No. _____

In The
# Supreme Court of the United States

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

*Petitioner,*

v.

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

*Respondents.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Boston School Committee overhauled the criteria for admission to its three competitive "Exam Schools" for the 2021–22 school year. The School Committee replaced the traditional standardized test with a zip code quota that reserved seats for students with the highest GPA in each Boston neighborhood. The number of seats allocated to each neighborhood was based on the neighborhood's population of school-aged children. Members of the School Committee spoke openly of their intent to racially balance the Exam Schools at the expense of Asian American and white students. Three of the seven members who voted to enact the quota ultimately resigned in disgrace for racially-charged actions. The district court found that these members "harbored . . . racial animus" and that "the race-neutral criteria were chosen precisely because of their effect on racial demographics." Yet the First Circuit held the School Committee had not violated the Equal Protection Clause because Asian American and white applicants continued to earn seats at the Exam Schools at a rate above the groups' share of the applicant pool.

The question presented is whether an equal protection challenge to facially race-neutral admission criteria is barred simply because members of the racial groups targeted for decline still receive a balanced share of admissions offers commensurate with their share of the applicant pool.

## PARTIES

Petitioner is the Boston Parent Coalition for Academic Excellence Corp., a voluntary association of parents and students in Boston.

Respondents are the School Committee of the City of Boston and several officials sued in their official capacities.

Respondent-Intervenors are the Boston Branch of the NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, and H.D. (a minor).

## CORPORATE DISCLOSURE STATEMENT

Petitioner is a voluntary association with no parent corporation and no stock.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 89 F.4th 46 (1st Cir. Dec. 19, 2023).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 4489840 (D. Mass. Oct. 1, 2021).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 3012618 (D. Mass. July 9, 2021).

- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 996 F.3d 37 (1st Cir. Apr. 28, 2021).
- *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, No. 21-10330-WGY, 2021 WL 1422827 (D. Mass. Apr. 15, 2021).

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## PETITION FOR WRIT OF CERTIORARI

Boston Parent Coalition for Academic Excellence Corp. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The decision of the First Circuit is available at 89 F.4th 46 (1st Cir. 2023) and reprinted at App. 1a–30a.

An earlier First Circuit opinion denying a motion for an injunction pending appeal is reported at 996 F.3d 37 (1st Cir. 2021).

The district court's indicative ruling denying a Rule 60 motion—issued after the district court retracted its initial opinion awarding judgment to the School Committee of the City of Boston and other defendants—is unreported but available at 2021 WL 4489840. It is reprinted at App. 31a–79a.

The district court's initial opinion awarding judgment to the defendants is unreported, but available at 2021 WL 1422827.

## JURISDICTION

The final decision of the First Circuit sought to be reviewed was issued on December 19, 2023. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

## INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

For the second time in less than a year, one of the Courts of Appeal has allowed a public school district to implement admissions criteria designed to reduce admission of students from a particular racial group at a competitive high school on the theory that the reduction did not go *too far*. This "patently incorrect and dangerous" view of the equal protection guarantee "cries out for correction." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari).

The facts here show the danger of the rule adopted below and the need for this Court's intervention. The Boston School Committee overhauled admission at its three competitive admission "Exam Schools," replacing the longstanding admissions exam with a zip code quota that guaranteed spots at the schools for a set number of applicants with the highest GPA from each of Boston's neighborhoods. It chose the quota precisely because it would reduce the number of Asian American and white students who gained admission. Immediately after the vote, the Committee's president had to resign in disgrace after he was caught on a hot mic ridiculing the names of Asian-American parents who had signed up to speak in opposition to the quota. Two other Committee members later met the same fate after the Boston Globe published further text messages between them expressing animus towards white residents of the West Roxbury neighborhood. The district court found that these Committee members "harbored some form of racial animus." App. 72a.

Under the rule now adopted in two Circuits, none of that mattered. Because the proportion of Asian-American and white students admitted to the Exam Schools under the zip code quota was still higher than each group's share of the applicant pool, the challengers' equal protection claim was doomed from the start. The rule permits a school district to target applicants of a group that it deems "overrepresented" until members of that group no longer achieve at a level above their share of the population. This is antithetical to the Constitution's guarantee of equal protection under the law.

It is also in tension with multiple pillars of this Court's precedent. Time and again this Court has emphasized that racial balancing for its own sake is *per se* unconstitutional. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 223 (2023) (*SFFA*) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (*Fisher I*)); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). It has rejected the notion that racial discrimination might ever be "benign," that is, designed to help some groups but not to hurt others. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226–27 (1995). And it has developed a totality-of-the-circumstances framework designed to smoke out illegitimate discriminatory intent in facially-neutral policies. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

Yet the Court of Appeals would permit a school district to openly target students on the basis of their race until the percentage of their "racial group" in the incoming class drops below its share of the applicant pool. The rule evades the one mechanism designed to

uncover proxy racial discrimination by declaring that no discrimination has occurred where racial balance exists. This turns all three lines of precedent on their head and demands this Court's intervention.

The nature of the Court of Appeals' disparate impact measure is so counterintuitive that lower courts have not applied it in any other context. When a state election law is shown to have been enacted to limit the voting power of a particular racial group, for example, no Court of Appeal would sustain it on the grounds that the voters of that group can still vote on par with other groups. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–32 (4th Cir. 2016). Such a benchmark is foreign to an intentional discrimination claim of any stripe, which by its nature demands an appraisal of the challenged law's effect. *See Coal. for TJ*, 2024 WL 674659, at *4–5 (Alito, J., dissenting from denial of certiorari). That is why the lower courts consistently apply the same before-and-after comparison in many other situations. *See, e.g.*, *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013).

This issue is not going away. The model the Fairfax County School Board used to remake the student body at Thomas Jefferson has already been "trumpeted to potential replicators as a blueprint for evading" this Court's decision in *SFFA*. *Coal. for TJ*, 2024 WL 674659, at *5. Should the Court turn away this case, it will only embolden government officials to continue targeting disfavored racial groups—particularly, Asian Americans. The facts of this case make it especially troubling, and the Court's refusal to intervene would send the signal that even overtly

racist behavior will not stand in the way of racial balancing by proxy. Certiorari should be granted before the "virus" of this rule spreads any further. *See id.* at *5.

## STATEMENT OF THE CASE

### I. Factual Background[1]

Boston's Exam Schools are three of the most prestigious public high schools in America. App. 35a–36a & n.3. Founded in 1635, the Boston Latin School is the oldest operating high school in the United States, counting among its alumni five signers of the Declaration of Independence.[2] Along with the Boston Latin Academy and the John D. O'Bryant School, the Exam Schools are rated the top three high schools in Boston—and among the leaders nationally—by U.S. News & World Report. App. 35a–36a & n.3. Together, the three schools enroll almost 6,000 students. App. 36a n.3. The School Committee of the City of Boston, which operates Boston Public Schools (BPS), oversees Exam School admissions. App. 32a.

Boston residents may apply to the Exam Schools for entrance in either seventh or ninth grade. App. 36a. Before the overhaul that became the subject of this case, Exam School admissions were based on an applicant's grades in English Language Arts and

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[1] Much of the facts come from the agreed-upon statement of facts and attached exhibits, available in the First Circuit appendix beginning at page 164 (hereinafter cited as "Record Below"). The Record Below was quite voluminous, so this Petition cites to the opinions below in the Appendix wherever possible.

[2] *See* Boston Latin School, *BLS History*, https://www.bls.org/apps/pages/index.jsp?uREC_ID=206116&type=d (last visited Apr. 9, 2024).

Math and his or her performance on a standardized test. App. 37a. BPS assigned a point value to each student's average grades and then added the applicant's score on the exam to calculate each applicant's composite score. *Id.* Each applicant ranked the three Exam Schools in order of preference, and BPS issued admissions decisions under a ranked-choice system—applicants with the highest scores received an offer to attend their first-choice school, and this process continued until all the seats at each school were filled. *Id.* Each student's admissions decision was based only on his or her composite score and preference ranking of the three schools. *Id.*

BPS staff began analyzing potential changes to the Exam School admissions criteria as early as 2019. In the fall of that year, BPS established a committee to review proposals for overhauling Exam School admissions. App. 37a–38a. And in July 2020, the School Committee followed Superintendent Brenda Cassellus' recommendation to establish the Exam School Admissions Criteria Working Group. App. 39a. The School Committee tasked the Working Group with submitting a recommendation on revisions to the Exam School criteria to the seven-member Committee. *Id.*

From the very beginning, the racial composition of the schools was at the center of the conversation. The data the Working Group considered—much of it consisting of modeling of the racial composition of the Exam Schools under various potential alternative criteria—revealed an almost singular focus on race. *See* Record Below at 174–75 (agreed-upon statement of facts ¶ 41) & 1753–94 (exhibits 44–54). The Working Group also completed an "Equity Impact

Statement" under the BPS "Equity Impact Planning Tool," which has as a core principle 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." *See* App. 40a–41a (emphasis added). Members of the Working Group viewed their job in terms of racial balancing. One of the members 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." Record Below at 422.

The Working Group presented its recommended zip code quota to the School Committee on October 8, 2020. App. 40a. Prominent in its presentation were multiple slides containing racial data on standardized testing and Exam School applications, as well as a slide discussing previous litigation that had restricted BPS' use of race in the past. *See* App. 42a; *see also* Record Below at 1475–76, 1481. But the key slide showed the "Projected Shift" in the racial composition of the Exam Schools under the Working Group's recommendation. Modeling predicted a substantial drop in Asian American and white representation with a corresponding gain for black and Hispanic applicants. Record Below at 1486.

Members of the School Committee endorsed the proposal, some in more explicit terms than even the Working Group had done. School Committee member Lorna Rivera focused on "the issue of just really naming it, you know, and really considering race and ethnicity" and called on the Committee 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." Record Below at 433–34. Alexandra Oliver-Dávila was, amazingly, 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." Record Below at 462. At the next meeting, a Working Group member assured them that the zip code plan would "allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." Record Below at 653. Rivera supported the plan only as a first step—she criticized it "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." Record Below at 943.

The October 21 meeting was also notable because School Committee president Michael Loconto was caught on a hot mic ridiculing the names of Chinese-American parents who had signed up to oppose the proposal. *See* App. 42a–43a. Far from being offended, Rivera and Oliver-Dávila's text messages to each other showed they thought the incident was extremely funny. App. 43a; *see also* Record Below at 2025. All three members would eventually resign in disgrace—Loconto the next day and the two others months later[3] when the *Boston Globe* published further text messages between them expressing animus towards white residents of the West Roxbury neighborhood of

[3] *See also* Max Larkin, *Second Boston School Committee Member Resigns Following Leaked Text Messages*, WBUR (June 8, 2021), https://www.wbur.org/news/2021/06/08/second-resignation-boston-school-committee.

Boston. App. 48a, 50a–51a, 56a–57a. But all voted that night to approve the Working Group's recommendation of a zip code quota with just minor changes. App. 42a.

Under the plan the School Committee approved, the venerable standardized test was no more. App. 44a. BPS ranked applicants according to their GPA only and then filled 20% of the seats at each of the Exam Schools with the top-ranked applicants. App. 45a. After that, however, the plan allocated a set number of seats to each of Boston's 29 zip codes—and a grouping the School Committee created for students who were homeless or in the custody of child services—based on the school-aged population of each. App. 44a–46a. Rather than a Citywide competition for Exam School seats, the quota prompted 30 separate competitions for the seats within each zip code.

**II. Racial Impact of Criteria Overhaul**

The quota accomplished the School Committee's and Working Group's racial balancing goal. Modeling demonstrated that the quota would reduce the number of offers issued to Asian American and white students not only compared to the previous test-in criteria, *see* App. 47a, but also relative to a hypothetical Citywide competition using only GPA, *see* Record Below at 1778. That is precisely how it worked. The proportion of admitted students who were white or Asian American fell from 61% to 49%, App. 16a, 47a, and the decline occurred due to the gerrymandering effect of the zip codes, Record Below 2070–71, 2892, 2898, 2900. Because each zip code was allocated seats solely based on its share of school-age children, some zip codes—those with many students

with high GPAs—experienced much more stringent competition for its allocated seats than did others.

By design, those zip codes were the ones with more Asian American and white students. The average admitted student GPA varied substantially by zip code. In the largely white and Asian American West Roxbury zip 02132, for example, the average GPA of the 69 admitted students was 11.52 on a 12-point scale. Record Below at 2892, 2898, 2900. Not a single student from West Roxbury was admitted with a GPA under 10.0—and the same was true in at least five other zip codes with a majority white and Asian American population. *See id.* But in the predominantly black and Hispanic Dorchester zip code of 02121, the *average* GPA of an admitted student was 9.79 and 41 of the 67 students admitted had a GPA below 10.0. *See id.* On the whole, students in areas with more white and Asian American students had to achieve substantially higher GPAs to gain admission into an Exam School under the quota.

**III. The Lawsuit**

Boston Parent Coalition for Academic Excellence is a nonprofit organization formed to "promot[e] merit-based admissions to Boston Exam Schools" and "diversity in Boston high schools by enhancing K-6 education across all schools in Boston." App. 47a–48a. Membership "is open to any student, alumni, applicant, or future applicant of the Boston Exam Schools, as well as their family members." App. 48a.

The Coalition sued the School Committee in February 2021 on behalf of 14 Asian American and white students who were in the process of applying to the Exam Schools as sixth graders and faced the

prospect of the zip code quota. *See* App. 48a. Ten of the 14 reside in the West Roxbury neighborhood, which faced particularly high admissions requirements and the express animus of two Committee members who later resigned in disgrace. *See id.*; *see also* Record Below at 2082–88. The Coalition initially sought a preliminary injunction, but the district court opted to collapse its decision on the injunction into its merits decision. App. 9a. After that, the Coalition and the School Committee agreed to a stipulated record to reach a decision before BPS made admissions offers. *Id.* The record—compiled with the help of public records requests—contained voluminous data, School Committee deliberations, and text messages between Committee members during the body's meetings. The district court conducted a trial on the papers and entered judgment in favor of the School Committee, holding that the zip code quota was not enacted with discriminatory intent. App. 9a.

The Coalition immediately appealed and unsuccessfully sought an injunction pending appeal from the First Circuit. *Boston Parent Coal. for Academic Excellence Corp. v. Sch. Comm. of City of Boston*, 996 F.3d 37 (1st Cir. 2021). But before briefing began on the merits, the *Boston Globe* published its exposé of Committee members' Rivera and Oliver-Dávila's text messages during the October 21, 2020, Committee meeting. App. 9a–10a, 56a–57a. These messages—which heaped scorn on white residents of West Roxbury—were omitted from the stipulated record despite the Defendants' representation that the record contained "[a] true and accurate transcription of text messages between Boston School Committee Members, Vice-Chairperson Alexandra Oliver-Dávila and Lorna Rivera during the October 21, 2020 Boston

School Committee meeting," Record Below at 181; *see* App. 56a–57a, 66a–68a & n.15, 78a n.23. As a result, the Coalition sought to reopen the case in the district court through a Rule 60(b) motion. App 10a. On July 9, 2021, the district court withdrew its initial opinion as "factually inaccurate." ECF No. 121 in Case No. 1:21-cv-10330-WGY (D. Mass.). However, it ultimately denied the Coalition's Rule 60 motion. Although the court found that "[t]hree of the seven School Committee members harbored some form of racial animus," App. 72a, it denied the motion partly on the grounds that the text messages it deemed "racist" would not have changed the result, App. 72a–75a.

The First Circuit affirmed. It first held that the Coalition had standing to sue on behalf of five of the original 14 students. App. 14a. Although an injunction was no longer possible, the panel held that the Coalition was still entitled to seek relief for those five students who would have been admitted to one of the Exam Schools had there been a Citywide competition with no quotas. *Id.* On the merits, however, the panel held that the Coalition could not establish that the zip code quota disproportionately harmed Asian American and white applicants because those groups still earned more seats than their share of the applicant pool would suggest. *See* App. 17a–19a (holding that the School Committee "chose an alternative that created less disparate impact, not more"). So even though the First Circuit understood that the zip code quota "was chosen precisely to alter racial demographics," App. 29a, the court held it did not violate the five students' equal protection rights.

This petition followed.

## REASONS FOR GRANTING THE PETITION

### I. The First Circuit's Rule Permits Racial Balancing by Proxy, Undermining Decades of This Court's Precedent

**First.** If there is one constant in this Court's equal protection precedents, it is disdain for racial balancing. Beginning with the very first modern admissions case to reach this Court in 1978, the controlling opinion declared that a university's purpose "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin" would be "facially invalid." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Then, in demanding the government satisfy strict scrutiny before race-based set-aside for public contracting, the Court disparaged a rigid 30% minority contracting quota as not "narrowly tailored to any goal, except perhaps outright racial balancing." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Indeed, even in cases where the Court ultimately permitted universities to use race in admissions to "obtain[] the educational benefits of 'student body diversity,'" *Fisher I*, 570 U.S. at 309 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)), it declared racial balancing to be "patently unconstitutional," *id.* at 311 (quoting *Grutter*, 539 U.S. at 330).

Tellingly, it was the Court's commitment to eradicating racial balancing that ultimately led to the downfall of race-based university admissions. When the Court discarded the diversity rationale last term, it did so in large part because it recognized that universities' actual admissions procedures under *Grutter* and *Fisher* were indistinguishable from a

"numerical commitment" to racial balancing. *See SFFA*, 600 U.S. at 221–23. This echoed the complaints of dissenting justices in the past. *See Grutter*, 539 U.S. at 383–85 (Rehnquist, C.J., dissenting) ("[T]he correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'"). Ultimately, *SFFA* recognized that despite the Court's denunciation of racial balancing in cases like *Grutter* and *Fisher*, universities were still doing it. So the Court ditched the rule that enabled it.

The rule adopted below—and in the Fourth Circuit in *Coalition for TJ*—likewise enables racial balancing. It precludes an equal protection challenge to facially-neutral admissions criteria unless members of the targeted racial group gain admission at a lesser rate than the group's share of the applicant pool. And this case shows the consequences of that bar, as it has doomed the Coalition's case despite a district court finding that multiple decisionmakers expressed racial animus. *See* App. 29a ("More evidence of intent does not change the result of this case, given that our analysis assumes that the Plan was chosen precisely to alter racial demographics."); 72a ("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.").

Indeed, it would be difficult to imagine a rule better suited to permit schools to engage in racial

balancing. Nothing in either the First or Fourth Circuit's formulation of the rule prohibits the setting of racial targets. Rather, the First Circuit's reliance on Title VII disparate impact cases seems to *encourage* it. *See* App 17a–18a. According to that court, the purpose of disparate impact analysis is to encourage, "as between equally valid selection processes," decisionmakers "to use the one that reduces under-representation (and therefore over-representation as well)." App. 18a. In other words, to encourage racial balancing—even through intentional discrimination. *See id.* (accusing the Coalition of seeking to "leverage a disparate-impact theory of discrimination against the Plan for its alleged reduction—but not reversal—of certain races' stark over-representation among Exam School invitees"). Thus, it is no exaggeration to say that "[t]he holding below effectively licenses official actors to discriminate against any racial group with impunity as long as that group continues to perform at a higher rate than other groups." *Coal. for TJ*, 2024 WL 674659, at *4); *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 903 (4th Cir. 2023) (Rushing, J., dissenting) ("[T]he majority rejects the very possibility that a State could ever discriminate against a racial group by intentionally reducing its success in a competitive process to a level equal with that of other races."). Such a rule flouts this Court's prohibition on racial balancing.

**Second.** The ease by which school districts can evade the per se prohibition on racial balancing undermines this Court's framework for assessing intentional discrimination claims. *Arlington Heights* envisioned a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. The "starting point" of that

inquiry is an assessment of "[t]he impact of the official action" to determine whether the challenged action "bears more heavily on one race than another." *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

According to the First and Fourth Circuits, that is also the end point, even if members of one racial group are targeted for a substantial reduction in benefits. This per se bar blocks lower courts from considering precisely the kind of evidence of discriminatory intent that *Arlington Heights* said was so important in answering the key question—whether the decisionmakers implemented the policy "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *see Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.").

**Third**. Even where the type of racial animus exhibited here is absent, the First Circuit's definition of disparate impact clashes with a long line of this Court's precedents confirming that even seemingly "benign" racial discrimination is inherently suspect. The Court has repeatedly rejected the use of quotas and set-asides designed to "help" individuals in certain racial groups, understanding that "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *SFFA*, 600 U.S. at 218–19. It has invalidated a set-aside of 16 out of 100 seats for minority candidates in medical school admissions,

*Bakke*, 438 U.S. at 289 (opinion of Powell, J.); a 30% set-aside for minority subcontractors on government contracts, *Croson*, 488 U.S. at 507–08; and a university admission scheme that awarded 20% of the points necessary for admission "solely because of race," *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Yet by defining disparate impact in terms of racial balance, the First Circuit's rule permits this same supposedly "benign" consideration of race those cases rejected.

The Constitution demands that the Government "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *SFFA*, 600 U.S. at 223 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). This Court's precedent has consistently moved in that direction. The First Circuit's rule threatens that progress and undermines the Court's consistent condemnation of racial discrimination. Certiorari is necessary to stem the tide that widespread adoption of a similar rule would create.

## II. The First Circuit's Disparate Impact Definition Diverges from the Typical Treatment of Intentional Discrimination Claims in Circuit Courts

The First Circuit's per se bar on many intentional discrimination claims conflicts not only with this Court's precedent, but with how Courts of Appeals generally assess evidence of disparate impact within the *Arlington Heights* analysis. Put simply, the First Circuit's rule appears nowhere in other circuits' consideration of intentional discrimination claims in any other context. Certiorari is necessary to clear up this split in authority and make clear the proper way

to measure disparate impact as one factor in assessing discriminatory intent.

Perhaps the best illustration of the outlier nature of the First Circuit's rule is that even the Fourth Circuit—which applied the same rule in *Coalition for TJ*—doesn't apply it outside this specific context. In *McCrory*, a Fourth Circuit panel held that the North Carolina General Assembly had enacted an election law overhaul with racially discriminatory intent. Despite a lack of direct evidence of racial animus towards black voters, the court's *Arlington Heights* analysis concluded that the legislature sought to "entrench itself" through "targeting voters who, based on race, were unlikely to vote for the majority party." *McCrory*, 831 F.3d at 233. By "targeting," though, the court did not mean that the law made it more difficult to vote for prospective black voters than for voters of other races. Instead, the legislature "targeted" black voters by "restrict[ing] voting mechanisms it knew were used disproportionately by African Americans." *Id.* at 229. But it restricted these mechanisms—same-day registration, early voting, and the counting of out-of-precinct ballots—for everyone, and with the restrictions in place, black turnout *rose* by 1.8% over the previous comparable election. *See id.* at 232. The district court thought these facts mitigated any disparate impact the law had on black voters, but the Fourth Circuit disagreed. It harshly criticized "the standard the district court used to measure disparate impact," saying it "required too much in the context of an intentional discrimination claim."[4] *Id.* at 231.

[4] The First Circuit's discussion of Title VII cases as if that were the standard for demonstrating disparate impact under

Instead, it was enough in that context to show that "African Americans disproportionately used each of the removed mechanisms." *Id.*

*McCrory* endorsed a before-and-after comparison approach. It did not matter that the legislature's action still allowed black North Carolinians to vote in high (or greater) numbers—on the contrary, the panel explicitly rejected a standard that would have required plaintiffs to prove that the remaining voting options were not sufficient. *See id.* at 230 (citing *Arlington Heights*, 429 U.S. at 260, 265–66). Instead, to show the legislation targeted black voters, the Fourth Circuit simply looked at what existed before and noted that the legislature pared back methods of voting that black voters had disproportionately used. So it was unsurprising that when it came time to analyze competitive K-12 admissions cases, three different district courts within the Fourth Circuit applied *McCrory* to find that new admissions criteria had a disparate impact on Asian American students. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022), *rev'd* 68 F.4th 864 (4th Cir. 2023); *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 560 F. Supp. 3d 929, 952 (D. Md. 2021) ("As to disparate impact, no real dispute exists that the field test criteria disproportionately affected Asian American students. Since the field test was implemented, the acceptance rate for Asian American students has dropped at each of the programs." (citation omitted));

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*Arlington Heights* also diverges from *McCrory*, where the Fourth Circuit was careful to note that substantially less proof of disparate impact is required in a case where impact is not the entirety of the claim. 831 F.3d at 231 & n.8.

*Boyapati v. Loudoun Cnty. Sch. Bd.*, No. 1:20-cv-01075, 2021 WL 943112, at *8 (E.D. Va. Feb. 19, 2021) ("[B]ased on the facts alleged, it is plausible that the new Plan would have a disproportionately negative effect on Asian students, when compared with previous admission levels at certain middle schools."). These courts employed a commonsense approach to the use of disparate impact as an evidentiary tool in intentional discrimination cases. Simply put, if a change in the law made things for members of a particular racial group more difficult than they were before, that is at least *evidence of* discriminatory intent, even though it is not dispositive.

That approach didn't last in admissions cases. Things began to reverse course when, in a concurrence to the panel's decision to grant a stay pending appeal in *Coalition for TJ*, Judge Heytens suggested that the Coalition had not demonstrated disparate impact because the proportion of Asian Americans admitted under the challenged criteria was higher than the group's share of the applicant pool. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *3 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring). Sensing the Fourth Circuit's warning that *McCrory* would no longer apply in this context, the district court in *Association for Education Fairness* subsequently changed its position on disparate impact in a renewed motion to dismiss. *Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 617 F. Supp. 3d 358, 367–68 (D. Md. 2022). Just months later, the *Coalition for TJ* panel adopted Judge Heytens' analysis on the merits. 68 F.4th at 880–82. The panel in this case followed suit.

The divergence from *McCrory* shows how this case and *Coalition for TJ* effectively created a new rule that permits school districts to engage in racial balancing. *McCrory*'s treatment of disparate impact is more typical in *Arlington Heights* cases.[5] Perhaps the most analogous case is *Pryor*, 288 F.3d 548. That was a challenge to an NCAA bylaw that increased the academic standards that athletes had to meet to be eligible for a Division I scholarship. *See id.* at 552–55. The NCAA said it enacted the policy to improve the graduation rate of black college athletes, but the athletes who challenged it argued that it was adopted to "effectively 'screen out' or reduce the percentage of black athletes who could qualify for athletic scholarships." *Id.* at 564. The Third Circuit allowed the claim to proceed, noting that the complaint alleged "the NCAA sought to achieve its stated goal of improving graduation rates by using a system that would exclude more African-American freshmen who, in the past, might have qualified for scholarships." *Id.* at 565–66. This is conventional reasoning—the

[5] Whether the method of measuring disparate impact matters depends on the facts of a particular case. Sometimes it does not. A recent example is *Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018)—a case the Eleventh Circuit ultimately reviewed en banc and dismissed on jurisdictional grounds. But the panel reached the *Arlington Heights* analysis and found that Alabama's statute nullifying a city's minimum wage increase had a disparate impact on black residents because it "denied 37% of Birmingham's black wage workers a higher hourly wage, compared to only 27% of white wage workers." *Id.* at 1294. In this context, a disparate impact would necessarily exist regardless of the way impact is defined, because the before-and-after effect and the after-only effect are related. Nevertheless, the panel there still employed a before-and-after analysis, comparing the situation before the state law was passed to the one that existed under that law.

relevant comparator being "the past" success of black athletes at earning scholarships. But under the admissions-specific rule in the First and Fourth Circuits, the comparator instead would have been the proportion of students of other races who could earn scholarships under the new policy. In that scenario, the plaintiffs might have lost if the number of black athletes obtaining scholarships was still high under the challenged law—even if they had evidence of racial animus.[6]

This lays bare just how consequential the split of authority is on this issue. The proliferation of the rule adopted below will only widen the gulf between these two approaches. Only this Court's intervention can change the course of events and make clear to lower courts the proper way to measure disparate impact in *Arlington Heights* analysis.

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[6] As Justice Alito noted, a finding of no disparate impact is outcome determinative in many circuits because those courts "consider[] disparate impact to be a necessary element of a successful challenge to a facially neutral policy." *Coal. for TJ*, 2024 WL 674659, at *5 n.8. This, too, is contrary to *Arlington Heights*, which says only that impact "may provide an important starting point" of the "sensitive inquiry" into intent. 429 U.S. at 266; *see also McCrory*, 831 F.3d at 231 (emphasizing that disparate impact is just one factor in the *Arlington Heights* analysis). But it only heightens the need for this Court's review, since treating disparate impact as dispositive leaves no escape hatch for a finding of discriminatory intent in egregious cases like this one.

## III. This Case Presents a Clean Vehicle to Address a Live Question of National Importance

On top of the doctrinal reasons to take this case sits the elephant in the room: this issue is not going away. This Court has struggled with cases involving racial discrimination in education for more than a century.[7] Last term, *SFFA* finally resolved to end it once and for all—"all of it." 600 U.S. at 206. This case and those like it across the country threaten to undermine that promise. This Court should grant the petition and address this pressing issue before it is too late.

Boston is not the only place where local school administrators seek to overhaul competitive admissions in pursuit of racial balance. This Court recently saw what Fairfax County did in the *Coalition for TJ* case, but similar efforts are underway in many of our nation's largest school districts.

- In New York City, former mayor Bill de Blasio launched an effort to replace the venerable admissions exam for the City's eight test-in Specialized High Schools with a geographic quota. His main selling point was that the

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[7] *Cumming v. Bd. of Educ.*, 175 U.S. 528 (1899); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Bakke*, 438 U.S. 265; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Fisher I*, 570 U.S. 297; *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (*Fisher II*); *SFFA*, 600 U.S. 181.

quota would produce racial balance—with Asian American enrollment plummeting 40%.[8] His schools chancellor Richard Carranza derisively told critics "I just don't buy into the narrative that any one ethnic group owns admission to these schools."[9] And when this plan failed in the state legislature,[10] de Blasio and Carranza unilaterally altered admission criteria for a portion of the class to accomplish that same purpose.[11]

- In San Francisco, the school board scrapped merit-based admissions at competitive Lowell High School in favor of a lottery after controversy over its heavily Asian American

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[8] *See* New York City DOE, *Specialized High Schools Proposal* at 6–7, 12, https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/specialized-high-schools-proposal.pdf?sfvrsn=c27a1e1c_9 (last visited Apr. 9, 2024).

[9] *See* Elizabeth A. Harris & Winnie Hu, *Asian Groups See Bias in Plan to Diversify New York's Elite Schools*, N.Y. Times (June 5, 2018), https://www.nytimes.com/2018/06/05/nyregion/carranza-specialized-schools-admission-asians.html.

[10] The bill stalled in the State Senate largely on account of opposition from Asian American legislators, particularly Senator John Liu. *See* Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. Times (June 24, 2019), https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html.

[11] *See* Office of the Mayor, *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools* (June 3, 2018), https://www.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversityspecialized-high#/0; *see Christa McAuliffe Intermediate Sch. PTO v. de Blasio*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022), *appeal pending* No. 22-2649 (2d Cir.).

student body. One of the board members had tweeted several offensive things about Asian Americans, claiming once that they use "white supremacist thinking to assimilate and 'get ahead.'"[12] Voters recalled her and two other board members who voted for the lottery, and the Board reinstated merit-based admissions in a 4–3 vote.[13]

- In Montgomery County, Maryland, the Board of Education overhauled the admissions criteria for its magnet middle school programs following discussion littered with support for racial balancing. *See Ass'n for Educ. Fairness*, 560 F. Supp. 3d at 953. Asian American enrollment in the programs plummeted after the changes. *See id.* at 952. The district court found that the plaintiff parent association had plausibly alleged "that the County acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data." *Id.* at 953. But then the Board overhauled the criteria again—still disadvantaging Asian Americans—and the district court granted a second motion to

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[12] *See* Thomas Fuller, *'You Have to Give Us Respect': How Asian Americans Fueled the San Francisco Recall*, N.Y. Times (Feb. 17, 2022), https://www.nytimes.com/2022/02/17/us/san-francisco-school-board-parents.html.

[13] *See SF school board votes to bring back merit-based admissions at Lowell High School*, ABC7 (June 22, 2022), https://abc7news.com/lowell-high-school-admissions-merit-based-sfusd-board-vote-sf-lottery-system-ranking/11989124/.

dismiss based primarily on the same disparate impact rule at issue here. *See Ass'n for Educ. Fairness*, 617 F. Supp. 3d at 367–68.

- Other cities are moving to scrap selective admission schools altogether in large part due to their racial composition. The Chicago Board of Education passed a resolution in December 2023 that established a goal of moving away from competitive admission schools, saying the school system should replace them with "anti-racist processes and initiatives that eliminate all forms of racial oppression."[14] And the Seattle public school system is dismantling its "highly capable cohorts," calling it "highly inequitable" due to the substantial number of white and Asian American students in the programs.[15]

Wherever competitive admission K-12 schools exist, it seems that policymakers have targeted them for their racial makeup. And in every one of these circumstances, Asian Americans have been singled out for unfavorable treatment. As Justice Alito observed, "[p]ublic magnet schools with competitive admissions based on standardized tests have served as engines of social mobility by providing unique opportunities for minorities and the children of

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[14] Reema Amin & Becky Vevea, *Chicago Public Schools leaders want to move away from school choice*, Chalkbeat (Dec. 12, 2023), https://www.chalkbeat.org/chicago/2023/12/12/chicago-public-schools-moves-away-from-school-choice/.

[15] Claire Bryan, *Why Seattle Public Schools is closing its highly capable cohort program*, Seattle Times (Mar. 31, 2024), https://www.seattletimes.com/education-lab/why-seattle-public-schools-is-closing-its-highly-capable-cohort-program/.

immigrants, and these students' subsequent careers have in turn richly contributed to our country's success." *Coal. for TJ*, 2024 WL 674659, at *2. The disparate impact rule adopted in the First and Fourth Circuits would permit local school boards to turn these schools into laboratories for racial balancing. Only this Court's intervention could prevent that outcome.

As the sheer number of similar disputes shows, if the Court does not take this case up now, it is likely that this rule will continue to spread. *See id.* at *5. The opinion below and the Fourth Circuit's opinion in *Coalition for TJ* both "offer a roadmap for other federal courts to provide cover" when schools "skirt the Equal Protection Clause." *Id.* at *5 n.9. And university administrators are already advocating the use of similar admissions criteria to evade this Court's decision in *SFFA*. *Id.* If this Court waits until administrators implement that advice, it will be too late for countless students already being denied educational opportunities. The Court should grant this petition and decide the issue now.

This case provides an exceptionally clean vehicle to do just that. Unlike in many challenges to admissions criteria, there is no threat of mootness here. This case concerns the zip code quota that was used for admission to the Exam Schools in the fall of 2021, and the Coalition now seeks relief for just five students who would have gotten in had there been a Citywide competition without a zip code quota.

This case represents the Court's best chance to address a rule that threatens to undermine this Court's precedent, divide lower courts, and permit the type of discrimination the Court sought to eradicate in *SFFA*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: April 2024.

Respectfully submitted,

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## Appendix

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Filed December 19, 2023

**United States Court of Appeals**
**For the First Circuit**

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Nos. 21-1303
22-1144

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff, Appellant,

v.

THE SCHOOL COMMITTEE FOR THE CITY OF BOSTON; ALEXANDRA OLIVER-DÁVILA; MICHAEL O'NEILL; 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 PIMENTAL; H.D.,

Defendants, Intervenors, Appellees.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

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Before

Kayatta, Howard, and Thompson,
Circuit Judges.

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*Christopher M. Kieser*, *Joshua P. Thompson*, and *Pacific Legal Foundation*, with whom *William H. Hurd*, and *Eckert Seamans Cherin & Mellott, LLC*, were on brief for appellant.

*Kay H. Hodge*, *John M. Simon*, and *Stoneman, Chandler & Miller LLP*, with whom *Lisa Maki*, Legal Advisor, Boston Public Schools, were on brief for appellees.

*Doreen M Rachal*, and *Sidley Austin LLP*, with whom *Susan M. Finegan*, *Andrew N. Nathanson*, *Mathilda S. McGee-Tubb*, and *Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, were on brief for intervenors-appellees.

*Rachael S. Rollins*, United States Attorney, *Lisa Brown*, General Counsel, U.S. Department of Education, *Daniel Kim*, and *Jessica Wolland*, Attorneys, Office of the General Counsel, U.S. Department of Education, *Kristen Clarke*, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, *Nicolas Y. Riley*, and *Sydney A.R. Foster*, Attorneys, Civil Rights Division, were on brief for the United States of America, amicus curiae.

*Amanda Buck Varella*, *Melanie Dahl Burke*, and *Brown Rudnick LLP*, with whom *Francisca D. Fajana*, *Niyati Shah*, and *Eri Andriola*, were on brief for Asian Americans Advancing Justice-AAJC, Autism Sprinter, Boston University Center for Antiracist Research, Citizens for Public Schools, Edvestors, GLBTQ Legal Advocates & Defenders,

Hamkae Center, Hispanic Federation, Inc., Jamaica Plain Progressives, LatinoJustice PRLDEF, Massachusetts Advocates for Children, Massachusetts Appleseed Center for Law and Justice, Massachusetts Law Reform Institute, Mass Insight Education and Research Institute, Montgomery County Progressive Asian American Network, and Progressive West Roxbury/Roslindale, amici curiae.

*Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, State Solicitor, *Ann E. Lynch*, and *David Ureña*, Assistant Attorneys General of Massachusetts, were on brief for Massachusetts, California, Colorado, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Washington, amici curiae.

*Michael Sheetz*, *Adam S. Gershenson*, *Michael McMahon*, *Robby K.R. Saldaña*, and *Cooley LLP*, were on brief for the Anti-Defamation League, Black Economic Council of Massachusetts, Inc., Boston Bar Association, The Greater Boston Chamber of Commerce, Jewish Alliance for Law and Social Action, King Boston, and Massachusetts Immigrant and Refugee Advocacy Coalition, amici curiae.

*Sarah Hinger*, *Woo Ri Choi*, *Matthew Segal*, *Ruth A. Bourquin*, *Jon Greenbaum*, *David Hinojosa*, and *Genevieve Bonadies Torres*, were on brief for the American Civil Liberties Union Foundation, American Civil Liberties Union of Massachusetts, Inc., Lawyers' Committee for Civil Rights Under Law, and National Coalition on School Diversity, amici curiae.

*Paul Lantieri III*, and *Ballard Spahr LLP*, were on brief for the National Association for Gifted Children, amicus curiae.

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December 19, 2023

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**KAYATTA, Circuit Judge**. We consider for a second time this appeal challenging on equal protection grounds a temporary admissions plan (the "Plan") for three selective Boston public schools. Previously, we denied a motion by plaintiff Boston Parent Coalition to enjoin use of the Plan until this appeal could be decided on the merits. In so doing, we held that the Coalition failed to show that it would likely prevail in establishing that defendants' adoption of the Plan violated the equal protection rights of the Coalition's members.

We turn our attention now to the merits of the appeal after full briefing and oral argument. For the following reasons, we find our previously expressed skepticism of the Coalition's claim to be well-founded. We therefore affirm the judgment below. We also explain why events since we last opined in this case do not mandate a different resolution.

## I.

A full discussion of the facts and litigation giving rise to this appeal can be found in the prior opinions of this court and the district court. *See Bos. Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Bos.* (*Boston Parent I*), 996 F.3d 37, 41–43 (1st Cir. 2021); *Bos. Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Bos.* (Indicative Ruling), No. CV 21-10330, 2021 WL 4489840, at *3–4 (D. Mass. Oct. 1,

2021); *Bos. Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Bos.*, No. 21-10330, 2021 WL 1422827 (D. Mass. Apr. 15, 2021) *withdrawn by Bos. Parent Coal. for Acad. Excellence Corp.* v. *Sch. Comm. of City of Bos.*, No. 21-10330, 2021 WL 3012618 (D. Mass. July 9, 2021). We provide now only an abbreviated review of the record, focusing on those points pertinent to the appeal before us.

Boston Latin Academy, Boston Latin School, and the John D. O'Bryant School (collectively known as the "Exam Schools") are three of Boston's selective public schools. For the twenty years preceding the 2021–2022 school year, admission to the Exam Schools was based on applicants' GPAs and their performance on a standardized test. The schools combined each applicant's GPA and standardized test score to establish a composite score ranking applicants citywide. Exam School seats were then filled in order, beginning with the student with the highest composite score, based on the students' ranked preferences among the three schools. The racial/ethnic demographics for the students offered admission to the Exam Schools for the 2020–2021 school year were: White (39%); Asian (21%); Latinx (21%); Black (14%); and mixed race (5%). By contrast, the racial/ethnic demographics for the citywide school-age population in Boston that same year were: White (16%); Asian (7%); Latinx (36%); Black (35%); and mixed race (5%).[1]

During the summer of 2019, Boston Public Schools conducted several analyses of how potential changes

[1] We use the listed racial classifications only to be consistent with the district court's usage, to which neither party lodges any objection.

to admissions criteria would affect racial/ethnic demographics at the Exam Schools. Following this process, Boston Public Schools developed a new exam to be administered to Exam School applicants beginning with the 2021–2022 school year. However, when COVID-19 struck, the Boston School Committee determined that the Exam School admissions criteria for 2021–2022 needed revision in light of the pandemic's impact on applicants during both the 2019–2020 and the prospective 2020–2021 school years.

In March 2020, citing the COVID-19 pandemic, Massachusetts Governor Charlie Baker suspended all regular, inperson instruction and other educational operations at K–12 public schools through the end of the 2019–2020 school year. Schools transitioned to full remote learning. Pandemic-related gathering restrictions made administering the in-person test difficult.

The Boston School Committee convened a Working Group to recommend revised admissions procedures for the 2021–2022 school year. This group met regularly from August to October 2020, reviewing extensive data regarding the existing Exam School admissions process, alternative selection methods used in other cities, and potential impacts of different proposed methodologies on students. As part of its process, the Working Group completed a so-called "equity impact statement" that stated the desired outcomes of the revised admissions criteria recommendation as follows:

> Ensure that students will be enrolled (in the three exam high schools) through a clear and fair process for admission in the 21–22 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.

As part of its process, the Working Group reviewed multiple simulations of the racial compositions that would result from different potential admissions criteria.

The Working Group presented its initial recommendations to the Boston School Committee on October 8, 2020. During this meeting, members of the Working Group discussed historical racial inequities in the Exam Schools, and previous efforts to increase equity across the Exam Schools. The Working Group also discussed a substantial disparity in the increase in fifth grade GPAs for White and Asian students as compared to Black and Latinx students, the disproportionate negative impact of the COVID-19 pandemic on minority and low-income students, a desired outcome of "rectifying historic racial inequities afflicting exam school admissions for generations," and, as one School Committee member stated, the "need to figure out again how we could increase these admissions rates, especially for Latinx and Black students." Another School Committee member stated that she "want[ed] to see [the Exam Schools] reflect the District[,]" and that "[t]here's no excuse . . . for why they shouldn't reflect the District,

which has a larger Latino population and Black African-American population."

The School Committee met on October 21, 2020, to discuss the Working Group's plan. At that meeting, race again became a topic of discussion. Some School Committee members voiced concerns that the revised plan, while an improvement, "actually [did not] go far enough" because it would likely still result in a greater percentage of White and Asian students in exam schools than in the general school-age population. During this meeting, School Committee chairperson Michael Loconto made comments mocking the names of some Asian parents. Two members of the School Committee, Alexandra Oliver-Dávila and Lorna Rivera, texted each other regarding the comments, with one saying "I think he was making fun of the Chinese names! Hot mic!!!" and another responding that she "almost laughed out loud." The chairperson apologized and resigned the following day.

Subsequently, the Working Group recommended and the School Committee adopted the Plan. With test administration not feasible during the COVID-19 pandemic, the Plan relied on GPAs to select Exam School admittees for the 2021–2022 school year. It first awarded Exam School slots to those students who, citywide, had the top 20% of the rank-ordered GPAs. The remaining applicants were then divided into groups based on the zip codes in which they resided (or, in the case of students without homes or in state custody, to a designated zip code).

Next, starting with the highest ranked applicants living in the zip code with the lowest median family income (for families with school age children), and continuing with applicants in each zip code in

ascending order of the zip code's median family income, 10% of the remaining seats at each of the three Exam Schools were filled based on GPA and student preferences. Ten rounds of this process filled more or less all remaining available seats in the three schools.

The Coalition, a corporation acting on behalf of some parents and their children who reside in Boston, sued the School Committee, its members, and the Boston Public Schools superintendent. The Coalition asserted that the Plan violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and chapter 76, section 5 of the Massachusetts General Laws by intentionally discriminating against White and Asian students. *Boston Parent I*, 996 F.3d at 43. After the Coalition moved for a preliminary injunction to bar the School Committee from implementing the Plan, the district court consolidated a hearing on the motion with a trial on the merits following the parties' submission of a Joint Agreed Statement of Facts. The district court found the Plan to be constitutional. The Coalition subsequently appealed that decision on the merits and sought interim injunctive relief from this Court pending resolution of the merits appeal. We denied the interim request for injunctive relief, in large part because we determined the Coalition was unlikely to succeed on the merits. *Id.* at 48.

Following our decision, on June 7, 2021, the *Boston Globe* published previously undisclosed evidence of an additional text-message exchange between School Committee members Oliver-Dávila and Rivera during the Board Meeting at which the Committee adopted the Plan. Reacting to the Committee chairman's

mocking of Asian parent names, Oliver-Dávila texted Rivera "[b]est s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry." Rivera responded, "Me too!! Wait til the White racists start yelling [a]t us!" Oliver-Dávila then responded "[w]hatever . . . they are delusional." Additionally, Oliver-Dávila texted "I hate WR," which the parties seem to agree is short for West Roxbury, a predominantly White neighborhood. Rivera then responded "[s]ick of westie whites," to which Oliver-Dávila replied "[m]e too I really feel [l]ike saying that!!!!"

Armed with these revelations, the Coalition moved for relief under Federal Rule of Civil Procedure 60(b), asking the district court to reconsider its judgment or at least allow more discovery. Following an indicative ruling by the district court pursuant to Federal Rule of Civil Procedure 12.1, we remanded the case to the district court so that it could rule formally on the Coalition's Rule 60(b) motion. The district court deemed the text messages "racist," and found that they showed that "[t]hree of the seven School Committee members harbored some form of racial animus." *Bos. Parent Coal.*, 2021 WL 4489840, at *15. The district court nonetheless denied the Coalition's motion, finding that relief under Rule 60(b) was not warranted on at least two grounds. *Id.* at *13–16. First, the district court found that the Coalition could have discovered the new evidence earlier with due diligence, and that it was only the result of the Coalition's deliberate litigation strategy — namely, its theory that it need not show animus to prove intentional discrimination — that no such evidence was discovered. *Id.* at *15. Second, the district court found that the new evidence would not change the result were a new trial to be granted. *Id.* at *15–16.

As to the second finding, the district court noted that "it is clear from the new record that the race-neutral criteria were chosen precisely because of their effect on racial demographics," that is, "but for the increase in Black and Latinx students at the Exam Schools, the Plan's race-neutral criteria would not have been chosen." *Id.* at *15. However, the court concluded that the new evidence in question did not cure the Coalition's persistent failure to show any legally cognizable disparate impact on White or Asian students under the facially neutral Plan. *Id.* The district court thus denied the Coalition's Rule 60(b) motion. *Id.* at *17.

Meanwhile, following our earlier denial of the Coalition's request for injunctive relief, Boston Public Schools implemented the Plan for admissions to the Exam Schools for the 2021–2022 school year. Shortly thereafter, the challenged Plan was replaced with a plan based on GPA, a new standardized examination, and census tracts. The Coalition does not challenge the current admissions plan in this appeal.

With its request to enjoin use of the Plan now moot, the Coalition still persists with this appeal, pointing to five children of its members who were denied admission to the Exam Schools in 2021 despite allegedly having higher GPAs than those of some students in other zip codes who were admitted. The Coalition asks that we remand the case to the district court with instructions to order the School Committee to admit these five students to an Exam School.[2]

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[2] Defendants contend that it is too late for the Coalition to revise its request for relief. But the Coalition promptly revised its request as events unfolded in the district court. And in these circumstances, granting such a revised request is not beyond the

Additionally, the Coalition appeals the district court's denial of its Rule 60(b) motion.

**II.**

Before we turn to the merits, we address a threshold question of justiciability. The Coalition argues that if the Plan had not been adopted, the City would have based invites to the Exam Schools on GPA in a citywide competition, just as it did for 20% of the slots. And in that event, all five students for whom the Coalition seeks relief would have been admitted. The School Committee argues that the Coalition has no Article III standing to seek relief on behalf of five students who are not parties to this lawsuit, and that even if it did, there is no basis for granting the requested relief.

An association has standing to bring suit on behalf of its individual members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Coll. of Dental Surgeons of P.R.* v. *Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 40 (1st Cir. 2009) (quoting *Hunt* v. *Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Here, only the third of these so-called *Hunt* factors is in dispute. The School Committee contends that, because the Coalition now seeks injunctive relief for five individual members who are not themselves plaintiffs in this action, their

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court's "broad and flexible" power to fashion an equitable remedy. *See Morgan* v. *Kerrigan*, 530 F.2d 431, 432 (1st Cir. 1976).

individual participation in the lawsuit is required. Therefore, they argue, the Coalition lacks independent associational standing under *Hunt*.

"There is no well-developed test in this circuit as to how the third prong of the *Hunt* test — whether 'the claim asserted [or] the relief requested requires the participation of individual members in the lawsuit,' — applies in cases where injunctive relief is sought." *Pharm. Care Mgmt. Ass'n* v. *Rowe*, 429 F.3d 294, 313–14 (1st Cir. 2005) (Boudin, J. & Dyk, J., concurring) (quoting *Hunt*, 432 U.S. at 343). Here, granting the Coalition's requested remedy would certainly require some factual showing that some or all of the five students would have been admitted to an Exam School but for the adoption of the Plan. However, given the documented and apparently uncontested nature of the student-specific facts likely to be included in such a showing (i.e., GPA and school preference), it seems unlikely that any of the students would need to do much, if anything, in the lawsuit. Moreover, the Coalition's requested remedy, if granted, would clearly "inure to the benefit of those members of the association actually injured." *Id.* at 307 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975)).

The School Committee responds that if it did not use zip codes, it would not have chosen to use GPAs citywide as its sole selection criterion instead. It notes that such a GPA-only admissions plan has not been used for over twenty years, and therefore that the basis for the Coalition members' asserted injuries is purely speculative. Moreover, the School Committee questions the evidentiary basis of the assertions on behalf of the unnamed children.

These arguments strike us as better suited to challenging the merits of the Coalition's claims, not its standing to assert those claims. In substance, the School Committee disputes what would have happened had it not used the Plan. And on that point, the record is not clear enough to dismiss the Coalition's position as speculative. Moreover, at this stage, we need only note that courts have broad authority to fashion equitable relief following a finding of an equal protection violation. *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). Therefore, we see no bar — at least at the threshold of justiciability — to the Coalition's claim for equitable relief on behalf of some of its individual members. We now turn to the merits.

## III.

### A.

When reviewing the merits of a district court's decision on a stipulated record, we review legal conclusions de novo and factual findings for clear error. *See Consumer Data Indus. Ass'n* v. *Frey*, 26 F.4th 1, 5 (1st Cir. 2022). Yet, "when the issues on appeal 'raise[ ] either questions of law or questions about how the law applies to discerned facts,' such as whether the proffered evidence establishes a discriminatory purpose or a disproportionate racial impact, 'our review is essentially plenary.'" *Boston Parent I*, 996 F.3d at 45 (quoting *Anderson ex rel. Dowd* v. *City of Bos.*, 375 F.3d 71, 80 (1st Cir. 2004)). "Similarly, we review *de novo* the district court's other

legal conclusions, including the level of scrutiny it applied when evaluating the constitutionality of the challenged action." *Id.*

**B.**

The Fourteenth Amendment prohibits "all governmentally imposed discrimination based on race," save for those rare and compelling circumstances that can survive the daunting review of strict scrutiny. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)). The Equal Protection Clause's "central purpose" is to "prevent the States from purposefully discriminating between individuals on the basis of race." *See Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). Generally, purposeful racial discrimination violative of the Equal Protection Clause falls into three categories of state action that merit strict scrutiny: (1) where state action expressly classifies individuals by race (*see, e.g.*, *Students for Fair Admissions*, 600 U.S. at 194–95; *Grutter* v. *Bollinger*, 539 U.S. 306, 327–28 (2003)); (2) where a policy is facially neutral but is in fact unevenly implemented based on race (*see Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–74 (1886)); and (3) where a facially race-neutral, and evenly applied, policy results in a racially disparate impact and was motivated by discriminatory intent (*see Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)).

The Coalition's principal arguments for challenging the Plan fall into category (3) — an evenly applied, facially race-neutral plan that was motivated by a discriminatory purpose and has a disparate

impact. But the record provides no evidence of a relevant disparate impact. And the evidence of defendants' intent to reduce racial disparities is not by itself enough to sustain the Coalition's claim. Our reasoning follows.

**1.**

The Coalition makes two attempts to show that the School Committee's use of the Plan to determine Exam School admissions had a disparate impact on the Coalition's members. We address each in turn.

**a.**

To prove that the Plan had a disparate impact on its members, the Coalition first points out that White and Asian students made up a smaller percentage of the students invited to join the Exam Schools under the Plan than in the years before the Plan was implemented. Specifically, with respect to the prior year, the percentages of invited students classified as White dropped from 40% to 31%, while the percentage classified as Asian dropped from 21% to 18%.

The Coalition's reliance on these raw percentages without the benefit of some more robust expert analysis serves poorly as proof that the observed changes were caused by the Plan rather than by chance. *See Boston Parent I*, 996 F.3d at 46 (noting that the Coalition "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"); *see also Coal. for TJ* v. *Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 881 (4th Cir. 2023).

Nevertheless, given the size of the overall pool, the reductions cited by the Coalition may be at least

minimally significant. Notably, when the defendants applied the Plan to the prior year's admission applications in a test-run simulation, it produced virtually the same percentage changes. And defendants have never claimed that the changes were entirely random. To the contrary, the Plan's effects were expected, at least in part, by those who knew the schools best: the defendants themselves. We therefore do not rest our decision on the lack of expert evidence that changes in the racial makeup of the admitted class in 2021–2022, as compared to 2020–2021, were not the result of mere chance.

Rather, we find that the Coalition fails to show disparate impact for another, more fundamental reason. To see why this is so, we find it instructive to consider disparate impact theory in its most customary form — a statutory cause of action for unintentional discrimination in certain settings, such as employment. *See, e.g.*, *Jones* v. *City of Bos.*, 752 F.3d 38, 53 (1st Cir. 2014) (applying Title VII, 42 U.S.C. § 2000e–2(k)). A theory of unintentional discrimination cannot, by itself, establish liability in an equal protection case such as this, which requires proof of both disparate impact and discriminatory intent. *See Arlington Heights*, 429 U.S. at 266–68. Our point, instead, is that even when sufficient to establish liability in its native habitat of Title VII, disparate impact theory does not call into question the introduction of facially neutral, and otherwise valid, selection criteria that reduce racial disparities in the selection process. In fact, where applicable, disparate-impact discrimination jurisprudence does just the opposite. As between alternative, equally valid selection criteria, it encourages the use of the criterion expected to create the least racial disparity unless

there is some good reason to do otherwise. *Cf.* 42 U.S.C. § 2000e–2(k)(1)(A)(ii) and (C).

In this manner, disparate-impact analysis aims to counter the use of facially neutral policies that "'freeze' the status quo of prior discriminatory . . . practices." *Griggs* v. *Duke Power Co.*, 401 U.S 424, 430 (1971). That is to say, it encourages precisely what the Coalition claims the Plan has done here: as between equally valid selection processes that meet the selector's legitimate needs, to use the one that reduces under-representation (and therefore over-representation as well). So, in seeking to leverage a disparate-impact theory of discrimination against the Plan for its alleged reduction — but not reversal — of certain races' stark over-representation among Exam School invitees, the Coalition has it backwards.

To be sure, where race itself is used as a selection criterion, certainly a before-and-after comparison would provide relevant support for an equal protection challenge. In that context, any "negative" effect resulting from the use of race would be relevant because "race may never be used as a 'negative.'" *Students for Fair Admissions*, 600 U.S. at 218. Here, though, the Plan did not use the race of any individual student to determine his or her admission to an Exam School. And the Coalition offers no evidence that geography, family income, and GPA were in any way unreasonable or invalid as selection criteria for public-school admissions programs.

In sum, even assuming the Coalition's statistics show non-random demographic changes in the pool of Exam School invitees between 2020–2021 and 2021–2022 as a result of the Plan's implementation, those changes simply show that as between equally valid,

facially neutral selection criteria, the School Committee chose an alternative that created less disparate impact, not more.[3] To rule otherwise would turn "the previous status quo into an immutable quota" and risk subjecting any new policy that "might impact a public institution's racial demographics — even if by wholly neutral means — to a constitutional attack." *Coal. for TJ*, 68 F.4th at 881 (internal quotation omitted).

**b.**

This brings us to the Coalition's alternative attempt to employ disparate-impact theory to prove prohibited intentional race discrimination. The Coalition contends that the Plan, even when measured against a process of random selection, had a disparate impact on White and Asian applicants. To make this argument, the Coalition first notes that the overall acceptance rate for applicants for the 2021–2022 school year was 58.5%. And it posits that a random distribution would result in an even application of that 58.5% rate across each zip code. The Coalition then isolates certain zip codes where the population was either "predominantly" (as in 55% or greater) White/Asian or Black/Latinx, and juxtaposes those zip codes' respective acceptance rates under the Plan with those under a hypothetical 58.5% comparator. Following this logic, the Coalition concludes that the Plan resulted in 66 fewer than expected spots allocated across ten predominantly White/Asian zip codes, and 57 more spots across seven predominantly Black/Latinx zip codes. Using this

[3] Moreover, by not using zip codes to award 20% of the invitations, the School Committee opted not to use an approach that would have reduced racial disparities even more.

same data, the Coalition also argues that because the average GPA of the admitted students from the predominantly White/Asian zip codes was higher than that from the predominantly Black/Latinx zip codes, the Plan made it disproportionally more difficult for White and Asian students to gain acceptance.

In our view, this backfilled analysis — crafted by counsel in an appellate brief — falls woefully short of the mark. The analysis uses GPA data from only ten of the twenty zip codes that the Coalition identifies as "predominantly" White and Asian. It also neglects another two zip codes where, ostensibly, there was neither a predominantly White/Asian nor Black/Latinx population under the Coalition's definition. And all the while, the Coalition never explains why 55% should be the relevant threshold, nor why aggregating populations of separate racial groups is methodologically coherent.[4]

Moreover, the Coalition's analysis rests on a sleight of hand. It counterfactually assumes that if White/Asian students comprised 55% or more of the students in a given zip code, then every marginal student in that zip code who just missed out on acceptance was also White or Asian. Suffice it to say, there is zero evidence for this assumption. The bottom line remains the same: White and Asian students respectively made up approximately 16% and 7% of the eligible school-age population and 31% and 40% of the successful applicants. Use of the Plan caused no

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[4] Intervenors-appellees raise additional alarms about the Coalition's data, noting that several zip codes cited by the Coalition as "predominantly" White and Asian actually have a greater Black or Latinx population than Asian.

relevant disparate impact on those groups.[5] *Cf. Coal. for TJ*, 68 F.4th at 879 (finding no disparate impact on Asian-American students under school admissions policy where "those students have had greater success in securing admission to [the school] under the policy than students from any other racial or ethnic group").

**2.**

We turn next to the Coalition's argument that it need not prove a disparate impact per se. Rather, the Coalition contends that any change in the racial composition of admitted students is unconstitutional if the change was intended — even if it is the result of facially neutral and valid selection criteria that merely reduce, but do not reverse, the numerical over-representation of a particular race. There are several problems with this theory.

First, the Coalition points to no case in which a facially neutral selection process was found to violate the Equal Protection Clause based on evidence of intent without any corollary disparate impact. To the contrary, to successfully challenge the use of a facially neutral, and otherwise bona fide, selection criterion,

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[5] The district court found that "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." *Bos. Parent Coal.*, 2021 WL 4489840, at *15. As to the actual admissions data, the district court made no such findings, but we take notice that for seventh-grade applicants, the Plan resulted in White students, who constitute 16% of the Boston school-age population, receiving 31% of the invitations, and Asian students, who constitute 7% of that population, receiving 18% of the invitations.

the Coalition must prove both improper intent and disparate impact. *Anderson ex rel. Dowd*, 375 F.3d at 89 (noting that "[c]ourts can only infer that an invidious racial purpose motivated a facially neutral policy when that policy creates disproportionate racial results"); *see also Lewis* v. *Ascension Parish Sch. Bd.*, 806 F.3d 344, 359 (5th Cir. 2015) ("To subject a facially race neutral government action to strict scrutiny, the plaintiff must establish both discriminatory intent and a disproportionate adverse effect upon the targeted group."); *Coal. for TJ*, 68 F.4th at 882 (quoting *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971)) (agreeing and noting that "[n]o case in [the Supreme] Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it . . . ."); *Doe ex rel. Doe* v. *Lower Merion Sch. Dist.*, 665 F.3d 524, 549 (3d Cir. 2011) ("Although disproportionate impact, alone, is not dispositive, a plaintiff must show discriminatory impact in order to prove an equal protection violation.").

Second, the Coalition's "intent only" theory runs counter to what appears to be the view of a majority of the members of the Supreme Court as expressed in *Students for Fair Admissions*. There, the Court found that Harvard and UNC's race-conscious admissions programs violated the Equal Protection Clause. 600 U.S. at 213. But in rejecting the universities' use of an applicant's race as a means to achieve a racially diverse student body, three of the six justices in the majority — with no disagreement voiced by the three dissenters — separately stressed that universities can lawfully employ valid facially neutral selection criteria that tend towards the same result. *See id.* at 299–300 (Gorsuch, J., with Thomas, J., concurring)

(recounting the argument that the universities "could obtain significant racial diversity without resorting to race-based admissions practices," and noting that "Harvard could nearly replicate [its] current racial composition without resorting to race-based practices" if it increased tips for "socioeconomically disadvantaged applicants" and eliminated tips for "children of donors, alumni, and faculty"); *id.* at 280 (Thomas, J., concurring) ("If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account."); *id.* at 317 (Kavanaugh, J., concurring) (universities "'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race'") (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment)).

Granted, no concurring opinion expressly held that a school may adopt a facially neutral admissions policy precisely because it would reduce racial disparities in the student body as compared to the population of eligible applicants. But the message is clear. Justice Gorsuch, and indeed plaintiff Students for Fair Admissions itself, identified use of socio-economic status indicators — i.e., family income — as a tool for universities who "sought" to increase racial diversity. *See id.* at 299–300 (Gorsuch, J., with Thomas, J., concurring). And Justice Kavanaugh wrote that "universities still 'can, of course, act *to undo* the effects of past discrimination in many permissible ways.'" *Id.* at 317 (Kavanaugh, J., concurring) (emphasis added).

Nor is there any reason to suppose that these assurances do not apply to admission to selective

public schools. As Justice Kennedy wrote in his pivotal concurring opinion in *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, "[i]n the administration of public schools by the state and local authorities 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." 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (internal citation omitted).

Third, holding school officials liable for any reduction in the statistical over-representation of any racial group, merely because the change was the intended result of a new facially neutral and valid selection policy, would deter efforts to reduce unnecessary racial disparities. A school might base admission on residence in geographical proximity to the school, on attendance at specific schools in a lower grade, on tests or GPA, or some combination of the myriad indicia of students' prior success. A school might even decide to rely only on a lottery. It hardly would be surprising to find that a change from one of those selection criteria to another significantly altered the racial composition of the pool of successful applicants.

Nor would a lack of intent provide any safe harbor given that responsible school officials would likely attempt to predict the effects of admissions changes, if for no other reason than to avoid increasing disparities. And many honest school officials would admit that as between two equally valid selection criteria, they preferred the one that resulted in less rather than greater demographic disparities. In short, any distinction between adopting a criterion (like family income) notwithstanding its tendency to

increase diversity, and adopting the criterion because it likely increases diversity, would, in practice, be largely in the eye of the labeler. *Cf. Coal. for TJ*, 68 F.4th at 882 (quoting *Palmer*, 403 U.S. at 224) ("If the law is struck down for [intent alone] . . . it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.").

To be sure, in striking down Harvard and UNC's race-conscious plans in *Students for Fair Admissions*, the Supreme Court noted that "[w]hat cannot be done directly cannot be done indirectly," such that "universities may not simply establish through application essays or other means the regime [the Court found unlawful]." 600 U.S. at 230 (citation omitted). But we do not read that admonition as calling into question the use of a bona fide, race-neutral selection criterion merely because it bears a marginal but significant statistical correlation with race.

Certainly, Justices Gorsuch, Thomas, and Kavanaugh, in joining the majority opinion, did not read the Court's opinion to foreclose use of the very selection criteria to which their concurrences pointed as permissible race-neutral alternatives to the race-conscious admissions programs before the Court.

Of course, at some point, facially neutral criteria might be so highly correlated with an individual's race and have so little independent validity that their use might fairly be questioned as subterfuge for indirectly conducting a race-based selection process. In that event, nothing in this opinion precludes a person harmed by such a scheme from pursuing an equal protection claim under the authority of *Students for*

*Fair Admissions*. Here, though, admission under the Plan correlated positively with being White or Asian, the only groups numerically over-represented under the Plan. And the Plan's prosaic selection criteria — residence, family income, and GPA — can hardly be deemed otherwise unreasonable. Nor is this a case in which a school committee settled on and employed a valid selection criterion, and then simply threw out the results because the committee did not like the racial demographics of the individuals selected.

Thus, we find no reason to conclude that *Students for Fair Admissions* changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles. For such policies to merit strict scrutiny, the challenger still must demonstrate (1) that the policy exacts a disparate impact on a particular racial group and (2) that such impact is traceable to an invidious discriminatory intent. *See Arlington Heights*, 429 U.S. at 264–65; *see also Coal. for TJ*, 68 F.4th at 879; *Lower Merion Sch. Dist.*, 665 F.3d at 549; *Hayden* v. *County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); *Raso* v. *Lago*, 135 F.3d 11, 16 (1st Cir. 1998).

As we previously stated:

> [O]ur most on-point controlling precedent, *Anderson ex rel. Dowd* v. *City of Boston*, makes clear that a public school system's inclusion of diversity as one of the guides to be used in considering whether to adopt a facially neutral plan does not by itself trigger strict scrutiny. *See* 375 F.3d at 85–87 (holding that strict scrutiny did not apply to attendance plan adopted based on desire to promote student choice, equitable access to resources for all

> students, and racial diversity). In *Anderson*, we expressly held that "the mere invocation of racial diversity as a goal is insufficient to subject [a facially neutral school selection plan] to strict scrutiny." *Id.* at 87.

*Boston Parent I*, 996 F.3d at 46. Our view has not changed. There is nothing constitutionally impermissible about a school district including racial diversity as a consideration and goal in the enactment of a facially neutral plan. To hold otherwise would "mean that that any attempt to use neutral criteria to enhance diversity . . . would be subject to strict scrutiny." *Boston Parent I*, 996 F.3d at 48.

"The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb . . . ." *Students for Fair Admissions*, 600 U.S. at 220. So too here, treating students differently based on the zip codes in which they reside was not like treating them differently because of their skin color.

**C.**

Because we find that the Plan is not subject to strict scrutiny, we would normally proceed to consider its constitutionality under rational basis review. But the Coalition, for good reason, does not argue that the Plan fails rational basis review. So we deem any such claim waived.

**IV.**

Finally, the Coalition appeals the district court's denial of its motion under Federal Rule of Civil Procedure 60(b), which allows for relief from a final judgment in "exceptional circumstances . . . favoring

extraordinary relief." *See Karak* v. *Bursaw Oil Corp.*, 288 F.3d 15, 19 (1st Cir. 2002). We review the district court's denial of the Coalition's Rule 60(b) motion for abuse of discretion. *Fisher* v. *Kadant, Inc.*, 589 F.3d 505, 512 (1st Cir. 2009).

Pursuant to Rule 60(b), a "court may relieve a party . . . from a final judgment, order, or proceeding" based on, inter alia, "newly discovered evidence that, with reasonable diligence, could not have been discovered in time." Fed. R. Civ. P. 60(b)(2). The newly discovered evidence to which the Coalition pointed was the text messages, discussed above, between Oliver-Dávila and Rivera, particularly their agreement that they were "[s]ick of westie whites."

"Under this rule, a party moving for relief . . . must persuade the district court 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) (internal quotation and citation omitted). Here, the district court concluded, among other things, that the Coalition failed to meet the second and fourth requirements. *See Bos. Parent Coal.*, 2021 WL 4489840, at *15–16.

As to the second requirement, the district court found that the Coalition failed to show that "the evidence could not by due diligence have been discovered earlier." *González-Piña*, 407 F.3d at 433. The district court — buttressed by its experience closely supervising this litigation and the parties' arguments along the way — reasonably determined

that the Coalition made a deliberate decision to forgo discovery, despite its apparent suspicion that the two School Committee members harbored racial animus, and even discouraged further development of the record at trial. *Bos. Parent Coal.*, 2021 WL 4489840, at *15. The Coalition purportedly did so because it was, and remains, adamant that it did not need to make a showing of racial animus to prevail. *See id.* Additionally, the district court found that the School Committee's failure to disclose the text messages in its response to various third parties' public records requests did not constitute the kind of misconduct — such as that occurring within the judicially imposed discovery process — that warrants Rule 60(b) relief. *See id.* at *14. We see no abuse of discretion in any of these findings.

As to the fourth requirement, the district court found that the text-message evidence was not "of such a nature that it would probably change the result were a new trial to be granted," *González-Piña*, 407 F.3d at 433, principally on the grounds that the evidence did not rectify the Coalition's failure to make a proper showing of the Plan's disparate impact. *See Bos. Parent Coal.*, 2021 WL 4489840, at *15–16. The district court did not abuse its discretion in reaching this conclusion. More evidence of intent does not change the result of this case, given that our analysis assumes that the Plan was chosen precisely to alter racial demographics. We recognize that the text messages evince animus toward those White parents who opposed the Plan. But the district court supportably found as fact that the added element of animus played no causal role that was not fully and sufficiently played by the motive of reducing the under-representation of Black and Latinx students.

*Id.* at *15. In the district court's words, what drove the Plan's selection was the expected "increase in Black and Latinx students." *Id.* (citing *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)) (distinguishing "action taken *because of* animus" from action taken "*in spite of* [its] necessary effect on a group") (emphasis in original). So, we need not decide what to make of a case in which a school district took action to reduce a numerically over-represented group's share of admissions because of animus toward that group.

Consequently, we find that the district court did not abuse its discretion in denying the Coalition relief under Rule 60(b).

## V.

For the foregoing reasons, we *affirm* the district court's denial of the Coalition's motion under Rule 60(b), and its judgment rejecting the Coalition's challenges to the Plan.

Filed October 1, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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|---|---|
| BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.<br>Plaintiff,<br>v.<br>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,<br>Defendants,<br>AND<br>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.,<br>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 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

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

[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

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.*

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.

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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.

[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.

### 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 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

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[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.

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 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

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[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.

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-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, 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

[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.

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

[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.

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 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

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

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

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 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

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[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.

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. 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

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[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?
>
> 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.

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 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 threshold of 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 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?*

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.

**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,

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> 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).

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

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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.

charged.[16] Indeed, the disclaimer attached to the School Committee's response acknowledged that the

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[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.

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,*

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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.

[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.

*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 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 will not excuse or reward such lack

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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.

**Why** did this happen? Trial counsel were simply overwhelmed by the magnitude of necessary trial preparation.

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. 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*

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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.

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 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

[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.

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; B*oston 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

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[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.").

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, 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

[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

("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 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.

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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.

## 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

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

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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.

[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.

No. _____

In the
# Supreme Court of the United States

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

*Petitioner,*

v.

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

*Respondents.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

## CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 7,176 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 2024.

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**AFFIDAVIT OF SERVICE**

SUPREME COURT OF THE UNITED STATES

No. ___

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BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

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

*Respondents,*

----------X

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, Ann Tosel, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for Boston Parent Coalition for Academic Excellence Corp.

That on the 17th day of April, 2024, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* and three hundred dollar filing fee check through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of April, 2024.

Ann Tosel

Ann Tosel

Sworn to and subscribed before me
this 17th day of April, 2024.

Mariana Braylovskiy

**MARIANA BRAYLOVSKIY**
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026