *Anderson*, all concerned district-wide attendance plans. In *Lewis II*, the plaintiff lost his *Arlington Heights* claim because he could not show that the non-white students placed in a particular attendance zone were

adversely affected compared to students placed in neighboring zones. *See Lewis II*, 806 F.3d at 361–62. In *Doe*, the plaintiffs lost in large part because evidence indicated the decisionmakers tried to *avoid* redistricting disproportionately more students of any particular race. *See Doe*, 665 F.3d at 553. And in *Spurlock*, evidence that the re-zoning plan was chosen because of its effect on black students was exceedingly weak—even testimony the plaintiffs emphasized showed, at most, that the plan was chosen *in spite of*, rather than *because of*, any racially disparate impact. *See Spurlock*, 716 F.3d at 400 (citing *Feeney*, 442 U.S. at 279). And in none of these cases did *any* decisionmaker express racial animus of the type seen here.

Further, there is a fundamental difference between (i) drawing attendance zones for ostensibly comparable schools with some awareness of racial demographics and (ii) designing admissions criteria for selective schools so that it will limit enrollment of particular racial groups and achieve racial balance. The district court failed to recognize that, in a competitive admissions environment, using a racial proxy with the intent to *increase* the representation of certain racial groups "by necessity" implies intent to *decrease* the representation of the remaining groups.

Ass'n for Educ. Fairness, 560 F. Supp. 3d at 953. The alternative is that *Arlington Heights* contains a gaping exception for "benign" racial balancing—an exception the Supreme Court has roundly rejected. Indeed, "[t]he Court has squarely held that, well-intentioned or not, express or neutral on its face, a law or policy that purposefully discriminates on account of race is presumptively invalid and can survive only if it withstands strict scrutiny review." *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 566 (3d Cir. 2002). It can be no other way. After all, "[r]acial balancing is no less pernicious if, instead of using a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent." *Coal. for TJ*, 2022 WL 986994, at *7 (Rushing, J., dissenting).

In the end, even absent the clear racial animus, the original record is clear that the School Committee enacted the ZIP Code quota *because* of its racial effect, rather than *in spite* of that effect. That alone is enough to trigger strict scrutiny. *See Feeney*, 442 U.S. at 279–80; *Ass'n for Educ. Fairness*, 560 F. Supp. 3d at 956. The evidence of animus from three of the seven decisionmakers simply demonstrates beyond doubt that the ZIP Code quota was intended to discriminate against white and Asian-

American students. The district court should have analyzed the ZIP Code quota under strict scrutiny.

III. The ZIP Code Quota Fails Strict Scrutiny

Once the Coalition has shown the requisite intent, the burden shifts to the School Committee to demonstrate that the ZIP Code quota was narrowly tailored to further a compelling government interest. *Adarand*, 515 U.S. at 227. Strict scrutiny is "the most demanding constitutional test." *Reed v. Town of Gilbert*, 576 U.S. 155, 182–83 (2015) (Kagan, J., concurring in the judgment). Accordingly, the Supreme Court has recognized only two interests as sufficiently compelling to justify racial discrimination in education—remedying a school district's own past intentional discrimination and obtaining the benefits of diversity in higher education. *Parents Involved*, 551 U.S. at 720–23.

The School Committee cannot rely on either recognized interest here. BPS was declared unitary in 1987. *See Wessmann*, 160 F.3d at 792. Once a school district has achieved unitary status, it may not pursue remedial race-based action. *See Parents Involved*, 551 U.S. at 720–21. Nor can a K-12 school district rely on "the interest in diversity in higher education upheld in *Grutter*." *Id.* at 722. *Parents Involved* explicitly

rejected the school districts' attempt to extend *Grutter* to K-12 education—the majority clarified that *Grutter* had "relied upon considerations unique to institutions of higher education," and that lower courts that had applied *Grutter* "to uphold race-based assignments in elementary and secondary schools" had "largely disregarded" its limited holding. *Id.* at 724–25; *see also id.* at 770–71 (Thomas, J., concurring) (*Grutter*'s holding "was critically dependent upon features unique to higher education"). The Court in *Parents Involved* then fractured on the extent to which a more limited interest in diversity might be compelling in the K-12 context. *Compare id.* at 731–32 (plurality opinion), *with id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment). But it produced no holding on this question other than that *Grutter* is inapplicable to K-12 schools. *See Doe*, 665 F.3d at 544 n.32 ("Justice Kennedy's proposition that strict scrutiny is 'unlikely' to apply to race[-]conscious measures that do not lead to treatment based on classification does not 'explain[] the result' of [*Parents Involved*].").[11] As a result, the

[11] In its opinion last April, this Court recognized a split of authority on the question whether Justice Kennedy's concurrence in *Parents Involved* is binding. *Boston Parent*, 996 F.3d at 48–49.

School Committee has the burden of identifying a new compelling interest sufficient to justify its racial discrimination.

None exists. Even under Justice Kennedy's formulation, the School Committee clearly lacks a compelling interest in the use of a racial proxy to manipulate admissions results for competitive public schools. The *Parents Involved* concurrence—which, again, is *not binding*—allows that "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment). The school assignment policies upheld in cases like *Anderson*, *Doe*, and *Spurlock* are examples of such general policies. A plan explicitly targeted to make it more difficult for students of a particular race to gain admission to a *competitive high school* is the antithesis of such a *general* plan that treats all students equally. As the Chief Justice wrote, "[t]he principle that racial balancing is not permitted is one of substance, not semantics." *Id.* at 732 (plurality opinion). "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.*

What is more, this case is a particularly bad vehicle to introduce a new compelling interest. It is questionable whether *any* government policy motivated in part by racial animus could satisfy strict scrutiny. *See United States v. Machic-Xiap*, 552 F. Supp. 3d 1055, 1063 n.3 (D. Or. 2021). After all, "[r]acial animus is not a compelling interest." *Id.* At the very least, the racist comments by the three School Committee members should subject the School Committee to a heightened burden to show that it was not simply acting with the intent to harm Asian-American (and white) students by reducing their numbers at the Exam Schools.

In any event, the School Committee cannot show that the ZIP Code quota is narrowly tailored to further any interest it might have. Below, the School Committee argued that it did not ultimately choose the proposed option with the largest disparate impact on white and Asian-American students. But that does not mean the School Committee seriously considered options that were actually race-neutral—not intended to promote racial balancing. To the contrary, the Working Group explicitly outlined that the *entire point* of the exercise was to promote balancing. Nothing in the record suggests that the Working Group or School Committee members thought the prior percentage of

Black and Hispanic students at the Exam Schools—35%—was not enough to ensure that the Exam Schools were meaningfully diverse. Rather, the record suggests that the Working Group *began* by identifying the desired *outcomes* and designed its proposal to meet these outcomes. "This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under . . . existing precedent." *Parents Involved*, 551 U.S. at 729 (plurality opinion).

There are many things the School Committee might have tried to increase Black and Hispanic enrollment at the Exam Schools before claiming to have no other option than a crude ZIP Code quota. On this record, the School Committee cannot meet its burden to show that the ZIP Code quota was its "last resort." *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment). Even without the later-discovered racist text messages, the district court should have issued judgment in favor of the Coalition. At this stage, this Court should reverse the judgment below[12] and remand the case with instructions that

[12] In the alternative, the Coalition asks the Court to vacate the judgment and remand the case so that the district court can conduct the strict scrutiny analysis in the first instance.

the district court order the School Committee to admit the five students identified in the Verified Amended Complaint who did not receive offers because of the ZIP Code quota. *See Wessmann*, 160 F.3d at 809 (ordering that a white student who was not admitted due to race-based admissions scheme be admitted to Boston Latin).

IV. The Additional Racist Text Messages Should Either Be Considered as Part of the Full Record or Grounds To Vacate the Judgment and Remand for Discovery

The foregoing demonstrates that this Court should reverse the judgment below without reaching the Rule 60(b) motion. But should the Court find the evidence of intent in the agreed upon record falls short, the path is clear—the Court should reverse the district court's denial of the Rule 60(b) motion and either add the additional racist text messages to the record (changing the result) or vacate the judgment and remand for fact discovery.

Rule 60(b)(2) relief is appropriate where

> (1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted.

González-Piña v. Rodríguez, 407 F.3d 425, 433 (1st Cir. 2005) (quoting *U.S. Steel v. M. DeMatteo Constr. Co.*, 315 F.3d 43, 52 (1st Cir. 2002)). There is no dispute that the racist text messages were discovered after judgment was issued, and the evidence demonstrates animus against a different racial group on the part of two School Committee members, so the first and third prongs are satisfied. The dispute centers on the second and fourth prongs.[13]

Beginning with the fourth prong, racist text messages in question demonstrate School Committee Members Oliver-Davila and Rivera harbored animus towards white Bostonians—and particularly those who live in West Roxbury. After seeing the text messages, the district court remarked that the ZIP Code quota "is not the celebrated result of transcending racial classifications that this Court once found it to be." Addendum 096. The court recognized that "[t]hree of the seven School Committee members harbored some form of racial animus, and it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics." *Id.* As the Coalition

[13] The district court correctly thought only the second and fourth prongs were in dispute.

detailed at length above, that conclusion would dictate a finding that the School Committee acted with discriminatory intent. Indeed, it answers in the affirmative the ultimate question posed in *Feeney*—whether the race-neutral criteria was implemented *because of* rather than *in spite of* the disparate impact. *Feeney*, 442 U.S. at 279. The district court's legal error constitutes abuse of discretion. *See Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003) ("An error of law is, of course, an abuse of discretion.").

Compounding the error, the district court also failed to engage with the clear disparate impact of the ZIP Code quota—which by the time of the Rule 60(b) motion was no longer a projection but an accomplished fact. Although the Court recognized that "remaining overrepresented" compared to BPS as a whole does not preclude a finding of disparate impact, Addendum 099, it did not grapple with the data demonstrating that white and Asian-American applicants disproportionately had to satisfy a higher burden to gain admission than did Black and Hispanic applicants. *See supra* Part I. If the district court was correct that the additional racist text messages altered the School Committee's intent, it

should have granted relief based on that intent and the ZIP Code quota's demonstrated disparate impact.

On the second prong, the district court faulted the Coalition for its decision not to seek discovery and instead agree to proceed on the record. But as the Coalition emphasized below, the Coalition would never have agreed to forego discovery had it known the School Committee defendants had misrepresented—intentionally or otherwise—that "[a] true and accurate transcription of text messages between Boston School Committee Members, Vice-Chairperson Alexandra Oliver-Davila and Lorna Rivera during the October 21, 2020 Boston School Committee meeting" was attached to the stipulated facts as Exhibit 72. App. 181 (ASF ¶ 67). Given the district court's decision to collapse the motion for a preliminary injunction into a hearing on the merits and the School Committee's representation to the court that the text message thread was "true and accurate," the Coalition sought to expedite the final decision in this case (and conserve judicial resources). Yet the district court faulted the Coalition for relying on that very representation.

It is hard to imagine how the Coalition could be faulted for failing to exercise "due diligence" when it relied not merely on the word of an

attorney in private communication, but on the School Committee defendants' representation to the district court that the text message chain was accurate. After all, the type of evidence considered under Rule 60(b)(2) is typically "evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant." *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988) (quoting *Brown v. Penn. R. Co.*, 282 F.2d 522, 526–27 (3d Cir. 1960)). Reliance on opposing counsel's stipulation to the court—not merely a statement in open court, but a signed stipulation of facts—is excusable. Indeed, courts within this Circuit have held the government's representation to the court that it has complied with its production obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), enough to limit discovery even in a criminal case. *See United States v. Flaherty*, No. 15-cr-10127-MLW, 2015 WL 6965099, at *3 (D. Mass. Nov. 11, 2015) (collecting cases). Particularly in civil cases, a contrary rule would encourage unnecessary discovery and discourage parties from entering joint stipulations for fear that they might be blamed later for failing to investigate opposing counsel's representations.

The district court also emphasized that the School Committee defendants' obligations in responding to public records requests are not

equivalent to those incurred by parties during discovery. That is true, but irrelevant to whether the Coalition exercised "due diligence" or whether its failure to uncover the racist text messages was "excusable." That is because the Coalition did not merely rely on the results of third-party public records requests—it relied on the representation of the School Committee defendants to the Court in the stipulated record. The Coalition is not entitled to Rule 60(b) relief simply because the School Committee or the City of Boston may have botched responses to public records requests, but because the School Committee stipulated to a fact that turned out to be false, and the Coalition justifiably relied on that stipulation.

Because the district court abused its discretion in denying Coalition's Rule 60(b)(2) motion, this Court should at the minimum consider the additional racist text messages as part of the record. But if the Court still finds the record lacking evidence of discriminatory intent, it should vacate the judgment below and remand to provide the Coalition an opportunity to seek the discovery it decided to forego in reliance on the School Committee's stipulation.

CONCLUSION

For the reasons stated herein, the Coalition respectfully asks this Court to reverse the judgment below and remand the case to the district court with instructions to order the entry into the Exam Schools of the five students identified in the Verified Amended Complaint, or grant alternative relief as described herein.

DATED: June 7, 2022.

Respectfully submitted,

CHRISTOPHER M. KIESER
JOSHUA P. THOMPSON
WILLLIAM H. HURD

s/ Christopher M. Kieser
CHRISTOPHER M. KIESER

Attorneys for Plaintiff – Appellant

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,978 words.

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DATED: June 7, 2022.

/s/ Christopher M. Kieser
CHRISTOPHER M. KIESER
Attorney for Plaintiff – Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Christopher M. Kieser
CHRISTOPHER M. KIESER

ADDENDUM

Table of Contents

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP., Plaintiff, v. THE SCHOOL COMMITTEE OF THE CITY OF BOSTON, ALEXANDRA OLIVER-DAVILA, MICHAEL O'NEILL, HARDIN COLEMAN, LORNA RIVERA, JERI ROBINSON, QUOC TRAN, ERNANI DEARAUJO, BRENDA CASSELLIUS, SUPERINTENDENT OF THE BOSTON PUBLIC SCHOOLS, Defendants, AND THE BOSTON BRANCH OF THE NAACP, THE GREATER BOSTON LATINO NETWORK, ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK, ASIAN AMERICAN RESOURCE WORKSHOP, MAIRENY PIMENTAL, AND H.D., Defendants-Intervenors.	)	CIVIL ACTION NO. 21-10330-WGY

YOUNG, D.J. April 15, 2021

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

Acting on behalf of fourteen White and Asian American parents and children resident in Boston, the plaintiff

Addendum 001

corporation sues the Boston School Committee (the "School Committee") charging racial discrimination and seeking to enjoin an interim plan governing admission to Boston's three "exam" schools for the 2021-2022 school year (the "Plan"). This is a serious charge.

The material facts are undisputed. On their face, the criteria employed for admission are completely race neutral -- and yet, it is transparent that the School Committee, and the Exam School Admissions Criteria Working Group (the "Working Group") which advised it, were acutely aware of the racial composition of the classes expected to be admitted under the Plan.

Thus, the key legal question is the mode of analysis this Court will employ in evaluating the undisputed facts. Is it enough to establish that the race neutral criteria are rationally based upon appropriate educational goals -- and stop? Or ought this Court go further and require the School Committee to prove a compelling governmental interest in these criteria and this particular plan before allowing it to proceed? For answer, this Court turns -- as it must -- to the decisions of the Supreme Court of the United States.

I. PRESENT PROCEDURAL POSTURE

The School Committee consists of seven persons appointed by the Mayor of Boston and is responsible for managing the Boston

Public Schools. Joint Agreed Statement Facts ("Joint Statement") ¶¶ 1-2, ECF No. 38. During the COVID-19 pandemic, the School Committee has made many decisions regarding education in the Boston Public Schools, one of which pertains to the application process for three of Boston's public schools, Boston Latin School, Boston Latin Academy, and the John D. O'Bryant School of Mathematics and Science ("O'Bryant") (collectively, the "Exam Schools"). Unable to host a standardized test safely, the School Committee developed the Plan, which deviated from the Exam Schools' past admissions process. After public meetings on the Plan, the School Committee formally adopted it on October 21, 2020. Joint Statement ¶¶ 3-48.

On February 26, 2021, the Boston Parent Coalition for Academic Excellence Corp. (the "Coalition") brought this action against the School Committee, its members, and the Superintendent of the Boston Public Schools, Dr. Brenda Cassellius. See generally Compl., ECF No. 1. The Coalition brings this action on behalf of its members and seeks preliminary and permanent injunctions for alleged violations of the Equal Protection Clause of the Fourteenth Amendment and Massachusetts General Laws chapter 76, section 5. See generally Am. Compl., ECF No. 96.

This Court promptly scheduled a hearing upon the Coalition's request for a preliminary injunction. Elec. Notice

(Feb. 26, 2021), ECF No. 9. At that hearing, this Court -- as is its wont -- collapsed the further hearing on the preliminary injunction with trial on the merits pursuant to Federal Rule of Civil Procedure 65(a), but see Nwaubani v. Grossman, 806 F.3d 677, 679 (1st Cir. 2015) (Thompson, J.) (cautioning against overuse of this procedural device), allowed the intervention of various interest groups, and urged the parties to agree upon all undisputed facts, Elec. Clerk's Notes (Mar. 3, 2021), ECF No. 27.

The parties turned to with a will and on March 15, 2021 filed a quite comprehensive joint agreed statement of facts (the "Joint Statement"). The Coalition pronounced itself satisfied with the Joint Statement as a basis for judgment in its favor or, at the very least, under the strict scrutiny test, for shifting to the School Committee the burden of proving a compelling governmental interest warranted upholding the Plan. Tr. Status Conference 24:11-19, ECF No. 100. The School Committee maintained the Joint Statement supported judgment in its favor under the rational basis test but, cautiously, reserved its right to proffer evidence should that be necessary. Id. 34:9-35:22.

Accordingly, the arguments held on April 6, 2021, are analogous to arguments for and against judgment at the close of the plaintiff's case in chief in a jury waived trial. Fed. R.

Civ. P. 52. In such a situation, before judgment can enter, this Court must provide findings of fact and rulings of law. Id.

II. FINDINGS OF FACT

The Joint Statement, as stipulated by the parties, is substantially reproduced below.

A. The Boston Public Schools

Approximately 80,000 K-12 students live in Boston. Joint Statement, Ex. 11, City Enrollment by Race (SY 18-19), ECF No. 38-11. Almost seventy percent of them attend Boston Public Schools, and the quality of education among the schools is anything but equivalent. Id.; id., Ex. 14, Massachusetts Department of Elementary and Secondary Education Report ("MDESE Report") 2, ECF No. 38-14. The home of the oldest and most prestigious public schools in the country is also home to thirty-four schools "among the lowest performing [ten percent] of schools in the state."[1] MDESE Report 2; Joint Statement ¶¶ 8-11.

[1] Most of the 17,000 students attending these thirty-four low-performing schools "come from historically underserved student groups." MDESE Report 2.

The Exam Schools are the Boston Public Schools system's highest performing and most prestigious schools.[2] Joint Statement ¶ 7. These schools serve seventh through twelfth-grade students, and there are generally two opportunities for students to apply. Id. ¶¶ 7, 13. Students apply while in sixth grade for admission into seventh grade or in eighth grade for admission into ninth grade.[3] Id.

Although any resident-student in Boston is eligible to apply for admission, only a fraction of students is admitted to these schools, making application a highly competitive process. Id. ¶¶ 7, 11. For reference, over 4,000 students attending public, private, charter, and METCO schools applied for admission to the Exam Schools for the 2020-2021 school year. Id. ¶ 18; id., Ex. 15, Historical Applicant Pool by Race & School Type, ECF No. 38-15; id., Ex. 16, Exam School 3-Year Invitation Data by Race ("Invitation Data"), ECF No. 38-16.

[2] The parties stipulate to the prestige of these schools and the respective ranking assigned to each school by U.S. News & World Report in 2020. Joint Statement ¶ 11. As of the 2020-2021 school year, 5,859 students are enrolled at the Exam Schools: 2,472 are enrolled at Boston Latin School, 1,771 are enrolled at Boston Latin Academy, and 1,616 are enrolled at O'Bryant. Id. ¶ 12.

[3] The School Committee allots most available seats in these schools for sixth-grade applicants. Id. ¶ 13.

Only thirty-five percent of applicants were invited to attend.[4] Compare Invitation Data, with Joint Statement ¶ 20.

B. The Old Admissions Process

The Boston Public Schools system uses a unified application process for admission to the Exam Schools. Joint Statement ¶ 15. For many years, this process remained relatively unchanged and involved three factors, a GPA score, a standardized test score, and the applicant's school preference. Id. Each applicant ranked the Exam Schools by preference when he or she sat for the standardized admissions test.[5] Id. ¶ 14. Administrators at the Boston Public Schools would average and assign a numeric value to the applicant's grades in English Language Arts and Math. Id. ¶ 15. This GPA numeric value was added to the applicant's standardized test score creating a

[4] Of the 1,432 students invited to attend the Exam Schools, 1,025 were admitted to the seventh grade and 408 were admitted to the ninth grade. Joint Statement, Ex. 20, Questions from Michael O'Neill ("Admissions Chart"), ECF No. 38-20. Boston Latin School invited 540 students (484 to seventh grade and 58 to ninth grade), Boston Latin Academy invited 424 students (336 to seventh grade and 89 to ninth grade), and O'Bryant invited 568 students (205 to seventh grade and 261 to ninth grade). Invitation Data; Admissions Chart.

[5] For the 2020-2021 school year, thirty-five percent of applicants ranked Boston Latin School as their first choice, thirty-seven percent of applicants ranked Boston Latin Academy as their second choice, and thirty-five percent of applicants ranked O'Bryant as their third choice. Joint Statement, Ex. 17, Exam School Ranks by School/Race for SY 20-21 Enrollment ("Exam School Ranks"), ECF No. 38-17.

composite score, by which applicants were ranked. Id. Starting with the student with the highest composite score, each student received an invitation to his or her first choice of the Exam Schools. Id. If the student's first choice was full, the student was placed in his or her next choice. Id. This process continued until all seats in the three Exam Schools were filled. Id.

C. The Procedure to Change the Admissions Process

In the summer of 2019, the Boston Public Schools' Office of Data and Accountability conducted several analyses to determine how potential changes to the Exam School admissions criteria would affect diversity at the Exam Schools. Id. ¶ 27 (citing id., Ex. 31, Analysis Possible Admissions Criteria Changes, ECF No. 38-31). In the fall of 2019, the Superintendent established a Review Committee to solicit and evaluate responses to a request for proposal for a new examination to be administered to Exam School applicants. Id. ¶ 28.

On March 10, 2020, Governor Charles Baker declared a state of emergency because of the COVID-19 pandemic. Id. ¶ 22. Since March 10, 2020, the Governor has limited the size of gatherings according to the pandemic's fluctuations within the Commonwealth. Id. ¶ 23. On March 15, 2020, the Governor suspended all normal in-person instruction and educational operations of K-12 public schools through the end of the 2019-

2020 school year. Id. ¶ 22. Accordingly, Boston Public Schools were fully remote from March 17, 2020 until October 1, 2020 and remain remote at least three days every week. Id. ¶ 24. Shifting from conventional schooling to remote learning brought with it challenges for the School Committee to address. Id. ¶ 25. "The COVID pandemic has had significant impacts on [students of Boston Public Schools] and [was] a regular topic of discussion at School Committee meetings." Id. The School Committee provided laptops and internet access to students and implemented remote learning guidelines. Id.

By July 2, 2020, the Review Committee had finished its evaluation. Id. ¶ 29. The Superintendent announced that the new plan for Exam School admissions would use the Measures of Academic Progress Growth Test for the 2021-2022 school year. Id.; see id., Ex. 1, Official Minutes Remote Boston School Committee Meeting on July 22, 2020, ECF No. 38-1. Later that month, the School Committee adopted the Superintendent's recommendation to establish the Working Group.[6] Joint Statement

[6] Nine members sat on the Working Group: (1) Samuel Acevedo, Boston Public School Opportunity and Achievement Gap Task Force Co-Chair; (2) Acacia Aguirre, parent of an O'Bryant student; (3) Michael Contompasis, Former Boston Latin School Headmaster and Boston Public School Superintendent; (4) Matt Cregor, Staff Attorney, Mental Health Legal Advisors Committee; (5) Tanya Freeman-Wisdom, O'Bryant Head of School; (6) Katherine Grassa, Curley K-8 School Principal; (7) Zena Lum, parent of a Boston Latin Academy student; (8) Rachel Skerritt, current Boston Latin

¶ 31. The Working Group was to "[d]evelop and submit a recommendation to the Superintendent on revised exam school admissions criteria for [the 2021-2022 school year] entrance in light of the potential impact of the COVID-19 pandemic on the prospective applicants during the latter half of the [2019-2020 school year] and potential impact on [the 2020-2021 school year]." Id.; see id., Ex. 32, Exam School Admissions Criteria Working Group Charter, ECF No. 38-32. From August 2020 through October 2020, the Working Group met weekly or bi-weekly in meetings closed to the public. Joint Statement ¶¶ 34, 35.

The Working Group studied a wide range of information including the admissions criteria used by other cities, the results of the existing admission criteria, the use of test scores, the population of eligible students in Boston, median family income by zip code, application and admissions data by race, the population of the Exam Schools, and the feasibility, equity, and impacts of potential changes to the admission criteria. Id. ¶¶ 34, 37-41, 44; see id., Exs. 31, 34-36, ECF Nos. 38-31, 38-34, 38-35, 38-36. It used simulations to understand how various admission criteria would affect the socioeconomic, racial, and geographic representation of sixth-

School Head of School; and (9) Tanisha Sullivan, President of the NAACP's Boston Branch. Joint Statement ¶ 32; see id., Ex. 2, Official Minutes of the Remote Boston School Committee Meeting on August 5, 2020, ECF No. 38-2.

grade students admitted to the Exam Schools. Joint Statement ¶¶ 40-41; see id., Exs. 44-54, ECF Nos. 38-44, 38-45, 38-46, 38-47, 38-49, 38-50, 38-51, 38-52, 38-53, 38-44, 38-55. The Working Group also analyzed administrative and operational issues with the use of each criterion, such as the feasibility of using prior exam scores, the variability of grades within and outside the Boston Public School system, and schools practicing grade inflation.[7] Joint Statement ¶¶ 37, 42-43; see id., Exs. 35, 55-58, 60-61, ECF Nos. 38-35, 38-55, 38-56, 38-57, 38-58, 38-60, 38-61.

At its meeting on September 29, 2020, the Working Group made its Admissions Recommendation to the Superintendent, and, with the Superintendent's support, the Working Group presented its initial recommendation to the School Committee on October 8, 2020. Joint Statement ¶¶ 45-46. After this meeting, the Working Group responded to questions by the School Committee members and completed an Equity Impact Statement using the Boston Public Schools' Equity Impact Planning Tool. Id. ¶ 47.

[7] For example, in 2016, sixty-nine percent of applicants to Boston Latin School from one private parochial school in West Roxbury had A+ GPA averages. Joint Statement ¶ 43; see id., Ex. 61, Exam School Admissions Working Group Data Summary at 4, ECF No. 38-61. For reference, between ten and twenty-two percent of applicants from other schools had A+ GPA averages. Exam School Admissions Working Group Data Summary at 4.

The Equity Impact Planning Tool is a district mandated six-step process for every major policy program, initiative, and budget decision. Id., Ex. 64, BPS Racial Equity Planning Tool at 3, ECF No. 38-64. The tool acknowledges that the Boston Public School system "does not consistently provide authentic learning opportunities for [its] students who are most marginalized to develop into self-determined, independent learners, able to pursue their aspirations," and that these "failures lead to disengaged students and significant achievement gaps." Id. To rectify this, the six-step process focuses the policy proponents on racial and ethnic inequalities to consider whether and how their proposal aligns with the district's broader goals. Id. at 1; id., Ex. 63, Equity Impact Statement for School Committee Proposals ("Equity Impact Statement") at 2, ECF No. 38-63. The Equity Impact Planning Tool explains the difference between equity and equality and how the two "can in fact stand in opposition to each other." BPS Racial Equity Planning Tool at 12. It further explains that "[t]o eliminate opportunity gaps persistent for Black and Latinx communities in Boston Public Schools, we must make a hard pivot away from a core value of equality -- everyone receives the same -- to equity: those with the highest needs are prioritized." Id. The Working Group completed the Equity Impact Statement for

its Admissions Recommendation and stated the following as its desired outcome:

> Ensure that students will be enrolled (in the three exam high schools) though a clear and fair process for admissions in the [2021-2022] school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston.
>
> Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston.

Equity Impact Statement at 1.

Members of the School Committee and Working Group made various remarks during the October 8, 2020 meeting. These remarks included acknowledging the desire to "rectify[] historic racial inequities" at the Exam Schools, Joint Statement, Ex. 5, Remote Boston School Committee Meeting Thursday, Oct. 8, 2020 ("Oct. 8 Tr."), 173:9-14, ECF No. 38-5, court decisions involving race in Boston Public Schools, see id. 158:16-159:19, performance and admission disparities among different demographics, see id. 165:10-166:5; Joint Statement, Ex. 18, Recommendation of Exam Schools Admissions Criteria for SY21-22 ("Recommendation") at 8, 13, ECF No. 38-18, disappointment about such disparities and the desire to have the Exam Schools better reflect Boston's diversity, see Oct. 8 Tr. 213:8-1, and the

merits of considering racial and ethnic equality during the process, see id. 184:17-185:3.

On October 21, 2020, the School Committee adopted the Working Group's 2021-2022 Admissions Plan (i.e., the Plan), which included some changes from the Working Group's original Admissions Recommendation. Joint Statement ¶ 48. During this meeting, the School Committee Chairperson "made statements that were perceived as mocking the names of Asian members of the community who had come to the meeting to comment on the 2021 Admission Plan." Id. ¶ 66. The Vice-Chairperson and a voting member exchanged text messages recounting what had transpired, offering their sympathies before the inevitable backlash, stating that it was hard not to laugh, and generally not knowing what to do with themselves. Id., Ex. 72, Transcription of Oct. 21, 2020 Text Messages at 1-2, ECF No. 38-72. The Vice-Chairperson also exchanged text messages with the Superintendent, in which the Vice-Chairperson called the meeting the "[b]est meeting ever." Id. at 2.

Members of the School Committee and Working Group also acknowledged the Plan's potential to advance racial equality, see Remote Boston School Committee Meeting Wednesday, Oct. 21, 2020 ("Oct. 21 Tr.") 365:18-366:2, ECF No. 38-7, their desire for all Boston Public Schools to reflect the student population as a whole, see id. 397:19-398:2, 399:5-8, and the limitations

of the Plan to achieve a student body that more closely reflects the demographics of Boston's school-age children, see id. 368:5-14.

D. The New Admissions Process[8]

The Plan opened admissions for the Exam Schools on November 23, 2020 and closed admissions on January 15, 2021. Joint Statement ¶ 53. No invitations for admission have been sent. Id. ¶ 62. Under the Plan, applicants were not required to take an admissions exam.[9] Id. ¶ 50. Instead, applicants had to satisfy three criteria to be eligible for admission. Id. ¶ 51. First, the student must be a resident of one of Boston's twenty-nine zip codes. Id. Students who were homeless or in the custody of the Department of Children and Families qualified for a special "zip code" created for them to participate in the Plan. Id. Next, the student must hold a minimum B average in English Language Arts and Math during the fall and winter of the 2019-2020 school year or have received a "Meets Expectations" or "Exceeds Expectations" score in English Language Arts and Math

[8] The parties only stipulated to the mechanisms of the seventh-grade admissions process in detail. The parties, however, stipulate that "students also enter into the ninth and tenth grades using a similar process." Joint Statement ¶ 51 n.5.

[9] In recommending this change, the Superintendent and the Working Group cited the difficulties of administering a test during the pandemic. Id. ¶ 50.

on the Massachusetts Comprehensive Assessment System administered in the spring of 2019. Id. Finally, the student must "[p]rovide verification from the school district (or equivalent) that the student is performing at grade level based on the Massachusetts Curriculum standards."[10] Id.

The Plan also required eligible students to submit a list of the Exam Schools according to his or her preference. Id. ¶¶ 54-55. For students attending Boston Public Schools, these eligibility criteria were self-certified by the district, and eligible students were asked to submit their Exam School preferences by January 29, 2021.[11] Id. ¶ 54. Non-Boston Public School students were required to submit their proof of eligibility and Exam School preferences by December 31, 2020.[12] Id. ¶ 55.

The Plan has two rounds through which applicants are invited to the Exam Schools. Id. ¶¶ 57-63. Using the eligible

[10] For students attending Boston Public Schools, these criteria were self-certified by the district. Id. ¶ 54. Non-Boston Public School students were required to submit their proof of eligibility by January 15, 2021, and information was communicated to the students through their respective schools. Id. ¶ 55.

[11] This deadline was later extended to March 5, 2021. Id. ¶ 54.

[12] This deadline was later extended to January 15, 2021, and information was communicated to the non-Boston Public School students through their respective schools. Id. ¶ 55.

applicants' English Language Arts and Math GPAs for the first two grading periods of the 2019-2020 school year, students in the first round are invited to the first twenty percent of seats in each Exam School. Id. ¶ 57. Each student within this top twenty percent of GPAs is invited to his or her first-choice Exam School. Id. If, however, twenty percent of that student's first-choice Exam School is filled, that student moves to the second round of the Plan. Id.

The second round again ranks eligible applicants by their English Language Arts and Math GPAs for the first two grading periods of the 2019-2020 school year. Id. ¶ 58. In this round, however, the students are ranked within their zip code according to their GPA. Id. Each zip code is allocated a percentage of the remaining eighty percent of seats at the Exam Schools according to the proportion of school-age children residing in that zip code. Id. ¶ 59.

Students are then assigned to the Exam Schools over ten rounds until each Exam School is filled. Id., Ex. 66, 2020-2021 BPS Exam Schools Admissions Process at 23, ECF No. 38-66. Ten percent of the Exam Schools' seats allocated to each zip code are assigned per round. Id. Starting with the zip code with the lowest median household income with children under the age of eighteen according to the American Community Survey, the highest ranked applicants are assigned to his or her first-

choice Exam School until ten percent of that zip code's allocated seats are filled. Id. If an applicant's first-choice Exam School is filled, the applicant is assigned to his or her next choice. Id. Once a zip code fills its ten percent of seats, the next zip code's applicants are assigned. Id. Invitations under both processes will be issued at the same time. Id. ¶ 62.

E. Demographics and the Impact of the Plan

The City of Boston has 29 zip codes. Id. ¶ 39. According to the 2019 edition of the United States Census Bureau's American Community Survey of Demographic and Housing Estimates, the racial and ethnic demographics of Boston were as follows: 44.9 percent White, 22.2 percent Black, 19.7 percent Hispanic or Latinx, 9.6 percent Asian, and 2.6 percent two or more races, not including Hispanic or Latinx. Id. ¶ 21 (citing id., Ex. 21, ACS Demographic and Housing Estimates, ECF No. 38-21).

The demographics of the school-age population in Boston, however, is significantly more diverse than the City's general population, compare id., with Recommendation at 18, and for the 2020-2021 school year, the racial and ethnic demographics of Boston's school-age population were sixteen percent White, seven percent Asian, thirty-five percent Black, thirty-six percent Latinx, and five percent mixed race, Recommendation at 18.

Historically, the student body of the Exam Schools has not represented the same level of diversity. Recommendation at 8. According to simulations by the Working Group, had the initial version of the Plan been applied during the 2020-2021 admissions cycle it would have impacted the number of admitted students within virtually every zip code when compared to the number of admitted students under the old, exam-based admissions process used for the 2020-2021 school year. Id., Ex. 71, Additional Background Information & Data Reviewed by the Boston Public Schools Exam Schools Admissions Criteria Working Group at 5, ECF. 38-71. Similarly, the Working Group's simulations demonstrated that had the initial version of the Plan been applied during the 2020-2021 admissions cycle the racial make-up of the incoming class would have changed. Recommendation at 18. Under the old plan, the racial and ethnic demographics of the incoming class were the following: thirty-nine percent White, twenty-one percent Asian, fourteen percent Black, twenty-one percent Latinx, and five percent "Multi-Race/Other." Id. Had the Plan been applied, the class would have been thirty-two percent White, sixteen percent Asian, twenty-two percent Black, twenty-four percent Latinx, and five percent "Multi-Race/Other." Id.

F. The Parties

The Coalition is a Massachusetts not-for-profit organization. Suppl. Statement Agreed Facts ("Suppl. Statement") ¶ 1, ECF No. 78. The Coalition's stated purposes include "promoting merit-based admissions to Boston Exam Schools (including Boston Latin School, Boston Latin Academy and O'Bryant School of Science and Math) and promoting diversity in Boston high schools by enhancing K-6 education across all schools in Boston." Id. ¶ 2 (brackets and quotations omitted). The Coalition's membership is open to any student, alumni, applicant, or future applicant of the Boston Exam Schools, as well as their family members. Id. ¶ 3. The Coalition brings this action "on behalf of [its] members whose children are students applying for one or more of the Boston Exam Schools for the classes entering in the fall of 2021." Id. ¶ 4. Specifically, the Coalition represents the interests of fourteen students of Asian or White ethnicity and their member-parents. Id. The students reside in four of Boston's twenty-nine zip codes: Chinatown (zip code 02111), Beacon Hill/West End (zip code 02114), Brighton (zip code 02135), and West Roxbury (zip code 02132). Id. Each student "is a sixth-grade student . . . and an applicant to one or more of the Boston Exam Schools for the class entering in the fall of 2021," and each member-parent

supports his or her child's application to the Exam Schools. Id.

The School Committee is the governing body of the Boston Public Schools. Joint Statement ¶ 1. During the meetings when the Plan was discussed and developed, the School Committee had three types of members: one Chairperson, Michael Loconto, one Vice-Chairperson, Alexandra Oliver-Davila, five voting members, Michael O'Neill, Dr. Hardin Coleman, Dr. Lorna Rivera, Jeri Robinson, and Qouc Tran, and one non-voting member, Khymani James. Id. ¶ 4. After Chairperson Loconto resigned, the Mayor appointed Ernani DeAraujo to the School Committee as a voting member, Oliver-Davila became the Chairperson, and O'Neill became the Vice-Chairperson. Id. ¶ 5. Oliver-Davila, O'Neill, Coleman, Rivera, Robinson, Tran, and DeAraujo are named defendants in this action. Id. ¶¶ 4-5. Defendant Brenda Cassellius is the Superintendent of Boston Public Schools. Id. ¶ 6.

Several organizations and individuals moved to intervene in this matter. Mot. Boston Branch NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, & H.D. Leave Intervene Defs., ECF No. 20. Organizational intervenor Boston Branch of the NAACP sought "intervention on behalf of both itself as well as its members whose children have currently

pending applications to the [Exam Schools], including but not limited to" an NAACP member and their child, who have a pending application to the Exam Schools and who live in zip code 02119. Mem. Law. Supp. Mot. Boston Branch NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, & H.D. Leave Intervene Defs. 4, ECF No. 21. The "mission" of organizational intervenor Greater Boston Latino Network "centers on educational equity -- especially ending segregation and promoting equal access and opportunity." Id. Organizational intervenor Asian Pacific Islander Civic Action Network seeks to "advance[] the interests of Massachusetts' Asian and Pacific Islander American communities with a shared agenda to further equity and oppose discrimination through year-round civic action." Id. 5. Dorchester-based organizational intervenor Asian American Resource Workshop "is a grassroots, member-led group organizing Asian American communities throughout Greater Boston through political education, creative expression, and both issue- and neighborhood-based organizing." Id. Individual intervenor Maireny Pimentel resides in Boston's South End (zip code 02118) with her older eighth-grade son, who has a pending application at Boston Latin Academy, and with her younger sixth-grade son, who "intends to apply to the [Boston Exam Schools] in fall 2021." Id. 6. Individual intervenor H.D., a sixth-grade

student who resides in Dorchester (zip code 02122), "is currently waiting to hear about admission decisions from [the Exam Schools]." Id.[13]

III. RULINGS OF LAW

The Coalition argues that the Plan violates the Equal Protection Clause of the Fourteenth Amendment because strict scrutiny ought apply, and diversity is not a compelling interest in public schools. See Pl.'s Post Hearing Brief 1-5, 11-14, ECF No. 97. The Coalition arrives at this conclusion by arguing, contrary to controlling precedent, that any consideration of race by the School Committee and Working Group makes race an impermissible motivating factor.[14] See generally Anderson ex

[13] This Court also acknowledges and expresses its thanks for the briefs amici curiae from the Anti-Defamation League, the Massachusetts Law Reform Institute, the Asian American Coalition for Education, the Asian American Legal Foundation, and the Center for Law and Education, Inc.

[14] When this Court pressed the Coalition at the hearing on its position, the following exchange took place:

> THE COURT: I just want to be clear on your argument. So long as race was one of the things considered, albeit the others are all legitimate, your contention is that this plan fails constitutionally?
>
> MR. HURD: Your Honor, our position is that, yes . . . .
>
> THE COURT: [A]ll right, your argument is -- in deciding what the level of scrutiny is, because race was one factor that they considered, it must be subject to strict scrutiny.

rel. Dowd v. City of Bos., 375 F.3d 71 (1st Cir. 2004); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J.) (concurring in part and concurring in judgment) (accepting diversity as a compelling governmental interest along with the four dissenters). The School Committee counters that the Coalition lacks Article III standing to challenge the Plan because the injury to the Coalition's members is speculative. See Defs.' Brief J. ("Defs.' Brief") 16-18, ECF No. 76; Intervenors' Brief Opp'n Pl.'s Mot. J. & Inj. Relief ("Intervenors' Brief") 2 n.2, ECF No. 72. Alternatively, the School Committee argues that rational basis review ought apply because the Plan is race-neutral, and the Coalition failed to demonstrate both a disparate impact and invidious discriminatory animus. See Defs.' Brief 3-15; Intervenors' Brief 2-14.

A. Standing

To satisfy the standing requirements imposed by the case or controversy provision of Article III, Section II of the U.S. Constitution, a plaintiff must establish an injury in fact that is concrete, particularized, and actual or imminent, traceable to the challenged action of the defendant, and redressable by a favorable ruling. See U.S. Const. art. III, § 2; Lujan v. Defs.

MR. HURD: Yes, your Honor.

Tr. Hearing 15:24-16:3, 16:13-17, ECF No. 101.

of Wildlife, 504 U.S. 555, 560-61 (1992). The parties principally dispute the Coalition's standing as to the first and third prongs. Defs.' Brief 16-18; Intervenors' Brief 2 n.2.

The School Committee's argument that the Coalition lacks standing is meritless. Defs.' Brief 16-18; Intervenors' Brief 2 n.2. The Coalition demonstrates its standing; however, it does not have standing on its stated basis -- race.

1. Legal Standard

To satisfy the first prong of Article III standing, the plaintiff must show that "he personally has suffered some actual or threatened injury . . . ." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (quotations omitted). "Concreteness and particularity are two separate requirements." Lyman v. Baker, 954 F.3d 351, 360 (1st Cir. 2020) (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016)). An injury is "concrete" when it "actually exist[s]," id. (quotations omitted), it is "particularized" when it "affect[s] the plaintiff in a personal and individual way," Lujan, 504 U.S. at 560 n.1, that goes beyond widely shared "generalized grievances about the conduct of the government," Lyman, 954 F.3d at 361 (citing Becker v. Fed. Election Comm'n, 230 F.3d 381, 390 (1st Cir. 2000)), and it is imminent when the threatened harm is "certainly impending" rather than a mere "allegation[] of possible future injury," Clapper v. Amnesty

Int'l USA, 568 U.S. 398, 409 (2013) (brackets and emphasis omitted); Lujan, 504 U.S. at 564 n.2. Conversely, allegations of future harm absent any demonstration that said future harm is "certainly impending" are too speculative to satisfy Article III. Clapper, 568 U.S. at 401, 409.

To satisfy the third prong of Article III standing, the plaintiff must demonstrate that the injury is redressable by a favorable ruling. Lujan, 504 U.S. at 561-62. A favorable ruling need not redress the entire injury, but the plaintiff must demonstrate that a favorable ruling will at least lessen the injury. See Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 318 (1st Cir. 2012).

The type of injury is integral to what the plaintiff must demonstrate to satisfy Article III standing. See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978). Where the plaintiff alleges a denial of equal protection, the injury is the denial of the ability to compete equally -- not the denial of the benefit. See Northeastern Fla., 508 U.S. at 666; Bakke, 438 U.S. at 319-20.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained

> the benefit but for the barrier in order to establish standing. . . . [The injury] is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla., 508 U.S. at 666.

For example, in Regents of the University of California v. Bakke, a White applicant challenged a medical school's admissions policy that set aside sixteen of 100 available seats for minority students. 438 U.S. at 278, 319-20. The Supreme Court held that the applicant's injury was his inability to compete for all 100 seats because only those who fell within a particular racial classification had "the opportunity to compete for every seat in the class." Id. at 320. The race not allowed to apply for those sixteen seats was the burdened group. Id. at 319-20. Accordingly, the injury could be remedied by a judicial decision declaring the admissions policy unconstitutional, which would allow the applicant, and others of his race, to compete for all 100 seats. Id.

2. The Coalition Has Standing

The School Committee argues that the Coalition's members have not demonstrated that they will suffer an injury. See Defs.' Brief 17; Intervenors' Brief 2 n.2. The Coalition argues that it has standing because the Plan uses geography as a proxy for race to impose a racial barrier to Exam School admission for

White and Asian students.[15] See Pl.'s Mem. Supp. Prelim. Inj. ("Pl.'s Mem.") 8-14, ECF No. 63. Both parties' arguments miss the mark.

First, the barrier erected by the Plan for applicants to the Exam Schools principally concerns the second round of invitations. Pl.'s Mem. 2-3. Therein applicants compete only against others within their zip code for the fraction of seats apportioned to the zip code based upon its percentage of Boston's school-age children. See Joint Statement ¶¶ 57-63. Consequently, applicants in a number of groups will be disadvantaged, such as those from zip codes with higher median family incomes who are assigned last each round, those from zip codes with a high number of applicants but a low percentage of the City's school-age population, and those from zip codes with higher-than-average median GPAs. Such applicants are disadvantaged because the Plan makes it more difficult for them to be admitted when compared to applicants from other zip codes. Were this Court to find the Plan unconstitutional, this unequal treatment could be redressed because one remedy could allow for

[15] The Coalition argues that they have standing on the basis of race because the Plan will result in fewer Asian and White applicants admitted to the Exam Schools. Reply Mem. Addressing Intervenors' Opp'n & Supp. J. & Inj. Relief 2-3, ECF No. 87. The Coalition fails to satisfy standing on the basis of race because, on its face, the Plan does not erect racial barriers and the Coalition even admits that the Plan is facially race-neutral. Tr. Hearing 24:4-5.

these applicants to compete for all the available seats at the Exam Schools. See Northeastern Fla., 508 U.S. at 666; Bakke, 438 U.S. at 319-20.

Moreover, the Coalition has demonstrated that its members are eligible to apply to the Exam Schools, that they did in fact apply, and that they reside in zip codes 02111, 02114, 02135, and 02132, all of which sent more students to the Exam Schools under the old plan than are presently likely under the Plan for school year 2021-2022. Suppl. Statement ¶ 4. It is reasonable to infer from this reduction in invitations that these zip codes will have either higher competition among their residents for their apportioned seats or pick later in the rounds. This Court therefore finds and rules that the Coalition has Article III standing.

B. Count I: Equal Protection

Disadvantaging the aforementioned groups warrants rational basis review under the Fourteenth Amendment's Equal Protection Clause because geography, wealth, and academic success are not suspect classes. Despite conceding that the Plan is facially race neutral, the Coalition attempts to trigger strict scrutiny by claiming that (1) the Plan uses proxies for race and that any proxy for race automatically triggers strict scrutiny and (2) that the Plan was motivated by interests in racial diversity and

that this automatically triggers strict scrutiny. Pl.'s Mem. 14-15. This plainly is not the law.

1. Level of Scrutiny to Apply

The Equal Protection Clause of the Fourteenth Amendment protects against discrimination on the basis of race. Anderson, 375 F.3d at 82. "When the government uses explicit racial classifications for the distribution of benefits, discriminatory intent is presumed, and those policies are always subjected to strict scrutiny." Id. (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Grutter v. Bollinger, 539 U.S. 306, 326 (2003)); see also Parents Involved, 551 U.S. at 720; Johnson v. California, 543 U.S. 499, 505-06 (2005); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995).

The Plan considered here, however, does not employ explicit racial classifications, and the Coalition concedes that the Plan is facially race neutral. See Tr. Hearing 24:4-5, ECF No. 101; supra Section II.D. Where the government 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, the spawn of an invidious discriminatory purpose. Bakke, 438 U.S. at 318-19. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v.

Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). "The Supreme Court non-exhaustively enumerated several factors relevant to the inquiry: the degree of disproportionate racial effect, if any, of the policy; the justification, or lack thereof, for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision." Anderson, 375 F.3d at 83.

2. Rational Basis Review Applies

There is no question but that the School Committee and the Working Group were keenly aware of the Plan's effect on diversity and interested in increasing the Exam Schools' "racial, socioeconomic and geographic diversity [better to reflect the diversity of] all students (K-12) in the city of Boston." Equity Impact Statement at 1; see supra Section II.C. This does not, however, subject the Plan to strict scrutiny. In the words of the First Circuit,

> the mere invocation of racial diversity as a goal is insufficient to subject [an otherwise race-neutral plan] to strict scrutiny. In those cases where the Supreme Court inquired whether diversity is a compelling state interest and whether the program at issue could survive strict scrutiny, the programs were all subjected to strict scrutiny because they used explicit racial classifications to achieve the goal of diversity. None of these cases, nor any other case to which our attention has been drawn, has subjected a governmental program to strict scrutiny simply because the state mentioned diversity as a goal.

Anderson, 375 F.3d at 87. Furthermore, "[t]he Supreme Court has explained that the motive of increasing minority participation and access is not suspect." Id. (citing City of Richmond v. JA Croson Co., 488 U.S. 469, 507 (1989) (approving the use of race-neutral means to increase minority participation in governmental programs)). In Parents Involved in Community Schools v. Seattle School District Number 1, Justice Kennedy not only ruled this motive permissible, but fortified its use through race-neutral proxies aimed at accomplishing its end:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including 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.

551 U.S. at 789 (Kennedy, J.) (concurring in part and concurring in judgment) (emphasis added). Although these proxies are race-conscious, it is "unlikely any of them would demand strict scrutiny to be found permissible" because they do not define students by their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. (citing Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are facially race neutral, so a more searching inquiry is

necessary before strict scrutiny can be found applicable in redistricting cases than in cases of classifications based explicitly on race." (quotations omitted))).

Similarly, the Third, Fifth, and Sixth Circuits have held that considering racial data is not a racial classification and does not trigger strict scrutiny. See Spurlock v. Fox, 716 F.3d 383, 394 (6th Cir. 2013) ("Racial classification requires more than the consideration of racial data. If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions."); Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 547-48 (3d Cir. 2011) ("Appellants also conflate a school assignment policy that explicitly classifies based on race with the consideration or awareness of neighborhood racial demographics during the development and selection of a policy. . . . The consideration or awareness of race while developing or selecting a policy, however, is not in and of itself a racial classification. Thus, a decisionmaker's awareness or consideration of race is not racial classification. Designing a policy 'with racial factors in mind' does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion." (quoting

Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999))); Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 358 (5th Cir. 2015) ("[T]he district court's legal conclusion that the Board's consideration of demographic data in formulating [the plan at issue] 'does not amount to [adopting] a rezoning plan that assigns students on the basis of race' conforms to Supreme Court case law . . . and is in accord with the decisions of this Court's sister circuits, see Spurlock, 716 F.3d at 394; Lower Merion, 665 F.3d at 548. Accordingly, we hold that the district court did not err in concluding that [the plan at issue] does not make express racial classifications and so is not subject to strict scrutiny on that basis."); see also United States v. Hays, 515 U.S. 737, 745 (1995) ("[T]he legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." (quotations omitted)).

The Coalition, unwilling or unable to distinguish precedent concerning explicit racial classifications from precedent concerning race-neutral classifications, repeatedly urged this Court to apply inapposite precedent to conclude that strict scrutiny applies. Pl.'s Mem. 14-20 (citing Johnson, 543 U.S. at 505-06 (applying strict scrutiny to explicit racial

classifications); Adarand, 515 U.S. at 204 (same); Miller v. Johnson, 515 U.S. 900, 916–17 (1995) (invalidating racial gerrymandering where the legislature blatantly subordinated all other bases for redistricting to race)). In so doing, the Coalition conjured the proverbial third rail of equal protection doctrine -- racial balancing. Reply Mem. Addressing Defs.' Brief & Supp. J. & Inj. Relief ("Pl.'s Reply") 2, 5-9, 12-14, ECF No. 83.

To support its assertion factually, the Coalition points to statements concerning race by members of the School Committee,[16]

[16] The Coalition points to School Committee Member Rivera's statement at meetings, such as the need to "be explicit about racial equity," "need[ing] to figure out again how we could increase those admissions rates, especially for Latinx and [B]lack students," Oct. 8 Tr. 184:17-185:3, the Plan being a "step in the right direction" for "addressing racial and ethnic disparities in educational achievement and to advance ethnic studies and racial equity in the school district," Oct. 21 Tr. 365:18-366:2, and the Plan not going "far enough because White students continue to benefit from thirty-two percent of the seats," id. 368:5-14.

The Coalition also points to School Committee Vice-Chairperson Oliver-Davila's statements, such as "I want to see those schools reflect the District. There's no excuse, you know, for why they shouldn't reflect the District, which has a larger Latino population and black African-American population." Oct. 8 Tr. 213:8-1. "I mean, we know that Black and Latino youth are underrepresented, and they have been locked out of this opportunity. And for me, you know, it's just criminal that the percentages have not increased." Oct. 21 Tr. 397:19-398:2. "I think that all of our schools should reflect the student body that we have. We should not -- it should not be acceptable to have schools that don't represent that, just not acceptable." Id. 399:5-8.

members of the Working Group,[17] and within the Equity Planning Tool. Setting aside, for a moment, the Coalition's cavalier interpretations of the Fourteenth Amendment's Equal Protection doctrine, this Court does not take lightly the statements made by the School Committee and the Working Group. Without question, some statements raise cause for concern. The statement within the Equity Planning Tool, for example, about a hard pivot away from equality and towards equity simply has no support in the Equal Protection jurisprudence of the Supreme Court. See, e.g., Feeney, 442 U.S. at 273 ("[T]he Fourteenth

[17] Working Group member Tanisha Sullivan stated: "This proposal will allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." Oct. 21 Tr. 78:18-20. She also stated the following: "When reviewing available assessment and report card grades, the working group saw persistent opportunity and achievement gaps reflected in the data. I want to say that this was one of -- this was a defining moment in our process. Well over half of the White and Asian fourth grade students met or exceeded expectations in both ELA and math in the '18-'19 -- fourth grade '18-'19 MCAS scores. Less than 15 percent of Latinx students and less than 13 percent of Black students received the same scores. Additionally, when looking at fifth grade GPA from the same year, what we saw is that all -- across all racial demographic groups there is an increase in fifth grade GPA from fall to spring. However, the rate of increase is higher for White and Asian students than it is for Black and Latinx students. These two factors played a significant role in what we will ultimately recommend." Oct. 8 Tr. 165:10-166:5.

Working Group member Samuel Acevedo stated: "The working group faces two imperatives determining the most equitable admissions policy to the Boston's -- to Boston's elite schools in the limited context of this mid-COVID-19 year, but also long-term rectifying historic racial inequities afflicting exam school admissions for generations." Oct. 8 Tr. at 173:9-14.

Amendment guarantees equal laws, not equal results."). Had this Plan unconstitutionally substituted equality of result for equality of opportunity along racial lines, this Court would not hesitate to strike it down.

But that is not what happened here.

Apparently well counseled, the School Committee considered diversity and developed its Plan within the permissible framework of the Supreme Court precedent. Despite its goal of greater "racial, socioeconomic and geographic diversity [better to reflect the diversity of] all students (K-12)," the Plan principally anchors itself to geographic diversity by equally apportioning seats to the City's zip codes according to the criterion of the zip code's percentage of the City's school-age children. See supra Section II.D. The Plan similarly anchors itself to socioeconomic diversity by ordering the zip codes within each round by their median family income. See supra Section II.D. The Plan is devoid, however, of any anchor to race. See supra Section II.D.

Viewing everything through the prism of race is both myopic and endlessly divisive. Geographic and socioeconomic diversity are appropriate educational goals in their own right, regardless of race. See Parents Involved, 551 U.S. at 722 (discussing cases involving the interest of diversity and how it encompasses "a far broader array of qualifications and characteristics of

which racial or ethnic origin is but a single though important element" (quoting Grutter, 539 U.S. at 325)). They are not mere shibboleths or surrogates for racial balancing. Indeed, Boston's richly varied cultural heritage, see, e.g., Mark Peterson, The City-State of Boston (Princeton Univ. Press 2019), makes it all the more appropriate to draw the Exam Schools' entering class from every corner of the City. Likewise, putting the poorest neighborhoods first in the draw is a bold attempt to address America's caste system. See, e.g., Isabel Wilkerson, Caste (Penguin Books Ltd. 2020). Indeed, a respected legal philosophy adopts this same approach. See generally John Rawls, A Theory of Justice (Belknap Press 1971).

The School Committee's goal of a more racially representative student body, although more often discussed and analyzed, did not commandeer the Plan, and it in fact necessarily took a back seat to the Plan's other goals, which the Plan more aptly achieved. Consequently, any effect on the racial diversity of the Exam Schools is merely derivative of the Plan's effect on geographic and socioeconomic diversity -- not the reverse.

This Court finds and rules that the Plan is race-neutral, and that neither the factors used nor the goal of greater diversity qualify as a racial classification. See Parents Involved, 551 U.S. at 789 (Kennedy, J.) (concurring in judgment

and concurring in part); Anderson, 375 F.3d at 87; see also Spurlock, 716 F.3d at 394; Lower Merion, 665 F.3d at 548; Lewis, 806 F.3d at 358. Accordingly, rational basis review applies.

"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). "[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." Heller v. Doe ex rel. Doe, 509 U.S. 312, 319 (1993); see also id. at 320 (noting that the race-neutral classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" (quotations omitted)).

Here, the School Committee was tasked with developing an admissions plan amid a pandemic which affected some students more significantly than others to admit applicants from schools with different grading practices, including grade inflation, all without the benefit of a standardized test. See supra Section II.D. The School Committee settled on socioeconomic, racial, and geographic diversity as interests to help guide its legitimate endeavor of creating a new admissions process for the 2021-2022 school year. See supra Section II.D; Parents

Involved, 551 U.S. at 789 (Kennedy, J.) (concurring in judgment and concurring in part); City of Cleburne, 473 U.S. at 440; Anderson, 375 F.3d at 87; see also Spurlock, 716 F.3d at 394; Lower Merion, 665 F.3d at 548; Lewis, 806 F.3d at 358.

Therefore, the Court finds and rules that the Plan is rationally related to the School Committee's legitimate interest.

3. The Coalition Has Failed to Prove Disparate Impact and an Invidious Discriminatory Purpose

The Coalition would have this Court believe that the School Committee's interest in socioeconomic diversity is a "sham"[18] and that the scheme was aimed at harming White and Asian students. Tr. Hearing 15:10-14; Pl.'s Reply 2-4. The Supreme Court has developed standards for uncovering such intent -- precedent that the Coalition repeatedly denied it must satisfy. Tr. Status

[18] This Court appreciates the obvious frustration and anxiety from having an admission plan changed the year one applies and see data to suggest that fewer applicants from your area code will be allowed to attend a prestigious institution than the year before. Nevertheless, the Fourteenth Amendment's Equal Protection Clause is not a bulwark for the status quo. The aim of the doctrine is to avoid racial classifications wherever possible because of their invidious use in the past but still allow laudable endeavors. One may not simply bootstrap any neutral classification arguably correlated with race and, claiming that it is an impermissible proxy therefor, strip away all forms of diversity. That is neither the spirit nor the letter of the doctrine, and to allow such efforts to succeed by delegitimizing other forms of diversity will be the undoing of the doctrine.

Conference 23:2-5 ("We don't have to show racial animus."); Tr. Hearing 15:24-16:3, 16:13-17; Pl.'s Brief 7.

The Plan is race-neutral, see supra Section III.B.2, and thus "good faith [is] presumed in the absence of a showing to the contrary" that the action has a disparate impact, the spawn of an invidious discriminatory purpose, Bakke, 438 U.S. at 318-19. See also United States v. Armstrong, 517 U.S. 456, 465-69 (1996) (requiring the plaintiff to prove both discriminatory purpose and discriminatory effect).

a. Disparate Impact

The Coalition alleges that White and Asian students will suffer a disparate impact under the Plan because White students will make up thirty-two instead of thirty-nine percent of seats at the Exam Schools, and Asian students will make up sixteen instead of twenty-one percent of seats at the Exam Schools.[19]

[19] For reference, White and Asian students combined comprise twenty-three percent of school-age children in Boston but represented fifty percent of incoming students at the Exam Schools. Recommendation at 18. Under the new plan, White students will go from representing 243 percent of their share of the school-age population in Boston to 200 percent. Id. Similarly, Asian students will go from representing 300 percent of their share of the school-age population in Boston to 228 percent. Id. This Court does not suggest that remaining overrepresented alone disproves disparate impact. It simply notes that when a group is as overrepresented as White and Asian students at the Exam Schools, it would appear that nearly any changes to the admissions process would have resulted in some reduction, if only from the law of averages. See supra note 18 ("[The] Equal Protection Clause is not a bulwark for the status quo.").

Recommendation at 18. This is a sixteen percent decrease for White students and a twenty-four percent decrease for Asian students. Id.

This, however, is not what the Supreme Court considers a disparate impact. See generally, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987); Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights, 429 U.S. at 266; Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also generally Anderson, 375 F.3d at 87-90 (holding that the results were not "stark" and did not qualify as a disparate impact under Arlington Heights).

The Coalition has not met its burden of proof. It failed to proffer any expert testimony or statistical analysis of the Plan. Moreover, at this juncture, the Coalition cannot even demonstrate the final demographic effects of the Plan. The Coalition relies on the information the Working Group presented to the School Committee at the October 8, 2020 meeting, but the Plan was amended after that meeting by changing the rank of zip codes within each round from median income to median family income. Recommendation at 18; Joint Statement ¶¶ 45-46. Therefore, the Coalition has not presented any statistical evidence as to what the effect of the Plan in its final form will be on Boston's ethnic communities.

Moreover, even if these numbers did represent the Plan's effect in its final form, the Coalition's argument is still

unavailing. The racial demographics of the Exam Schools under the old plan were a disjunctive consequence year to year -- there was no guarantee that any White or Asian student would even be admitted. To use a variable consequence as the baseline upon which all future plans must comport is erroneous.[20]

Accordingly, this Court finds and rules that the Coalition failed to demonstrate that the Plan has a disparate racial impact.

b. Invidious Discriminatory Purpose

Finally, the Coalition alleges that the School Committee had animus towards Asians and White applicants. Pl.'s Mem. 7. Whether the Board harbored an invidious discriminatory purpose as a motivating factor behind the Plan "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights, 429 U.S. at 266; see Davis, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); see also Anderson, 375

[20] It goes without saying that White and Asian students are not "losing" seats simply because last year different White and Asian students were exceedingly privileged to win a high number of seats without any evidence that this years' students would have fared the same. No such evidence was presented, and this Court rejects the use of stereotypes to that effect. See Brief Amici Curiae the Asian American Coalition for Education and the Asian American Legal Foundation Supp. Pl. 5, ECF No. 88.

F.3d at 87-89 (upholding a plan that would "preserve racial and ethnic diversity and reduce the likelihood of racial isolation with its schools").

The first two criteria that the Supreme Court has enumerated, the degree of any disproportionate racial effect and the justification therefor, do not demonstrate discriminatory animus for the reasons articulated above, see supra Sections III.B.2 & III.B.3.a, leaving the Plan's legislative and administrative historical background and its adoption for this Court's inquiry, see Anderson, 375 F.3d at 83.

Turning first to the administrative history of the Plan's adoption, the School Committee and Working Group did not deviate from their normal procedures, and the Coalition does not suggest otherwise. See generally Yick Wo, 118 U.S. at 374; Joint Statement. As for the Plan's legislative history, however, the Coalition points to statements made by members of the School Committee as evidence of a discriminatory purpose. See Pl.'s Mem. 3-8.

First, the Coalition points to statements made during the October 21, 2020 meeting, at which the School Committee adopted the Plan. Joint Statement ¶¶ 48-68. The Chairperson "made statements that were perceived as mocking the names of Asian members of the community who had come to the meeting to comment on the 2021 Admission Plan." Id. ¶ 66. School Committee

counsel concedes that these statements were "stupid" and "should not have been made," Tr. Hearing 48:14-19, but argued that the insensitive behavior had nothing to do with the Plan, its purpose, or its adoption, see id. These were racist comments directed at the City's Asian American community. This Court takes them seriously but finds no persuasive evidence that any other voting member had such animus. This is conclusive.

The Coalition points to statements about racial diversity and text messages about the Chairperson's racist remarks as evidence that other members of the School Committee expressed their discriminatory motivations. Pl.'s Mem. 7. This Court finds that these statements do not evidence an invidious discriminatory purpose. See Anderson, 375 F.3d at 87-90; see also Village of Arlington Heights, 429 U.S. at 266. The text messages evidence concern about the remarks and speculation about the backlash from the comments. Transcription of Oct. 21, 2020 Text Messages at 1-2. They do not demonstrate that the members of the School Committee supported the Chairperson's racist mocking. Similarly, the remarks about diversity made during the October 8 and October 21 meetings evidence diversity as a motivating factor, but not a discriminatory purpose, as discussed in depth above. See supra Section II.B.2.; see also Anderson, 375 F.3d at 87-90; Lower Merion, 665 F.3d at 547-48 ("Neither Pryor nor Arlington Heights stands for the proposition

that strict scrutiny must be applied when race, but not a discriminatory purpose, was a motivating factor.").

Accordingly, this Court finds and rules that the Plan was not motivated by an invidious discriminatory purpose.

C. Count II: Mass. Gen. Laws Chapter 76, Section 5

Notwithstanding the parties' underdeveloped arguments on the point, count II alleges violation of Massachusetts General Law chapter 76, section 5. See Am. Compl. ¶¶ 65-69. In relevant part, this statute provides that "[n]o person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation." Mass. Gen. Laws ch. 76, § 5. Under the Massachusetts Department of Elementary and Secondary Education's implementing regulation, "Public schools shall not use admission criteria that have the effect of subjecting students to discrimination because of their race, color, sex, gender identity, religion, national origin or sexual orientation." 603 Mass. Code Regs. § 26.02(5).

This Court finds and rules in favor of the School Committee on count II. As explained above, the Plan does not have the effect of subjecting students to discrimination because of their race. See supra Sections III.B.2 & III.B.3.

IV. CONCLUSION

It comes down to this: This year, the best way for a rising seventh or ninth-grader to get into one of Boston's three prestigious exam schools is (1) get excellent grades all around (the GPA Criterion), (2) attend a school with a high level of grade inflation, (3) live in a Boston zip code heavily populated with school-age children (geographic diversity) -- but hopefully not too many rising seventh or ninth-graders (your direct competition), but (4) a zip code encompassing the poorest residential area of the city (socioeconomic diversity). No one quarrels with the first criterion. The second, while unpalatable, could hardly be avoided since the pandemic and other factors made it impossible to administer a standardized test. Only the third and fourth criteria bear any correlation to racial demographics at all,[21] and both have been approved by the Supreme Court. See Parents Involved, 551 U.S. at 722; id. at 789 (Kennedy, J.) (concurring in part and concurring in judgment). The fact that the policymakers appreciated the correlation does not render these diversity criteria unworthy of consideration as rationally advancing proper educational goals for Boston's children.

[21] Indeed, the very fact of the correlation speaks to a host of factors that may be capable of historical proof but which go well beyond the agreed upon record here. A number of the amici briefs delve into these matters.

The education of one's children is a matter of prime concern to any parent. Thus it is worthy of remark that the Plan the Court today upholds applies **only** to the 2021-2022 school year. All parties here concede there may be better race-neutral ways to handle Exam School admissions. Tr. Hearing 19:18-20:8; id. 33:17-34:6. This is also the year of a mayoral election. As the mayor appoints the School Committee, these matters are sure to be, and of right ought be, the subject of lively civic debate. As Justice Scalia sagely observed, "[There is] the need for continuing democratic debate and democratic decision-making, on an ever-increasing list of social issues." Antonin Scalia, Scalia Speaks 199 (Christopher J. Scalia & Edward Whelan eds., 2017). Here, this Court rules only that this one year Plan has a rational basis and denies none of Boston's citizens the equal protection of the laws. Nor does it violate Massachusetts General Laws chapter 76 section 5. Judgment shall enter for the School Committee defendants.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

Addendum 048

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Boston Parent Coalition for Academic Excellence Corp.

Plaintiff

V.

The School Committee of the City of Boston et al

Defendants

CIVIL ACTION

NO. 21cv10330-WGY

JUDGMENT

YOUNG, D. J.

In accordance with the FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT entered on April 15, 2021, JUDGMENT is hereby entered for the School Committee DEFENDANTS against PLAINTIFF Boston Parent Coalition for Academic Excellence Corp..

By the Court,

APRIL 15, 2021

/s/Matthew A. Paine

Date

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP. Plaintiff, v. THE SCHOOL COMMITTEE OF THE CITY OF BOSTON, ALEXANDRA OLIVER-DAVILA, MICHAEL O'NEILL, HARDIN COLEMAN, LORNA RIVERA, JERI ROBINSON, QUOC TRAN, ERNANI DEARAUJO, and BRENDA CASSELLIUS, SUPERINTENDENT OF THE BOSTON PUBLIC SCHOOLS, Defendants, AND THE BOSTON BRANCH OF THE NAACP, THE GREATER BOSTON LATINO NETWORK, ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK, ASIAN AMERICAN RESOURCE WORKSHOP, MAIRENY PIMENTEL, and H.D., Defendants-Intervenors.	CIVIL ACTION NO. 21-10330-WGY

YOUNG, D.J. October 1, 2021

INDICATIVE RULE 60(b) RULING

I. PROCEDURAL BACKGROUND

The Boston School Committee (the "School Committee") consists of seven persons appointed by the Mayor of Boston and

is responsible for managing the Boston Public Schools. Joint Agreed Statement Facts ("Joint Statement") ¶¶ 1-2, ECF No. 38. During the COVID-19 pandemic, the School Committee has made many decisions regarding education in the Boston Public Schools, one of which pertains to the application process for three of Boston's public schools: Boston Latin School, Boston Latin Academy, and the John D. O'Bryant School of Mathematics and Science ("O'Bryant") (collectively, the "Exam Schools"). Unable to host a standardized test safely, the School Committee developed an interim admissions plan (the "Plan"), which deviated from the Exam Schools' past admissions process. After public meetings on the Plan, the School Committee formally adopted it on October 21, 2020. Joint Statement ¶¶ 3-48.

On February 26, 2021, the Boston Parent Coalition for Academic Excellence Corp. (the "Coalition") brought this action against the School Committee, its members, and the Superintendent of the Boston Public Schools, Dr. Brenda Cassellius. See generally Verified Compl. ("Compl."), ECF No. 1. The Coalition sought preliminary and permanent injunctions for alleged violations of the Equal Protection Clause of the Fourteenth Amendment and Massachusetts General Laws chapter 76, section 5. See generally Am. Compl., ECF No. 96.

This Court promptly scheduled a hearing upon the Coalition's request for a preliminary injunction. Electronic

Notice (Feb. 26, 2021), ECF No. 9. At that hearing, this Court -- as is its wont -- collapsed the further hearing on the preliminary injunction with trial on the merits pursuant to Federal Rule of Civil Procedure 65(a), but see Nwaubani v. Grossman, 806 F.3d 677, 680-81 & n.7 (1st Cir. 2015) (Thompson, J.) (cautioning against overuse of this procedural device), allowed the intervention of various interest groups, and urged the parties to agree upon all undisputed facts, Electronic Clerk's Notes (Mar. 3, 2021), ECF No. 27.

The parties turned to with a will and on March 15, 2021 filed a quite comprehensive joint agreed statement of facts (the "Joint Statement") -- or so I thought. The Coalition pronounced itself satisfied with the Joint Statement as a basis for judgment in its favor or, at the very least, under the strict scrutiny test, for shifting to the School Committee the burden of proving that a compelling governmental interest warranted upholding the Plan. Tr. Status Conference 24:11-19, ECF No. 100. The School Committee maintained that the Joint Statement supported judgment in its favor under the rational basis test but, cautiously, reserved its right to proffer evidence should that be necessary. Id. 34:9-35:22.

Accordingly, the arguments held on April 6, 2021 were analogous to arguments for and against judgment at the close of the plaintiff's case in chief in a jury-waived trial. See Fed.

R. Civ. P. 52. In such a situation, before judgment can enter, this Court must provide findings of fact and rulings of law. Id.

On April 15, 2021, this Court entered its findings of fact, rulings of law, and order for judgment. See generally Boston Parent Coal. for Acad. Excellence Corp. v. City of Bos. ("Boston Parent I"), Civil Action No. 21-10330-WGY, 2021 WL 1422827 (D. Mass. Apr. 15, 2021), opinion withdrawn sub nom. Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos. ("Boston Parent III"), CIVIL ACTION NO. 21-10330-WGY, 2021 WL 3012618 (D. Mass. July 9, 2021). In Boston Parent I this Court found and ruled that the Plan governing admission to Boston's three Exam Schools for the 2021-2022 school year (and only the 2021-2022 school year) had a rational basis furthering a legitimate governmental interest, comported with the Fourteenth Amendment's Equal Protection Clause, and did not violate Massachusetts General Laws chapter 76, section 5. Id. at *17. This Court subsequently entered judgment for the School Committee. Judgment, ECF No. 105.

The Coalition appealed the judgment to the First Circuit and moved to enjoin the Plan's implementation pending resolution of the appeal. See generally Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos. ("Boston Parent

II"), 996 F.3d 37 (1st Cir. 2021). The First Circuit denied the Coalition's motion. Id. at 51.

The matter seemed to be resolved -- until a newspaper published discriminatory text messages between two School Committee members sent during the board meeting in which the School Committee adopted the Plan. The Coalition moved for relief from judgment under Rule 60(b), Mot. Pursuant Fed. R. 60(b), ECF No. 112, and on July 9 this Court heard argument on the motion, withdrew its opinion in Boston Parent I, and took the matter under advisement, Electronic Clerk's Notes (July 9, 2021), ECF No. 121. On July 23, the First Circuit suspended the appellate briefing schedule until such time as this Court has addressed the Rule 60(b) motion. Order Court, ECF No. 125.

For the reasons developed below, if granted jurisdiction, this Court would **DENY** the motion.

II. FACTUAL BACKGROUND[1]

A. The Boston Public Schools

Approximately 80,000 K-12 students live in Boston. Joint Statement, Ex. 11, City Enrollment by Race (SY 18-19), ECF No. 38-11. Almost seventy percent of them attend Boston Public Schools, and the quality of education among the schools is

[1] The Joint Statement, as stipulated by the parties, is substantially reproduced below and supplemented with the information that subsequently came to light.

anything but equivalent. Id.; id. Ex. 14, Massachusetts Department of Elementary and Secondary Education Report ("MDESE Report") 2, ECF No. 38-14. The home of the oldest and most prestigious public schools in the country is also home to thirty-four schools "among the lowest performing [ten percent] of schools in the state."[2] MDESE Report 2; Joint Statement ¶¶ 8-11.

The Exam Schools are the Boston Public Schools system's highest performing and most prestigious schools.[3] Joint Statement ¶ 11. These schools serve seventh through twelfth-grade students, and there are generally two opportunities for students to apply. Id. ¶¶ 7, 13. Students apply while in sixth grade for admission into seventh grade or in eighth grade for admission into ninth grade.[4] Id.

[2] Most of the 17,000 students attending these thirty-four low-performing schools "come from historically underserved student groups." MDESE Report 2.

[3] The parties stipulate to the prestige of these schools and the respective ranking assigned to each school by U.S. News & World Report in 2020. Joint Statement ¶ 11. As of the 2020-2021 school year, 5,859 students were enrolled at the Exam Schools: 2,472 were enrolled at Boston Latin School, 1,771 were enrolled at Boston Latin Academy, and 1,616 were enrolled at O'Bryant. Id. ¶ 12.

[4] The School Committee allots most available seats in these schools for sixth-grade applicants. Joint Statement ¶ 13.

Although any resident-student in Boston is eligible to apply, only a fraction is admitted. Id. ¶¶ 7, 11. For reference, over 4,000 students attending public, private, charter, and Metropolitan Council for Educational Opportunity schools applied for admission to the Exam Schools for the 2020-2021 school year. Id. ¶ 18; id. Ex. 15, Historical Applicant Pool by Race & School Type, ECF No. 38-15; id. Ex. 16, Exam School 3-Year Invitation Data by Race ("Invitation Data"), ECF No. 38-16. Only thirty-five percent of applicants were invited to attend.[5] Compare Invitation Data, with Joint Statement ¶ 20.

B. The Old Admissions Process

The Boston Public Schools system uses a unified application process for admission to the Exam Schools. Joint Statement ¶ 15. For many years, this process remained relatively unchanged and involved three factors: a GPA score, a standardized test score, and the applicant's school preference. Id. Each applicant ranked the Exam Schools by preference when

[5] Of the 1,433 students invited to attend the Exam Schools, 1,025 were admitted to the seventh grade and 408 were admitted to the ninth grade. Joint Statement, Ex. 20, Questions from Michael O'Neill ("Admissions Chart") 3, ECF No. 38-20. Boston Latin School invited 542 students (484 to seventh grade and 58 to ninth grade), Boston Latin Academy invited 425 students (336 to seventh grade and 89 to ninth grade), and O'Bryant invited 466 students (205 to seventh grade and 261 to ninth grade). Admissions Chart.

he or she sat for the standardized test.[6] Id. ¶ 14. Administrators at the Boston Public Schools would average and assign a numeric value to the applicant's grades in English Language Arts and Math. Id. ¶ 15. This GPA numeric value was added to the applicant's standardized test score to create a composite score, by which applicants were ranked. Id. Starting with the student with the highest composite score, each student received an invitation to his or her first choice of the Exam Schools. Id. If the student's first choice was full, the student was invited to his or her next choice. Id. This process continued until all seats in the three Exam Schools were filled. Id.

C. The Procedure to Change the Admissions Process

In the summer of 2019, the Boston Public Schools' Office of Data and Accountability conducted several analyses to determine how potential changes to the Exam School admissions criteria would affect diversity at the Exam Schools. Id. ¶ 27 (citing id. Ex. 31, Analysis Possible Admissions Criteria Changes, ECF No. 38-31). In the fall of 2019, the Superintendent established

[6] For the 2020-2021 school year, thirty-five percent of applicants ranked Boston Latin School as their first choice, thirty-seven percent of applicants ranked Boston Latin Academy as their second choice, and thirty-five percent of applicants ranked O'Bryant as their third choice. Joint Statement, Ex. 17, Exam School Ranks School/Race SY 20-21 Enrollment ("Exam School Ranks"), ECF No. 38-17.

a Review Committee to solicit and evaluate responses to a request for proposal for a new examination to be administered to Exam School applicants. Id. ¶ 28.

On March 10, 2020, Governor Charles Baker declared a state of emergency because of the COVID-19 pandemic. Id. ¶ 22. Since March 10, 2020, the Governor has occasionally limited the size of gatherings according to the pandemic's fluctuations within the Commonwealth. Id. ¶ 23. On March 15, 2020, the Governor suspended all normal in-person instruction and educational operations of K-12 public schools through the end of the 2019-2020 school year. Id. ¶ 22. Accordingly, the Boston Public Schools were fully remote from March 17, 2020, until October 1, 2020, and remained partially remote thereafter. Id. ¶ 24. Shifting from conventional schooling to remote learning brought with it challenges for the School Committee to address. Id. ¶ 25. "The COVID pandemic has had significant impacts on [Boston Public School students] and [was] a regular topic of discussion at School Committee meetings." Id. The School Committee provided laptops and internet access to students and implemented remote learning guidelines. Id.

By July 2, 2020, the Review Committee had finished its evaluation. Id. ¶ 29. The Superintendent announced that the new plan for Exam School admissions would use the Measures of Academic Progress Growth Test for the 2021-2022 school year.

Id.; see id. Ex. 1, Official Minutes Remote Boston School Committee Meeting (July 22, 2020), ECF No. 38-1. Later that month, the School Committee adopted the Superintendent's recommendation to establish the Working Group.[7] Joint Statement ¶ 31. The Working Group was to

> [d]evelop and submit a recommendation to the Superintendent on revised exam school admissions criteria for [the 2021-2022 school year] entrance in light of the potential impact of the COVID-19 pandemic on the prospective applicants during the latter half of the [2019-2020 school year] and potential impact on [the 2020-2021 school year].

Id.; see id. Ex. 32, Exam School Admissions Criteria Working Group Charter, ECF No. 38-32. From August 2020 through October 2020, the Working Group met weekly or bi-weekly in meetings closed to the public. Joint Statement ¶¶ 34, 35.

The Working Group studied a wide range of information, including the admissions criteria used by other cities, the results of the existing admission criteria, the use of test scores, the population of eligible students in Boston, median

[7] Nine members sat on the Working Group: (1) Samuel Acevedo, Boston Public School Opportunity and Achievement Gap Task Force Co-Chair; (2) Acacia Aguirre, parent of an O'Bryant student; (3) Michael Contompasis, Former Boston Latin School Headmaster and Boston Public School Superintendent; (4) Matt Cregor, Staff Attorney, Mental Health Legal Advisors Committee; (5) Tanya Freeman-Wisdom, O'Bryant Head of School; (6) Katherine Grassa, Curley K-8 School Principal; (7) Zena Lum, parent of a Boston Latin Academy student; (8) Rachel Skerritt, Boston Latin School Head of School; and (9) Tanisha Sullivan, President of the NAACP's Boston Branch. Joint Statement ¶ 32; see id. Ex. 2, Official Minutes Remote Boston School Committee Meeting (Aug. 5, 2020), ECF No. 38-2.

family income by zip code, application and admissions data by race, the population of the Exam Schools, and the feasibility, equity, and impacts of potential changes to the admission criteria. Id. ¶¶ 34, 37-41, 44; see id. Exs. 31, 34-36, ECF Nos. 38-31, 38-34, 38-35, 38-36. It used simulations to understand how various admission criteria would affect the socioeconomic, racial, and geographic representation of sixth-grade students admitted to the Exam Schools. Joint Statement ¶¶ 40-41; see id. Exs. 44-54, ECF Nos. 38-44, 38-45, 38-46, 38-47, 38-49, 38-50, 38-51, 38-52, 38-53, 38-54, 38-55. The Working Group also analyzed administrative and operational issues with the use of each criterion, such as the feasibility of using prior exam scores, the variability of grades within and outside the Boston Public School system, and schools practicing grade inflation.[8] Joint Statement ¶¶ 37, 42-43; see id. Exs. 35, 55-58, 60-61, ECF Nos. 38-35, 38-55, 38-56, 38-57, 38-58, 38-60, 38-61.

At its meeting on September 29, 2020, the Working Group made its Admissions Recommendation to the Superintendent, and,

[8] In 2016, for example, sixty-nine percent of applicants to Boston Latin School from one private parochial school in West Roxbury had A+ GPA averages. Joint Statement ¶ 43; see id. Ex. 61, Exam School Admissions Working Group Data Summary 4, ECF No. 38-61. For reference, between ten and twenty-two percent of applicants from other schools had A+ GPA averages. Exam School Admissions Working Group Data Summary 4.

with the Superintendent's support, the Working Group presented its initial recommendation to the School Committee on October 8, 2020. Joint Statement ¶¶ 45-46. After this meeting, the Working Group responded to questions by the School Committee members and completed an Equity Impact Statement using the Boston Public Schools' Equity Impact Planning Tool. Id. ¶ 47.

The Equity Impact Planning Tool is a district-mandated six-step process for every major policy program, initiative, and budget decision. Id. Ex. 64, BPS Racial Equity Planning Tool 3, ECF No. 38-64. The tool acknowledges that the Boston Public School system "does not consistently provide authentic learning opportunities for [its] students who are most marginalized to develop into self-determined, independent learners, able to pursue their aspirations," and that these "failures lead to disengaged students and significant achievement gaps." Id. To rectify this, the six-step process focuses the policy proponents on racial and ethnic inequalities so that the proponents consider whether and how their proposal aligns with the district's broader goals. Id. 1; id. Ex. 63, Equity Impact Statement School Committee Proposals ("Equity Impact Statement") 2, ECF No. 38-63. The Equity Impact Planning Tool explains the difference between equity and equality and how the two "can in fact stand in opposition to each other." BPS Racial Equity Planning Tool 12. It further explains that "[t]o eliminate

opportunity gaps persistent for Black and Latinx communities in Boston Public Schools, we must make a hard pivot away from a core value of equality -- everyone receives the same -- to equity: those with the highest needs are prioritized." Id. The Working Group completed the Equity Impact Statement for its Admissions Recommendation and stated the following as its desired outcome:

> Ensure that students will be enrolled (in the three exam high schools) though a clear and fair process for admissions in the [2021-2022] school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston.
>
> Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston.

Equity Impact Statement 1.

Members of the School Committee and Working Group made various remarks during the October 8, 2020 meeting. These remarks included acknowledging the desire to "rectify[] historic racial inequities" at the Exam Schools, Joint Statement, Ex. 5, Remote Boston School Committee Meeting (Oct. 8, 2020) ("Oct. 8 Tr."), 173:9-14, ECF No. 38-5, court decisions involving race in Boston Public Schools, see id. 158:16-159:19, performance and admission disparities among different demographics, see id. 165:10-166:5; Joint Statement, Ex. 18, Recommendation Exam

Schools Admissions Criteria SY21-22 ("Recommendation") 8, 13, ECF No. 38-18, disappointment about such disparities and the desire to have the Exam Schools better reflect Boston's diversity, see Oct. 8 Tr. 213:8-1, and the merits of considering race and ethnicity during the process, see id. 184:17-185:3.

On October 21, 2020, the School Committee adopted the Working Group's 2021-2022 Admissions Plan (i.e., the Plan), which included some changes from the Working Group's original Admissions Recommendation. Joint Statement ¶ 48. During this meeting, the School Committee Chairperson "made statements that were perceived as mocking the names of Asian members of the community who had come to the meeting to comment on the 2021 Admission Plan." Id. ¶ 66. Vice-Chairperson Alexandra Oliver-Davila ("Oliver-Davila") and a voting member, Dr. Lorna Rivera ("Rivera"), exchanged text messages recounting what had transpired, offering their sympathies before the inevitable backlash, stating that it was hard not to laugh, and generally not knowing what to do with themselves. Id. Ex. 72, Transcription Oct. 21, 2020 Text Messages 1-2, ECF No. 38-72. Oliver-Davila also exchanged text messages with the Superintendent, in which the Oliver-Davila called the meeting the "[b]est meeting ever." Id. 2.

Members of the School Committee and Working Group also acknowledged the Plan's potential to advance racial equality,

see Remote Boston School Committee Meeting (Oct. 21, 2020) ("Oct. 21 Tr.") 365:18-366:2, ECF No. 38-7, their desire for all Boston Public Schools to reflect the student population as a whole, see id. 397:19-398:2, 399:5-8, and the limitations of the Plan to achieve a student body that more closely reflects the demographics of Boston's school-age children, see id. 368:5-14.

D. The New Admissions Process[9]

The Plan opened admissions for the Exam Schools on November 23, 2020, and closed admissions on January 15, 2021. Joint Statement ¶ 53. Under the Plan, applicants were not required to take an admissions exam.[10] Id. ¶ 50. Instead, applicants had to satisfy three criteria to be eligible for admission. Id. ¶ 51. First, the student must be a resident of one of Boston's twenty-nine zip codes. Id. Students who were homeless or in the custody of the Massachusetts Department of Children and Families qualified for a special "zip code" created for them to participate in the Plan. Id. Second, the student must hold a minimum B average in English Language Arts and Math during the

[9] The parties only stipulated to the mechanisms of the seventh-grade admissions process in detail. The parties did, however, stipulate that "students also enter in[to] the ninth and tenth grades using a similar process." Joint Statement ¶ 51 n.5.

[10] In recommending this change, the Superintendent and the Working Group cited the difficulties of administering a test during the pandemic. Joint Statement ¶ 50.

fall and winter of the 2019-2020 school year or have received a "Meets Expectations" or "Exceeds Expectations" score in English Language Arts and Math on the Massachusetts Comprehensive Assessment System administered in the spring of 2019. Id. Finally, the student must "[p]rovide verification from the school district (or equivalent) that the student is performing at grade level based on the Massachusetts Curriculum standards." Id.

The Plan also required eligible students to submit a list of the Exam Schools according to his or her preference. Id. ¶¶ 54-55. For students attending Boston Public Schools, these eligibility criteria were self-certified by the district, and eligible students were asked to submit their Exam School preferences by January 29, 2021.[11] Id. ¶ 54. Non-Boston Public School students were required to submit their proof of eligibility and Exam School preferences by December 31, 2020.[12] Id. ¶ 55.

The Plan had two rounds through which applicants were invited to the Exam Schools. Id. ¶¶ 57-63. Using the eligible

[11] This deadline was later extended to March 5, 2021. Joint Statement ¶ 54.

[12] This deadline was later extended to January 15, 2021, and information was communicated to the non-Boston Public School students through their respective schools. Joint Statement ¶ 55.

applicants' English Language Arts and Math GPAs for the first two grading periods of the 2019-2020 school year, the highest graded students in the first round were invited to the first twenty percent of seats in each Exam School. Id. ¶ 57. Each student within this top twenty percent of GPAs was invited to his or her first-choice Exam School. Id. If, however, twenty percent of that student's first-choice Exam School was filled, that student moved to the second round of the Plan. Id.

The second round again ranked eligible applicants by their English Language Arts and Math GPAs for the first two grading periods of the 2019-2020 school year. Id. ¶ 58. In this round, however, the students were ranked within their zip code according to their GPA. Id. Each zip code was allocated a percentage of the remaining eighty percent of seats at the Exam Schools according to the proportion of school-age children residing in that zip code. Id. ¶ 59.

Students were then assigned to the Exam Schools over ten rounds until each Exam School was filled. Id. Ex. 66, 2020-2021 BPS Exam Schools Admissions Process 23, ECF No. 38-66. Ten percent of the Exam Schools' seats allocated to each zip code were assigned each round. Id. Starting with the zip code with the lowest median household income with children under the age of eighteen according to the American Community Survey, the highest ranked applicants were assigned to his or her first-

choice Exam School until ten percent of that zip code's allocated seats were filled. Id. If an applicant's first-choice Exam School was filled, the applicant was assigned to his or her next choice. Id. Once a zip code filled its ten percent of seats, the next zip code's applicants were assigned. Id. Invitations under both processes were issued at the same time, and the school year began on September 9, 2021.

E. Demographics and the Impact of the Plan

The City of Boston has twenty-nine zip codes. Id. ¶ 39. According to the 2019 edition of the United States Census Bureau's American Community Survey of Demographic and Housing Estimates, the racial and ethnic demographics of Boston were as follows: 44.9 percent White, 22.2 percent Black, 19.7 percent Hispanic or Latinx, 9.6 percent Asian, and 2.6 percent two or more races, not including Hispanic or Latinx. Id. ¶ 21 (citing id. Ex. 21, ACS Demographic & Housing Estimates, ECF No. 38-21).

The demographics of the school-age population in Boston, however, is significantly more diverse than the City's general population, compare id., with Recommendation 18, and for the 2020-2021 school year, the racial and ethnic demographics of Boston's school-age population were sixteen percent White, seven percent Asian, thirty-five percent Black, thirty-six percent Latinx, and five percent mixed race, Recommendation 18.

Historically, the student body of the Exam Schools has not reflected the same level of diversity. Recommendation 8. According to simulations by the Working Group, had the initial version of the Plan been applied during the 2020-2021 admissions cycle, it would have impacted the number of admitted students within virtually every zip code when compared to the number of admitted students under the old, exam-based admissions process used for the 2020-2021 school year. Id. Ex. 71, Additional Background Information & Data Reviewed Boston Public Schools Exam Schools Admissions Criteria Working Group 5, ECF No. 38-71. Similarly, the Working Group's simulations demonstrated that had the initial version of the Plan been applied during the 2020-2021 admissions cycle, the racial make-up of the incoming class would have changed. Recommendation 18. Under the old plan, the racial and ethnic demographics of the incoming class were the following: thirty-nine percent White, twenty-one percent Asian, fourteen percent Black, twenty-one percent Latinx, and five percent "Multi-Race/Other." Id. The new Plan resulted in a class make up that was thirty-one percent White, eighteen percent Asian, twenty-three percent Black, twenty-three percent Latinx, and six percent "Multi-Race/Other." See Mem. Pursuant Court Order & Further Supp. Relief J. Rule 60(b), Ex. N, Simulation Comparison, ECF No. 134-14.

F. The Parties

The Coalition is a Massachusetts not-for-profit organization. Suppl. Statement Agreed Facts ("Suppl. Statement") ¶ 1, ECF No. 78. The Coalition's stated purposes include "promoting merit-based admissions to Boston Exam Schools (including Boston Latin School, Boston Latin Academy and O'Bryant School of Science and Math) and promoting diversity in Boston high schools by enhancing K-6 education across all schools in Boston." Id. ¶ 2 (brackets and quotations omitted). The Coalition's membership is open to any student, alumni, applicant, or future applicant of the Boston Exam Schools, as well as their family members. Id. ¶ 3. The Coalition brings this action "on behalf of [its] members whose children are students applying for one or more of the Boston Exam Schools for the classes entering in the fall of 2021." Id. ¶ 4. Specifically, the Coalition represents the interests of fourteen students of Asian or White ethnicity and their member-parents. Id. The students reside in four of Boston's twenty-nine zip codes: Chinatown (zip code 02111), Beacon Hill/West End (zip code 02114), Brighton (zip code 02135), and West Roxbury (zip code 02132). Id. Each student "is a sixth-grade student . . . and an applicant to one or more of the Boston Exam Schools for the class entering in the fall of 2021," and each member-parent

supports his or her child's application to the Exam Schools. Id.

The School Committee is the governing body of the Boston Public Schools. Joint Statement ¶ 1. During the meetings when the Plan was discussed and developed, the School Committee had three types of members: one Chairperson, Michael Loconto, one Vice-Chairperson, Alexandra Oliver-Davila, five voting members, Michael O'Neill, Dr. Hardin Coleman, Dr. Lorna Rivera, Jeri Robinson, and Quoc Tran, and one non-voting member, Khymani James. Id. ¶ 4. After Chairperson Loconto resigned, the Mayor appointed Ernani DeAraujo to the School Committee as a voting member, Oliver-Davila became the Chairperson, and O'Neill became the Vice-Chairperson. Id. ¶ 5. Oliver-Davila, O'Neill, Coleman, Rivera, Robinson, Tran, and DeAraujo are named defendants in this action. Id. ¶¶ 4-5. Defendant Brenda Cassellius is the Superintendent of the Boston Public Schools. Id. ¶ 6.

Several organizations and individuals moved to intervene in this matter. Mot. Boston Branch NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, & H.D. Leave Intervene Defs., ECF No. 20. Organizational intervenor Boston Branch of the NAACP sought "intervention on behalf of both itself as well as its members whose children have currently

pending applications to the [Exam Schools], including but not limited to" an NAACP member and their child, who have a pending application to the Exam Schools and who live in zip code 02119. Mem. Law. Supp. Mot. Boston Branch NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, & H.D. Leave Intervene Defs. 4, ECF No. 21. The mission of organizational intervenor Greater Boston Latino Network "centers on educational equity -- especially ending segregation and promoting equal access and opportunity." Id. Organizational intervenor Asian Pacific Islander Civic Action Network seeks to "advance[] the interests of Massachusetts' Asian and Pacific Islander American communities with a shared agenda to further equity and oppose discrimination through year-round civic action." Id. 5. Dorchester-based organizational intervenor Asian American Resource Workshop "is a grassroots, member-led group organizing Asian American communities throughout Greater Boston through political education, creative expression, and both issue- and neighborhood-based organizing." Id. Individual intervenor Maireny Pimentel resides in Boston's South End (zip code 02118) with her older eighth-grade son, who has a pending application at Boston Latin Academy, and with her younger sixth-grade son, who "intends to apply to the [Boston Exam Schools] in fall 2021." Id. 6. Individual intervenor H.D., a sixth-grade

student who resides in Dorchester (zip code 02122), "is currently waiting to hear about admission decisions from [the Exam Schools]." Id.

III. SUBSEQUENT REVELATION

The day after the October 21, 2020 meeting, during which the School Committee adopted the Plan, the Boston Globe submitted a public records request for all communications by and between the School Committee members. Mem. Law Behalf City Boston Att'ys Catherine Lizotte & Henry C. Luthin, Ex. B, Second Aff. Catherine Lizotte ¶ 6, ECF No. 137-2. This request was assigned to Catherine Lizotte, the Legal Advisor to the Boston Public Schools. Id. ¶¶ 3-5. Among the communication Lizotte collected was an exchange between Olivia-Davila and Rivera. See generally Mem. Supp. Mot. Pursuant Fed. R. 60(b), Ex. A, Decl. Darragh Murphy ("Murphy Decl."), Attach. I-2, Text Message Screenshots, ECF No. 113-1. These text messages included the following:

> Rivera: "Best s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry"
>
> Oliver-Davila: "Me too!! Wait [un]til the white racists start yelling [a]t us!"
>
> Rivera: "Whatever . . . they are delusional"
>
> . . . .
>
> Rivera: "Ouch I guess that was for me!"
>
> Rivera: "I still stand by my statement"

> Oliver-Davila: "I said [Boston Public Schools] students should get preference and stand by this."
>
> Rivera: "Oh then it was both of us!"
>
> Oliver-Davila: "This guy wrote to me twice"
>
> Rivera: "Me too"
>
> Oliver-Davila: "White guy who is silent majority. He writes for [B]oston [H]erald"
>
> Rivera: "Not good"
>
> Oliver-Davila: "He complains becaise [sic] he wants to have a vote. I do think the students should vote. But his tweets are excessive"
>
> Rivera: "Agree"
>
> Rivera: "I hate W[est] R[oxbury]"
>
> Oliver-Davila: "Sick of westie whites"
>
> Rivera: "Me too I really feel [l]ike saying that!!!!"

Id. 77, 79-82.

In responding to the Boston Globe's public records request, Lizotte consulted with the corporation counsel, the first assistant corporation counsel, and the director of public records to determine which records were responsive to the request. Second Aff. Catherine Lizotte ¶ 9. The messages reproduced above were omitted, the messages deemed responsive were transcribed, and the City's response to the records request included a disclosure that read as follows:

> With respect to the text messages, it is important to note that none of the members possess a mobile phone that is

> owned by [Boston Public Schools] or the City of Boston. Each member was contacted and asked to provide text message records from the respective personal devices that are responsive to your request. While no portions of texts were redacted based on statutory exemptions to the public records law, [Boston Public Schools] did omit portions deemed not "related to [Boston Public Schools] issues."

Id. ¶¶ 9-12.

A few weeks later, on November 19, 2020, the Coalition filed its articles of organization with the Secretary of the Commonwealth. See Mass. Sec'y of Commonwealth, Boston Parent Coalition for Academic Excellence Corp., Articles of Organization, Filing No. 202014808120 ("Coalition Articles of Organization"), https://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?sysvalue=7CRKuYbTPkRPyuWnn71TU66SrAk8ygttTnL67y84NkY-. The same day, Darragh Murphy, a member of the Coalition, filed six public records requests. Murphy Decl. ¶ 5. The six requests asked for following information:

> ISEE exam scores and Grade Point Average (GPA's) for school year 2019/2020 of all 6th grade students who did NOT receive invitations for School Year 2020/2021 to Boston Latin Academy, the O'Bryant School, and Boston Latin School, de-identified with the name of the exam school to which each applicant was NOT invited to attend, the sending school name, and the ZIP code of each applicant.

Second Aff. Catherine Lizotte, Ex. 12, Murphy Public Records Request No. 1, ECF No. 137-2.

> ISEE exam scores and Grade Point Averages (GPA's) for school year 2019/2020 of all 6th grade students admitted for School Year 2020/2021 to Boston Latin Academy, the

> O'Bryant School, and Boston Latin School, de-identified, with the name of the exam school to which each applicant was invited to attend, and the sending school name, and the ZIP code of each applicant.

Id. Ex. 13, Murphy Public Records Request No. 2, ECF No. 137-2.

> Grade Point Averages (GPA's) for school year 2019/2020 of all 6th grade students admitted for School Year 2020/2021 to Boston Latin Academy, the O'Bryant School, and Boston Latin School, de-identified, with sending school name and ZIP code of each applicant.

Id. Ex. 14, Murphy Public Records Request No. 3, ECF No. 137-2.

> Copies of all electronic communications, including emails, text messages, voicemails, social media messages, tweets, etc, to and from Superintendent Cassellius, her staff and/or assistants, and all members of the Boston School committee, and all members of the Exam School Working Group **regarding the Exam School Working Group**, including, electronic attachments to all electronic communications.

Id. Ex. 15, Murphy Public Records Request No. 4, ECF No. 137-2

(emphasis added).

> Copies of all formulas, algorithms, calculations, instructions, rubrics, and guidelines used by Boston Public Schools to convert, analyze, and standardize Grade Point Averages (GPA's) for all 6th grade applications to Boston Latin Academy, the O'Bryant School, and Boston Latin School.

Id. Ex. 16, Murphy Public Records Request No. 5, ECF No. 137-2.

> Copies of all data sets, spreadsheets, formulas, algorithms, calculations, instructions, rubrics, and guidelines used by the Superintendent's Exam School Working Group to identify the number of school aged children in each Boston ZIP code, the median income of each Boston ZIP code, and the allocation of exam school seats per Boston ZIP code, including copies of all simulations run by the Exam School Working Group, the Superintendent's Office, the Boston Public School department, and the Boston School Committee, and all electronic communication to and from all members of the Exam School Working Group, the Superintendent, the Boston School Committee, the Mayor's

> Office, the Boston City Council, and the Boston Public Schools offices, **regarding the work of the Exam School Working group**, its data and findings, and the simulations.

Id. Ex. 17, Murphy Public Records Request No. 6, ECF No. 137-2 (emphasis added). The requests did not include any indicia of membership in the newly formed Coalition, and Murphy was not a registered agent of the Coalition. See Second Aff. Catherine Lizotte ¶ 17; see generally Coalition Articles of Organization. On November 20, 2020, the Coalition made fifteen requests for information and data sets regarding the October 21, 2020 exam school admissions presentation to the School Committee. Second Aff. Catherine Lizotte ¶ 18. Lizotte responded to both Murphy's requests and the Coalition's requests on January 13, 2021. Id. ¶ 19. Lizotte, however, did not produce the same text messages to Murphy's requests as she had to the Boston Globe's requests because Murphy's requests specifically asked for information regarding the Exam School Working Group. Id. Murphy made subsequent records requests, including one on February 23, 2021 for

> Copies of ALL electronic text messages, instant messages, and any other form of electronic communication sent and/or received, including any and all "group" messages sent and/or received by more than one of the following listed individuals, during the School Committee meeting scheduled for October 21, 2020, from the time the meeting started on 10/21/2020 until it was officially adjourned on Thursday, October 22, 2020, between and among each and all of the following: Superintendent Brenda Cassellius, SC Chair Michael Loconto[,] SC Members: Lora Rivera[,] Jeri

> Robinson[,] Michael O'Neil[l][,] Alexandra Oliver-Davila[,] Hardin LK Coleman[,] [and] Quoc Tran[.]

Id. Ex. 22, City Public Records Request / R000337-022321, ECF No. 137-2. On March 9, 2021, Lizotte responded to Murphy's February 23 request by forwarding the transcribed text messages that she had previously provided in response to the Boston Globe's records request. Second Aff. Catherine Lizotte ¶ 28. Murphy never appealed or objected to the March 9 response (or indeed to any of the responses she had received). Id. ¶ 29. On February 26, 2021, the Coalition filed the present action. See generally Compl.

Lizotte filed her appearance in this present action before the School Committee hired outside counsel. Thereafter Lizotte had minimal involvement in any trial-related matters. See generally id.

In March 2021 the present action was in full swing, this Court having collapsed the request for preliminary injunction with trial on the merits and exhorted the parties to agree upon the relevant facts. The parties, through counsel, were busily engaged in the process of stipulating to a joint statement of facts. Although the first draft statement sent by the Coalition did not include the transcribed text messages, subsequent attachments included excerpts from the transcribed text messages. Id. ¶¶ 30-31. No party made any reference to or

mention of the omitted text messages during the revisions of the joint statement, and all parties confirmed that the text message excerpts produced were true and accurate. On June 7, 2021, the Boston Globe, having apparently been tipped off, published a story revealing the omitted text messages. Bianca Vázquez Toness & Felicia Gans, After Sharing Racially Charged Texts About West Roxbury Families in October, a Boston School Official Has Resigned, Bos. Globe, June 7, 2021, https://www.bostonglobe.com /2021/06/07/metro/boston-appears-have-illegally-withheld-inappropriate-texts-after-career-ending-school-committee-meeting/.

IV. LEGAL ANALYSIS

Throughout this action, the Coalition has maintained two arguments despite conceding that the Plan is facially race neutral: (1) that the Plan uses proxies for race and that any proxy for race automatically triggers strict scrutiny, and (2) that the Plan was motivated by interests in racial diversity and that this automatically triggers strict scrutiny because any consideration of race is impermissible.[13] See, e.g., Mem. Supp.

[13] When this Court pressed the Coalition at the hearing on its position, the following exchange took place:

> THE COURT: I just want to be clear on your argument. So long as race was one of the things considered, albeit the others are all legitimate, your contention is that this plan fails constitutionally?

J. & Inj. Relief 14-15, ECF No. 63; Pl.'s Post Hr'g Br. 1-5, 11-14, ECF No. 97. Remarkably, the Coalition maintained this erroneous position despite explicit contrary law within this Circuit, this Court pressing the Coalition on the legal foundation for its position, this Court's prior withdrawn order plainly rejecting it, and the First Circuit's denial of the motion for injunctive relief on the same grounds as this Court's prior order. See generally Anderson ex rel. Dowd v. City of Bos., 375 F.3d 71 (1st Cir. 2004); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J.) (concurring in part and concurring in judgment) (accepting diversity as a compelling governmental interest along with the four dissenters); Boston Parent I, 2021 WL 1422827, at *10; Boston Parent II, 996 F.3d at 46.

The law here has been and remains clear: where the governmental action is facially race neutral and uniformly applied, "good faith [is] presumed in the absence of a showing

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> MR. HURD: Your Honor, our position is that, yes . . . .
>
> THE COURT: [A]ll right, your argument is -- in deciding what the level of scrutiny is, because race was one factor that they considered, it must be subject to strict scrutiny.
>
> MR. HURD: Yes, your Honor.

Tr. Case-Stated Hr'g 15:24–16:3, 16:13-17, ECF No. 101.

to the contrary" that the action has a disparate impact, the spawn of an invidious discriminatory purpose. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 268, 318-19 (1978). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). "The Supreme Court non-exhaustively enumerated several factors relevant to the inquiry: the degree of disproportionate racial effect, if any, of the policy; the justification, or lack thereof, for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision." Anderson, 375 F.3d at 83.

> In the words of the First Circuit,
>
> the mere invocation of racial diversity as a goal is insufficient to subject [an otherwise race-neutral plan] to strict scrutiny. In those cases where the Supreme Court inquired whether diversity is a compelling state interest and whether the program at issue could survive strict scrutiny, the programs were all subjected to strict scrutiny because they used explicit racial classifications to achieve the goal of diversity. None of these cases, nor any other case to which our attention has been drawn, has subjected a governmental program to strict scrutiny simply because the state mentioned diversity as a goal.

Id. at 87. Furthermore, "[t]he Supreme Court has explained that the motive of increasing minority participation and access is

not suspect." Id. (citing City of Richmond v. JA Croson Co., 488 U.S. 469, 507 (1989) (approving the use of race-neutral means to increase minority participation in governmental programs)). In Parents Involved in Community Schools v. Seattle School District Number 1, Justice Kennedy not only ruled this motive permissible, but fortified its use through race-neutral proxies aimed at accomplishing its end:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including 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.

551 U.S. at 789 (Kennedy, J.) (concurring in part and concurring in judgment) (emphasis added). Although these proxies are race-conscious, it is "unlikely any of them would demand strict scrutiny to be found permissible" because they do not define students by their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. (citing Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are facially race neutral, so a more searching inquiry is necessary before strict scrutiny can be found applicable in

redistricting cases than in cases of classifications based explicitly on race." (quotations omitted))).

Similarly, the Third, Fifth, and Sixth Circuits have held that considering racial data is not a racial classification and does not trigger strict scrutiny. See Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 548 (3d Cir. 2011) ("Appellants also conflate a school assignment policy that explicitly classifies based on race with the consideration or awareness of neighborhood racial demographics during the development and selection of a policy. . . . The consideration or awareness of race while developing or selecting a policy, however, is not in and of itself a racial classification. Thus, a decisionmaker's awareness or consideration of race is not racial classification. Designing a policy 'with racial factors in mind' does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion." (quoting Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999))); Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 358 (5th Cir. 2015) ("[T]he district court's legal conclusion that the Board's consideration of demographic data in formulating [the plan at issue] 'does not amount to adopting a rezoning plan that assigns students on the basis of race' conforms to Supreme Court case law and is in accord with the decisions of this Court's sister circuits. Accordingly, we hold that the district court did not

err in concluding that [the plan at issue] does not make express racial classifications and so is not subject to strict scrutiny on that basis." (brackets and citations omitted)); Spurlock v. Fox, 716 F.3d 383, 394 (6th Cir. 2013) ("Racial classification requires more than the consideration of racial data. If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions."); see also United States v. Hays, 515 U.S. 737, 745 (1995) ("[T]he legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." (quotations omitted)).

There has never been a question but that the School Committee and the Working Group were keenly aware of the Plan's effect on diversity and interested in increasing the Exam Schools' "racial, socioeconomic and geographic diversity [better to reflect the diversity of] all students (K-12) in the city of Boston." Equity Impact Statement 1; see supra Section II.C. Similarly, it is beyond question that at least one member of the School Committee harbored animus toward groups that allegedly

suffered disparate impacts. The School Committee Chairperson made racist comments publicly during the October 21, 2020 meeting directed at Boston's Asian American communities, which led to his resignation. See Joint Statement ¶¶ 48-68. Nevertheless, the Coalition was so certain that its specious approach to the Equal Protection doctrine was ironclad that it never sought additional discovery and discouraged any further development of the record[14] -- essentially stopping at the

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[14] The following occurred at trial:

> MR. HURD: [W]e don't have to show that kind of hostility and disrespect for Asians or whites in order to prevail, all we have to show in order to get to strict scrutiny is that the zip code quota plan was racially motivated.

Tr. Case-Stated Hr'g 10:15-19.

> THE COURT: And you say -- and I'm following your argument, you say, based upon this record, that's so clear that . . . the duty of the Court under the Constitution is so to declare and to enter a permanent injunction at this juncture in the proceedings?
>
> MR. HURD: Yes, your Honor, that is our position.
>
> THE COURT: All right.
>
> MR. HURD: And as we note in our briefs, alternatively if there is to be some continuation of these proceedings so that they may somehow bolster their position, then we are entitled at least to a preliminary injunction. But let me go back and --
>
> THE COURT: And at least as a matter of logic, I follow that. Now you've made that clear, so let's go on. Well just so I understand, and you''re making it clear, you say you win today, but if you don't win today, you at least get an

threshold of the doctrine and forgoing any serious development of evidence necessary to advance a theory under Arlington Heights. See Arlington Heights, 429 U.S. at 266; Boston Parent II, 996 F.3d at 46 (noting that the Coalition "for[went] any serious engagement" with statistically analyzing the Plan's alleged disparate impact); see generally Joint Statement.

Now, having lost unequivocally on the theory it advanced at trial, but armed with the serendipitous revelation that the School Committee improperly responded to prior, independent public records requests, the Coalition advances a new theory under the guise of Rule 60(b). The Coalition argues that it is entitled to relief from judgment under Rule 60(b) because (1) new evidence has come to light that the Coalition could not have discovered with reasonable diligence, and (2) the School Committee's fraud, misrepresentation, or misconduct substantially interfered with the Coalition's ability to prepare for trial. See Mem. Supp. Mot. Pursuant Fed. Rule 60(b) 9-14.

> injunction -- and I don't mean today, but when, in the very near future, I enter an order, you're entitled to an injunction to hold things as we go forward to expand the record?
>
> MR. HURD: Yes, your Honor, that's correct. And let me point out why we believe the record does not need and should not be expanded . . . .

Id. 21:4-22:3 (emphasis added).

A. Rule 60(b) Legal Standard

Federal Rule of Civil Procedure 60(b) enumerates six reasons upon which a "court may relieve a party or its legal representative from a final judgment, order, or proceeding . . . ." Fed. R. Civ. P. 60(b). "[R]elief under Rule 60(b) is extraordinary in nature," and "motions invoking that rule should be granted sparingly." Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002). To prevail, the movant must establish "that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted." Id. In assessing the motion, this Court "may assume the truth of fact-specific statements proffered by the movant," but "it need not credit bald assertions, unsubstantiated conclusions, periphrastic circumlocutions, or hyperbolic rodomontade." See id. at 20 n.3 (quotations omitted).

The Coalition moves under Rule 60(b)(2) in response to "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," and under Rule 60(b)(3) in response to "fraud (whether previously called intrinsic or extrinsic),

misrepresentation, or misconduct by an opposing party . . . ." Mem. Supp. Mot. Pursuant Fed. Rule 60(b) 7-8; see id. 9-14.

> A party who moves under Rule 60(b)(2) must demonstrate that
>
> (1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted.

González-Piña v. Rodríguez, 407 F.3d 425, 433 (1st Cir. 2005); see Karak, 288 F.3d at 19-20 ("[A] party who seeks relief from a judgment based on newly discovered evidence must, at the very least, offer a convincing explanation as to why he could not have proffered the crucial evidence at an earlier stage of the proceedings.").

A party who moves under Rule 60(b)(3) must show (1) "the opponent's misconduct by clear and convincing evidence" and (2) "that the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial." Anderson v. Cryovac, Inc., 862 F.2d 910, 926 (1st Cir. 1988). "Failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of this subsection." Id. at 923. Proof of "'[m]isconduct' does not demand proof of nefarious intent or purpose as a prerequisite to redress" -- misconduct "can cover even accidental omissions . . . ." Id. "By definition, lack of access to any

discoverable material forecloses 'full' preparation for trial since the material in question will be missing. Yet concealed evidence may turn out to be cumulative, insignificant, or of marginal relevance. If that be the case, retrial would needlessly squander judicial resources." Id. at 924.

Nevertheless, because "[v]erdicts ought not lightly to be disturbed . . . complainants [must] demonstrate convincingly that they have been victimized by an adversary's misconduct." Id. "[A]s with other defects in the course of litigation, the error, to warrant relief, must have been harmful -- it must have 'affect[ed] the substantial rights' of the movant." Id. (citing Fed. R. Civ. P. 61). Such substantial impairment may exist where "a party shows that the concealment precluded inquiry into a plausible theory of liability, denied it access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination." Id. at 925. "Moreover, since parties ought not to benefit from their own mis-, mal-, or nonfeasance, uncertainties attending the application of hindsight in this area should redound to the movant's benefit." Id. at 924. Consequently, "[s]ubstantial interference may also be established by presumption or inference" when the nondisclosure was knowing or purposeful rather than accidental. See id. at 926.

B. Under These Circumstances, Relief from Judgment Is Inappropriate.

Despite the School Committee's best efforts to justify its actions,[15] there is no question that the School Committee mishandled the public records requests from Murphy and the Boston Globe. The omitted, racially charged text messages were being sent even as the School Committee adopted the Plan affecting the groups disparaged in those text messages. See Murphy Decl., Attach. I-2, Text Message Screenshots 77, 79-82. How and why Lizotte and company did not disclose these pertinent messages is suspect and indicative of an effort by the School Committee to keep them hidden, perhaps because they were so embarrassingly racially charged.[16] Indeed, the disclaimer

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[15] These included a stunningly hapless brief that sought to equate the improperly withheld, racially charged texts with an aside by a committee member that "I love Kit Kats" (the candy bar) and an unethical suggestion that, having stipulated that the texts produced were "true and accurate" a reader ought not conclude they were "complete" absent specific stipulation. See Defs.' Opp'n Pl.'s Mot. Pursuant Federal Rule 60(b) 10, 14, ECF No. 118.

[16] A NOTE ON RACISM: Racism is the syphilis of American public discourse and civic engagement. It is embarrassing, ugly, deeply humiliating, oppressive, and infuriating, all five. We wish it were gone but don't know how to get there. So, mostly, we don't talk about it, since to do so we necessarily acknowledge how deeply it affects (or infects) all of us, some more than others.

No discussion of prejudice would be complete without an acknowledgment of the racist history of our nation. Much as we may wish it were not so, racism is a significant part of our

national heritage. After all, our very Constitution originally embraced human slavery as a pragmatic matter. See U.S. Const. art. I, § 2, cl. 3 (the Three-fifths clause); id. art. I, § 9, cl. 1 (the 1808 clause); id. art. IV, § 2 (the Fugitive Slave clause); id. art. V (prohibiting any amendment affecting the 1808 clause). Only in the wake of "a great civil war, testing whether [our] nation, or any nation so conceived and so dedicated can long endure," Abraham Lincoln, Gettysburg Address, Nov. 19, 1863, were the legal constraints of slavery struck down. Yet today, more than 150 years later, on January 6th of this very year, an apparent White supremacist dragged a Confederate flag through the rotunda of our nation's Capitol -- something a genuine army, the Army of Northern Virginia, could not accomplish in four years of hard-fought battles.

We ought not be surprised. As my classmate Howard Gray brilliantly paraphrased Faulkner's famous dictum: "History isn't dead. Hell, it isn't even past." See William Faulkner, Requiem for a Nun 92 (1951) ("The past is never dead. It's not even past.").

Today, racism in America demeans and degrades the very fiber of our nation. Like cancer, when it appears it metastasizes, spreading hate to recipients with all too predictable consequences.

We must each recognize the racism within us. We each must acknowledge it. We must own it -- and we must transcend it.

And we can. We are not born racist. Oscar Hammerstein had it right:

> You've got to be taught to hate and fear.
> You've got to be taught from year to year
> * * *
> Before you are six or seven or eight
> To hate all the people your relatives hate.
> You've got to be carefully taught.

Rodgers & Hammerstein, You've Got to Be Carefully Taught, on South Pacific (1949).

We can transcend the evil we have learned. We must, lest racism, like syphilis, drive us mad.

attached to the School Committee's response acknowledged that the decision to omit certain text messages lay outside any statutory exemption. Second Aff. Catherine Lizotte ¶¶ 9-12. Lizotte, however, failed to attach this disclaimer when she provided the partial transcript in response to Murphy's request, despite the plain language of Murphy's February 23 request that she wanted a copy of all the text messages sent during the School Committee hearing.[17] See City Public Records Request / R000337-022321. The question, therefore, is not whether a wrong occurred -- the question is whether the circumstances of the wrong warrants relief under Rule 60(b). See Karak, 288 F.3d at 19; Anderson, 862 F.2d at 924-26. This Court concludes it does not.

First, it is simply inapposite to conflate shoddy handling of public records requests with conduct during adversarial litigation. What happened here is a world apart from the responsibilities and duties owed during the judicially imposed discovery process. The controlling precedent cited above involves misconduct during judicially imposed discovery. See, e.g., Anderson, 862 F.2d at 924 ("[A]s with other defects in the course of litigation, the error, to warrant relief, must have

[17] An interpretation that is even more obvious when compared with Murphy's prior requests. Compare City Public Records Request / R000337-022321, with Murphy Public Records Request Nos. 1-6.

been harmful -- it must have 'affect[ed] the substantial rights' of the movant."). To conflate the Commonwealth's records request process with judicially imposed discovery and equate misconduct in the former with misconduct in the latter finds no support in precedent. Moreover, extending the law to equate the two would compel public entities to treat all requesters as adverse litigants. Absent some Massachusetts legislative or judicial intimation that its statutes are to be so enforced, this Court declines to make such an extension.

Moreover, Lizotte, in answering records requests on behalf of the School Committee, had no way of knowing that the Coalition meant to rely on the records requests of a third party. There is no evidence that Lizotte had any idea that Murphy was a member of the Coalition, particularly when the Coalition filed fifteen public records requests on its own behalf. Second Aff. Catherine Lizotte ¶ 18. The Coalition used but an excerpt of the transcript Lizotte sent to Murphy -- a transcript that had been previously sent to the Boston Globe -- so the mere appearance of an excerpt from the transcript is not enough reasonably to put Lizotte or trial counsel on notice that Murphy was working on the Coalition's behalf.

Second, while it is true that trial counsel were less diligent than one would have expected in reviewing and producing the client School Committee's own records, this was not fraud

but inadvertence stemming from the burden of operating at flank speed to prepare for what it very much wanted to be a timely, dispositive hearing[18] -- as events so proved. While this Court

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[18] A NOTE ON SPEED:

> The two great "enemies" of our American system of justice are **cost** and **delay** . . . . [O]ur [civil justice] system is so unwieldy, so stunningly expensive, and so ponderously slow that only corporate America, the very rich, and those so crippled that the contingent fee is attractive to the bar stand a realistic chance of having a jury of their peers.

Hon. William G. Young, Engage the Enemy More Closely, Forum, Conn. Trial Laws. Mag. (forthcoming Nov. 2021).

Everyone agrees that an early firm trial date is the best way to resolve cases and, after 43 years of judicial service, I have come to believe that almost anything that will speed matters up furthers the ends of justice.

One such technique is found in Fed. R. Civ. P. 65(a) -- the judicial power to collapse further hearing on a preliminary injunction with trial on the merits. I do this in every appropriate case. Usually it works well, see, e.g., Victim Rights Law Ctr. v. Cardona, CIVIL ACTION NO. 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021), order clarified, CIVIL ACTION NO. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), the first case out of a plethora of parallel litigation to render a final judgment authoritative nationwide, see Brian Bosworth, Lauren Bachtel & Christopher Cunio, How Court Ruling, DOE Guidance Change DeVos' Title IX Rule, Law360 (Aug. 27, 2021, 5:44 PM), https://www.law360.com/articles/1416729/how-court-ruling-doe-guidance-change-devos-title-ix-rule.

In the present case, speedy resolution was a compelling necessity. Sometimes, however, speed comes at the expense of accuracy. So here. The text above explains **what** happened -- no fraud, but unacceptable lacunae in the necessary preparation of the factual record.

will not excuse or reward such lack of diligence, on the totality of this record it is not an occasion for Rule 60(b) relief.

Finally, the Coalition here elected to forgo pressing for discovery NOT because it felt as though it had turned over every evidentiary rock but because, given its erroneous view of the law, it saw no need to overturn any more rocks than it already had examined. Tr. Case-Stated Hr'g 10:15-19, 21:4-22:3, ECF No.

Why did this happen? Trial counsel were simply overwhelmed by the magnitude of necessary trial preparation. Why was that, especially among trial counsel whose conduct in every other respect -- save for that silly brief -- was exemplary?

The answer lies in the symbiosis between a flawed business model and a complicit judiciary. I have been at the bar now for over half a century and in all that time judges have decried delay with a fervor usually reserved for articles of faith. Over that same period, trial counsel, from solo practitioners to big firms, take every case they feel competent to handle (after all, that's what pays the bills) and bet they can juggle their trial calendars to try the ones they cannot settle. At the same time, trial judges (most of whom were trial lawyers or wish they had been) recognize that trial counsel cannot be in two places at once. The result is that cases move through the courts at roughly a pace convenient to the local bar.

For example, I am presently responsible for 143 civil cases in Massachusetts. During the past thirty days of September 2021, I received 26 motions for continuance and allowed 23 of them. During the same time period, while responsible for 201 civil cases in the District of Puerto Rico, I received 45 motions for continuance and allowed 41 of them. And I am considered "tough" on continuances.

Where, as here, the public necessity compels a much quicker pace, trial counsel feel the strain as no firm can simply and immediately "staff up" to meet a complex equity case.

101. The Coalition had evidence that the Chairperson of the School Committee made racist remarks. Joint Statement ¶¶ 48-68. The Coalition was already suspicious that Oliver-Davila and Rivera harbored animus toward Whites and Asians. See Oct. 8 Tr. 184:17-185:3, 213:8-1; Oct. 21 Tr. 365:18-366:2, 368:5-14, 397:19-398:2, 399:5-8. Nevertheless, the Coalition insisted that it need not prove animus because of the alternative theory it advanced, was adamant that it would prevail on the Joint Statement alone, and discouraged further development of the record. See Tr. Case-Stated Hr'g 10:15-19, 15:24–16:3, 16:13-17, 21:4-22:3.[19]

1. Rule 60(b)(2)

Against this backdrop, the Coalition fails to satisfy the second and fourth elements of Rule 60(b)(2). See González-Piña, 407 F.3d at 433; Karak, 288 F.3d at 19-20. Although these racist text messages are clearly new evidence, they are evidence that could have been discovered earlier by the Coalition had it not chosen to forgo discovery and followed to fruition its suspicions that Oliver-Davila and Rivera harbored racial animus.

As for the fourth prong, this evidence is not of such a nature that it would probably change the result were a new trial

[19] For the foregoing reasons, and the analysis developed further below, this Court would also deny relief under Rule 60(b)(6) if granted jurisdiction.

to be granted. See González-Piña, 407 F.3d at 433; Karak, 288 F.3d at 19-20. This Plan is not the celebrated result of transcending racial classifications that this Court once found it to be. Three of the seven School Committee members harbored some form of racial animus, and it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics. In other words, but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen. While the increase of a zero-sum resource to one group necessitates the reduction of that resource to others, the case law is clear -- the concern is action taken because of animus toward a group, not in spite of an action's necessary effect on a group or groups. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979). The Plan's criteria are all facially race neutral. The precedent is clear that when the governmental action is facially race neutral, "good faith [is] presumed in the absence of a showing to the contrary," i.e., unless the plaintiff proves disparate impact and discriminatory animus under Arlington Heights. See Bakke, 438 U.S. at 318-19; Village of Arlington Heights, 429 U.S. at 266; Anderson, 375 F.3d at 83; see also Parents Involved, 551 U.S. at 789 (Kennedy, J.) (concurring in judgment and concurring in part); Lower Merion,

665 F.3d at 548; Lewis, 806 F.3d at 358; Spurlock, 716 F.3d at 394.

It ought be remembered that geographic and socioeconomic diversity are appropriate, validated educational goals in their own right, without any regard to racial demographics. If the only change possible is change free from any ignoble purpose, no change is ever possible.

As this Court noted in its prior order, and as the First Circuit noted in its denial for injunctive relief, the Coalition failed to establish a disparate impact from the Plan. Boston Parent II, 996 F.3d at 46 (noting that the Coalition "for[went] any serious engagement" with statistically analyzing the Plan's alleged disparate impact); id. at 45-46; Boston Parent I, 2021 WL 1422827, at *14-15 (finding and ruling that the Coalition failed to prove a disparate impact).

At trial, the Coalition relied on a projection -- not of the Plan it challenged but a projection of a prior plan that was amended by the Working Group into the present plan. That projection showed that White students would make up thirty-two instead of thirty-nine percent of seats at the Exam Schools, and that Asian students would make up sixteen instead of twenty-one

percent of seats at the Exam Schools.[20] Recommendation 18. As this Court noted, White and Asian students combined comprise twenty-three percent of school-age children in Boston but represented fifty percent of incoming students at the Exam Schools. Id. Thus, the Coalition's evidence of disparate impact was a projection of a prior plan that showed White students going from representing 243 percent of their share of the school-age population in Boston to 200 percent, and Asian students going from representing 300 percent of their share of the school-age population in Boston to 228 percent. Id. Again,

[20] As both this Court and the First Circuit noted, even the comparator used by the Coalition was specious. The racial demographics of the Exam Schools under the old plan were a disjunctive consequence year to year; there was no guarantee that any White or Asian student would even be admitted. To use a variable consequence as the baseline against which all future must comport is erroneous. White and Asian students are not "losing" seats simply because last year different White and Asian students were exceedingly privileged to win a high number of seats without any evidence that this years' students would have fared the same. No such evidence was presented, and this Court rejected the use of stereotypes to that effect. See Boston Parent II, 996 F.3d at 46 ("[A]s compared to a random distribution of invitations, the Plan has no adverse disparate impact on White and Asian students. Rather, plaintiff is able to generate a supposed adverse impact principally by comparing the projected admissions under the Plan to prior admissions under the predecessor plan. Alternatively, plaintiff compares projections under the Plan to projections of admissions based only on GPA. Either comparator does produce even higher percentages of White and Asian students than does the Plan. But plaintiff offers no analysis or argument for why these particular comparators, rather than a plan based on random selection, are apt for purposes of determining adverse disparate impact.").

this Court does not suggest that remaining overrepresented alone precludes a disparate impact. It simply notes that when a group is as overrepresented as White and Asian students at the Exam Schools, nearly any changes to the admissions process will likely result in some reduction, if only from the law of averages. Absent any additional statistical analysis, such a reduction is not a consequence that the caselaw considers a disparate impact. See Boston Parent II, 996 F.3d at 46 ("[P]laintiff offers no evidence establishing that the numerical decrease in the overrepresentation of Whites and Asians under the Plan is statistically significant."); see generally, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987); Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights, 429 U.S. at 266; Yick Wo v. Hopkins, 118 U.S. 356 (1886); see also generally Anderson, 375 F.3d at 87-90 (holding that the results were not "stark" and did not qualify as a disparate impact under Arlington Heights).

In the words of the First Circuit, "[a] party claiming a disparate impact generally does not even get to first base without such evidence." Boston Parent II, 996 F.3d at 46. Therefore, the new evidence is not of such a nature that it would probably change the result were a new trial to be granted. See González-Piña, 407 F.3d at 433; Karak, 288 F.3d at 19-20; see also United States v. Armstrong, 517 U.S. 456, 465-69 (1996)

(requiring the plaintiff to prove both discriminatory purpose and discriminatory effect).

2. Rule 60(b)(3)

Similarly, the Coalition fails both prongs of Rule 60(b)(3). See Anderson, 862 F.2d at 926. First, the Coalition fails to prove "misconduct by clear and convincing evidence." See id. As discussed above, the wrong established by the Coalition is not the "misconduct" contemplated by Rule 60(b)(3) because it occurred during an external state statutory process. See Anderson, 862 F.2d at 924 (implying that "misconduct" under Rule 60(b)(3) concerns misconduct between the parties during the course of litigation). To the extent that wrong misled this Court, both parties are partially responsible for baking it into the Joint Statement. Moreover, the wrong did not substantially interfere with the Coalition's "ability fully and fairly to prepare for, and proceed at, trial." See id. at 926. As discussed above, the Coalition elected to forgo a theory of liability based upon racial animus. In fact, the Coalition was so confident that the Joint Statement would prove its alternative theory of liability that it elected to forgo discovery, despite evidence that the School Committee Chairperson made racist statements and despite the Coalition's

suspicions that Oliver-Davila and Rivera had prejudices.[21] See Tr. Status Conference 23:2-5 ("We don't have to show racial animus."); id. 15:24-16:3, 16:13-17, 21:4-22:3; Joint Statement ¶¶ 48-68; Transcription Oct. 21, 2020 Text Messages 1-2. This Court would have to blind itself to many of the Coalition's tactical decisions and representations on the record to conclude that the wrong "precluded inquiry into a plausible theory of liability, denied it access to evidence that could well have been probative on an important issue, or closed off a

[21] At trial, the Coalition demonstrated its suspicions toward School Committee Member Rivera's statement at meetings, such as the need to "be explicit about racial equity," "need[ing] to figure out again how we could increase those admissions rates, especially for Latinx and [B]lack students," Oct. 8 Tr. 184:17-185:3, the Plan being a "step in the right direction" for "addressing racial and ethnic disparities in educational achievement and to advance ethnic studies and racial equity in the school district," Oct. 21 Tr. 365:18-366:2, and the Plan not going "far enough because [W]hite students continue to benefit from thirty-two percent of the seats . . . ." Id. 368:5-14.

The Coalition demonstrated similar suspicions toward School Committee Vice-Chairperson Oliver-Davila's statements, such as "I want to see those schools reflect the District. There's no excuse, you know, for why they shouldn't reflect the District, which has a larger Latino population and [B]lack African-American population." Oct. 8 Tr. 213:8-1. "I mean, we know that [B]lack and Latino youth are underrepresented, and they have been locked out of this opportunity. And for me, you know, it's just criminal that the percentages have not increased." Oct. 21 Tr. 397:19-398:2. "I think that all of our schools should reflect the student body that we have. We should not -- it should not be acceptable to have schools that don't represent that, just not acceptable." Id. 399:5-8.

potentially fruitful avenue of direct or cross examination." See Anderson, 862 F.2d at 924; Tr. Case-Stated Hr'g 10:15-19, 15:24-16:3, 16:13-17, 21:4-22:3. Accordingly, it is not appropriate to give the Coalition a second bite at the apple to recast its theory of liability as one that the Coalition knew existed but elected not to argue, and as to which there was some evidence that the Coalition elected not to utilize.

V. CONCLUSION

For the reasons discussed above, the motion under Rule 60(b) would be denied were this Court granted jurisdiction by the First Circuit.[22]

This Court is well aware that this indicative ruling is devoid of the valedictory tone of Boston Parent I, the withdrawn opinion. Indeed, it will doubtless complicate the work of devoted public officials and public-spirited citizens involved in crafting appropriate admissions procedures for the Exam Schools in the 2022-2023 school year. That can't be helped. The first duty of a trial judge is to find the facts fairly and accurately.[23]

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[22] For the foregoing reasons, the motion would also be denied as to count II, violation of Massachusetts General Law chapter 76, section 5.

[23] A NOTE TO BOSTON SCHOOL STUDENTS: Are you following this case? Not a very edifying spectacle, is it? The Boston School Committee is charged, under law, with providing each of you with

the finest education possible within the budget. In voting on your Exam School Admissions plan, the then chair mocked some of you, your parents, or your friends. Two of the then members texted they "hated" you, your parents, or your friends. The Public Meeting Law requires disclosure of officials' discussions of public matters. Instead, the lawyers who are sworn to uphold the law and who should have enforced this law simply deleted the comments. When found out, their trial lawyers first offered the lamest of lame excuses. As you well know, saying that you "hate" a group of people is not the same as saying that you "love Kit Kats." When you agree that a document is "true and accurate" you are necessarily agreeing that it is "complete." And me? The trial judge? -- I am revealed as a Pollyanna, wanting to believe better of people than was in fact the case, something you probably knew all along.

You can do better than this.
With love and respect, you will.
We're counting on you.

William G. Young
WILLIAM G. YOUNG
JUDGE
of the
UNITED STATES[24]

[24] This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that I'm a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 43 years.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.

Plaintiff,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON, ALEXANDRA OLIVER-DAVILA, MICHAEL O'NEILL, HARDIN COLEMAN, LORNA RIVERA, JERI ROBINSON, QUOC TRAN, ERNANI DEARAUJO, and BRENDA CASSELLIUS, SUPERINTENDENT OF THE BOSTON PUBLIC SCHOOLS,

Defendants,

AND

THE BOSTON BRANCH OF THE NAACP, THE GREATER BOSTON LATINO NETWORK, ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK, ASIAN AMERICAN RESOURCE WORKSHOP, MAIRENY PIMENTEL, and H.D.,

Defendants-Intervenors.

CIVIL ACTION
NO. 21-10330-WGY

YOUNG, D.J. February 24, 2022

ORDER

On October 1, 2021, this Court issued an Indicative Rule 60(b) Ruling, which stated that, "if granted jurisdiction this

Court would deny" Plaintiff Boston Parent Coalition for Academic Excellent Corp.'s (the "Coalition") Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") motion for relief from judgment. See Indicative Rule 60(b) Ruling 5, ECF No. 141.

The Court of Appeals ceded jurisdiction to this Court "to the extent necessary for it to proceed" on the Rule 60(b) motion. See Order of USCA, ECF No. 145.

For the reasons enumerated in this Court's Indicative Rule 60(b) Ruling, ECF No. 141, this Court DENIES the Coalition's Rule 60(b) motion, ECF No. 112.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

Kiren Mathews

From: CA01NoticeDocketActivity@ca1.uscourts.gov
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United States Court of Appeals for the First Circuit

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Case Number:	21-1303
Document(s):	Document(s)

Docket Text:
APPELLANT'S BRIEF filed by Appellant Boston Parent Coalition for Academic Excellence Corp. in 21-1303, 22-1144. Served on 06/07/2022. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 06/21/2022. [21-1303, 22-1144] (AVN)

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