No. 21A590

IN THE
SUPREME COURT OF THE UNITED STATES

COALITION FOR TJ,
Applicant,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

On Emergency Application to Vacate the Stay Pending Appeal Issued by the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON 8 1/2 BY 11 INCH PAPER IN SUPPORT OF APPLICANT BY THE COMMONWEALTH OF VIRGINIA AND 15 OTHER STATES

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APRIL 12, 2022

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The Commonwealth of Virginia and 15 other States, represented by their attorneys general, respectfully move for leave to file a brief of amici curiae in support of Applicant's Emergency Application to Vacate the Stay Pending Appeal, without 10 days' notice to the parties of amici's intent to file. Amici also respectfully move for leave of Court to file this brief on 8 1/2 by 11 inch paper, rather than in booklet form.

In light of the expedited briefing schedule set by the Chief Justice, amici could not provide 10 days' notice of their intent to file. Amici sought a position on the motion from the parties on Friday, April 8, the same day that the Application was filed. Applicant consents to the filing of the amicus brief. Respondent does not consent. It conditioned its consent on amici filing this brief no later than 5 p.m. on Monday, April 11. It was not feasible for amici to file this brief on Monday, April 11, only one business day after the Application was filed. Amici file this brief on Tuesday, April 12.

Amici States have a strong interest in protecting their citizens' Fourteenth Amendment rights, in ensuring that local entities comply with federal law, and in providing a public education for their citizens. More than one of the amici States have litigated cases before this and other courts concerning the intersection of school admissions and federal law's prohibition against racial discrimination. See, *e.g.*, Brief of Amici Curiae, *Students for Fair Admission, Inc.* v. *President & Fellows of Harvard College* (No. 20-1199) (Alabama, Arkansas, Arizona, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, Utah); Brief of Amicus Curiae, *Students for Fair Admission, Inc.* v. *President & Fellows of Harvard College* (No. 20-1199) (Texas); Brief of Amicus Curiae, *Coalition for TJ* v. *Fairfax Cnty. Sch. Bd.*, 2022 WL 986994 (4th Cir. 2022) (No. 22-1280) (Virginia).

Amici offer the proposed brief to provide a unique perspective on the equitable consequences of the lower court's stay. As the brief explains, the lower court's stay permits Respondent to continue using an admissions policy that discriminates against Asian-American students applying to Thomas Jefferson High School for Science and Technology on the basis of their race, circumventing a federal court's conclusion that the admissions policy violates the Fourteenth Amendment's Equal Protection Clause.

The Emergency Application to Vacate the Stay Pending Appeal was filed April 8, 2022. The expedited filing and consideration of the Application prevented amici from printing and filing this brief in booklet form. In light of the expedited proceedings and emergency nature of the Application, amici request the Court grant this motion and accept the paper filing.

Respectfully submitted.

/s/ Andrew N. Ferguson

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BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 15 OTHER STATES AS AMICI CURIAE IN SUPPORT OF APPLICANT

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has "many times over" reaffirmed that "racial balance is not to be achieved for its own sake." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007) (opinion of Roberts, C.J.) (brackets and quotation marks omitted). Racial balancing is contrary to this Court's "repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial . . . class." *Id.* at 730 (brackets and quotation marks omitted).

Respondent Fairfax County School Board (the Board) set out to "remake" admissions at Thomas Jefferson High School for Science and Technology (TJ) because it was "dissatisfied with the racial composition of the school." App. 34a. To accomplish its "goal of achieving racial balance," the Board replaced its race-neutral and meritocratic admissions policy with a new one intentionally designed to decrease Asian-American enrollment. *Ibid.* Racial discrimination in access to public education is an unquestionably important issue, and the Fourth Circuit was demonstrably wrong in issuing a stay that reinstituted the Board's unconstitutional policy. This Court should vacate the stay.

INTEREST OF AMICI CURIAE

Amici curiae the Commonwealth of Virginia, the State of Alabama, the State of Arizona, the State of Arkansas, the State of Georgia, the State of Kansas, the Commonwealth of Kentucky, the State of Louisiana, the State of Missouri, the State of Montana, the State of Nebraska, the State of Oklahoma, the State of South Carolina, the State of Texas, the State of Utah, and the State of West Virginia (the States), represented by their attorneys general, have interests in protecting their citizens' Fourteenth Amendment rights, in ensuring that local entities comply with federal law, and in providing a public education for their citizens. The Fourth Circuit's grant of a stay undermines each of these interests by allowing the operation

of a school board policy that intentionally discriminates against Asian-American students in violation of the basic constitutional guarantee of equal treatment without regard to race or color.

The States agree with the arguments advanced by Applicant Coalition for TJ and submit this brief to further elucidate the serious equitable concerns that weigh in favor of granting the Emergency Application to vacate the stay (Appl.).

BACKGROUND

TJ is an Academic-Year Governor's School in Alexandria, Virginia, administered by the Board as part of Fairfax County Public Schools. It is regularly recognized as one of the best public high schools in the nation. Prospective students must apply for admission. Prior to 2020, eligible applicants[1] were placed in a semifinalist pool based on standardized test scores. App. 25a. Applicants were chosen for admission from the semifinalist pool "based on a holistic review that considered GPA, test scores, teacher recommendations, and responses to three writing prompts and a problem-solving essay." *Ibid.*

Certain Fairfax County middle schools serve as "Advanced Academic Program . . . Level IV" centers. App. 46a. Gifted students, many of whom would attend other middle schools based on their residential address, are admitted to these centers based on work samples and aptitude test scores. Fairfax County Public Schools, *Advanced Academics Identification and Placement for Current FCPS Students* (last visited Apr. 12, 2022), https://tinyurl.com/2p8te6fe. Advanced Academic Program centers "offer[] identified students a highly challenging instructional program" that "is designed to meet the needs of advanced learners." Fairfax County Public Schools, *Full-Time Advanced Academic Program, Grades 3–8 (Level IV)* (last visited Apr. 12, 2022),

[1] To be eligible, applicants were required to reside in one of the five participating school divisions, be enrolled in eighth grade, have a minimum 3.0 grade point average, have completed or be enrolled in Algebra I, and pay an application fee (which could be waived based on financial need). App. 25a.

https://tinyurl.com/5d79b4ba. Historically, many of the students accepted to TJ have attended particular Advanced Academic Program centers. *E.g.*, App. 157a (showing that out of the 486 "[t]otal offers extended" for the class of 2024, 243 of those "offers [came] from top six feeder schools"); compare App. 143a–144a, with App. 238a (showing Level IV Advanced Academic Program centers). A disproportionate share of applicants from these six Advanced Academic Program centers have been Asian-American. App. 143a–144a, 154a–155a, 157a–158a (for the class of 2024, approximately 73.5% of "applicants from top six feeder schools . . . were Asian American").

In the fall of 2020, the Board's Superintendent, Scott Brabrand, presented to the Board a series of proposals to overhaul the school's admissions process. The record reveals that these changes were animated by racial balancing. The Board set out to alter "the racial makeup [of] TJ," App. 47a, by "decreas[ing] the enrollment of 'overrepresented' Asian-American students at TJ to better 'reflect the racial composition' of the surrounding area," App. 18a (Rushing, J., dissenting).

Two factors motivated the Board to diminish the number of Asian-American children attending TJ. First, the Board felt pressure from state agencies to improve "diversity" at Governor's Schools, which the Board interpreted as admissions "within 5% of diversity in their local districts." App. 40a; see also App. 4a–5a (Heytens, J., concurring). This concern "pushed the Board to act quickly to change TJ admissions with an explicit eye towards its racial composition." App. 40a.

Second, the nationwide unrest following George Floyd's murder motivated the Board to reduce Asian-American enrollment at TJ. One Board member, for instance, declared publicly that, "in looking at what has happened to George Floyd . . . we must recognize the unacceptable numbers of such things as the unacceptable numbers of African Americans that have been accepted to TJ." App. 39a–40a; see also App. 170a

(policy changes motivated by "BLM and a super progressive board" (text message from Board member Rachna Sizemore Heizer)). Similarly, in a message responding to the nationwide unrest, TJ's principal publicly condemned the numbers of Black students admitted to TJ, stating that if the school's "community . . . reflect[ed] racial composition in [Fairfax County Public Schools]," then the school "would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms." App. 28a.

"[T]o increase and decrease the representation of certain racial groups at TJ to align with districtwide enrollment data," the Board replaced the prior admission process. App. 40a–41a. The new policy, among other things, eliminated the consideration of standardized test scores, "guarantee[d] seats for students at each public middle school . . . equivalent to 1.5% of the school's eighth grade class size," and added consideration of "certain 'Experience Factors,'" including preferences for students from "middle school[s] deemed historically underrepresented." App. 26a.

Though facially race-neutral, the new policy targeted Asian-American applicants with surgical precision. First, the preference for students attending "a middle school deemed 'historically underrepresented at TJ'" categorically disadvantages students attending the top middle-school gifted centers, because those centers were historically *over*represented at TJ. App. 37a–38a. Asian-American children comprised a disproportionate share of applicants from the top six centers—two-thirds of the eligible applicants for the first class subject to the new admissions policy. App. 143a–144a, 157a–158a. At the same time, less than a quarter of applicants from "historically underrepresented" schools were Asian-American. App. 157a. The new policy's preference for "historically underrepresented" middle schools thus substantially diminished Asian-American applicants' chances to attend TJ—precisely as the Board intended.

Second, the 1.5% set-aside similarly disproportionately disadvantages Asian-American applicants—particularly those attending the top middle-school gifted centers—by forcing them to compete largely "against other applicants *from the same school*," rather than all other eligible students across all the participating school divisions. Superintendent's Office, *Regulation 3355.15* at 5 (effective Nov. 9, 2021), https://tinyurl.com/2p88d6zm (emphasis added). The set-aside leaves only about 100 of 550 total seats in each class unallocated. App. 26a. These requirements "disproportionately force[] Asian-American students to compete against more eligible and interested applicants (often each other) for the allocated seats at their middle schools." App. 37a; see App. 240a (percentage of eligible students from each school).

Just as the Board had predicted and intended, this policy change drastically decreased the number of Asian-American students admitted to TJ. The proportion of offers extended to Asian-American applicants in the five years prior to the policy change never fell below 65%, and was typically between 70% and 75%. App. 36a. Indeed, 73% of the offers extended to the last class admitted under the previous, meritocratic system were extended to Asian-American applicants. *Ibid.* Only 54% of offers for the first class after the Board imposed the challenged admission policy were extended to Asian-American applicants; the school extended 56 fewer offers to Asian-American applicants for the class of 2025 despite the admitted class size increasing by 64 students. App. 26a, 36a.

Coalition for TJ sued and alleged that the new policy unconstitutionally discriminated against Asian-American applicants on the basis of race. App. 24a. The district court agreed, granting Coalition for TJ's summary judgment motion and enjoining the Board from further use or enforcement of the policy. App. 22a. The Board appealed that decision and asked the district court to stay its injunction. The

district court declined, see App. 21, and the Board then moved for a stay in the United States Court of Appeals for the Fourth Circuit. A divided panel voted to grant the stay motion. App. 1a–2a. Judge Heytens wrote an opinion concurring in the grant of the stay, see App. 3a–14a, and Judge Rushing dissented, see App. 14a–20a.

In his concurrence, Judge Heytens contended that the district court's disparate impact analysis "is likely flawed" because it compared the rate of offers to Asian-American applicants after the enactment of the Board's discriminatory policy to the offer rate under the previous policy. App. 7a. The concurrence maintained that "the . . . relevant comparator for determining whether this race neutral admissions policy has an outsized impact on a particular racial group is the percentage of [Asian-American] applicants versus the percentage of offers," because the "core question for assessing disparate impact" is "whether members of one group have, proportionally, more difficulty securing admission than others." App. 7a–8a. The concurrence also concluded that the remaining factors weigh in favor of granting the stay, because "the timing and logistical constraints associated with" imposing a new policy at this point outweigh any harms Asian-American applicants would suffer. App. 14a.

In dissent, Judge Rushing concluded that "the Board has not made the showing necessary to warrant the extraordinary relief of a stay," and that the stay would prolong "the risk . . . [of] perpetuat[ing] the denial of Asian Americans' constitutional rights." App. 15a, 17a (quotation marks omitted). The dissent noted that "Board member discussions were permeated with racial balancing, as were its stated aims and its use of racial data to model proposed outcomes." App. 18a. The dissent further found "probative" of the Board's discriminatory intent the fact that, "under the new policy, Asian-American enrollment dropped 19 percentage points from the previous year and decreased from a historical average of 71% over class years 2020–2024 to 54% in class year 2025." App. 19a. Finally, the dissent also concluded that "the public

interest likewise disfavors a stay," because "everyone—even temporarily frustrated applicants and their families—ultimately benefits from a public-school admissions process not tainted by unconstitutional discrimination." App. 19a (quotation marks omitted). Any harm to the Board does not outweigh this strong public interest, because "designing and implementing a new admissions policy on a short timeline," while "inconvenient, is not irreparable." App. 16a.

Coalition for TJ has applied to the Chief Justice for an emergency order vacating the stay pending appeal issued by the Fourth Circuit.

ARGUMENT

A Circuit Justice may vacate a stay issued by a court of appeals where (1) the case "could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). The States agree with the Coalition for TJ that this Court very likely would review this case upon final disposition in the Fourth Circuit, because the case raises important questions of constitutional law upon which lower courts are divided. See Appl. 11–14. The States submit this brief to explain further reasons why the remaining factors for vacatur are also met.

I. The Stay Subjects Asian-American Students To Unconstitutional And Irreparable Racial Discrimination.

The Fourth Circuit's stay should be vacated because it irreparably injures the constitutional rights of Asian-American students applying for admission to TJ. The challenged policy is "directed only to racial balance, pure and simple," an objective this Court "has repeatedly condemned as illegitimate." *Parents Involved*, 551 U.S. at

726 (opinion of Roberts, C.J.); see also *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake."). The violation of the constitutional rights of Asian-American applicants "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

1. This Court has long recognized that a facially race-neutral law is nonetheless unconstitutional where its purpose is invidious racial discrimination. See *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–74 (1886) (prohibiting discriminatory enforcement of facially neutral laws). Where used as tools of racial discrimination, facially neutral policies are "just as abhorrent, and just as unconstitutional, as policies that expressly discriminate on the basis of race." App. 17a (Rushing, J., dissenting) (brackets omitted) (quoting *N.C. State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 220 (4th Cir. 2016)). A government may not evade the Equal Protection Clause's "central mandate" of "racial neutrality in governmental decisionmaking" simply by concealing its discriminatory intent behind neutral language. *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995).

Here, the Board's challenged policy was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"—Asian-American students. *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).[2]

[2] Judge Heytens' concurrence contends that *Feeney* is distinguishable from this case because the "Coalition has never claimed that the challenged policy was motivated by or has any sort of adverse effect on Black or Hispanic applicants." App. 9a. Of course it has not; the claim in this case is that the Board has discriminated against a different "identifiable group"—Asian-American children. The Fourteenth Amendment's command is not limited to particular races. *Schuette* v. *Coal. to Defend Affirmative Action*, 572 U.S. 291, 325 (2014) (Scalia, J., concurring in the judgment) ("Meant to obliterate rather than endorse the practice of racial classifications, the Fourteenth Amendment's guarantees 'obtai[n] with equal force regardless of the race of those burdened or benefitted.'" (quotation marks omitted) (quoting *Miller*, 515 U.S. at 904)). And that the Board intended to discriminate against one racial group in order to benefit other racial groups does not make that discrimination permissible. See *Johnson* v. *California*, 543 U.S. 499, 505 (2005) (strict scrutiny applies to "benign" racial classifications).

"The specific sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker's purposes," including on whether the actions were "taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. Here, the history of the policy reveals the Board's invidiously discriminatory purpose of achieving a preferred racial balance at the expense of Asian-American applicants.

First, the events that catalyzed the Board's actions—the protests following George Floyd's murder, and pressure from state and local officials, including TJ's principal, to change the school's racial composition to match the demographics of the school system—confirm that the Board designed the challenged policy to racially balance the school. *Supra* at 3–4. The Board has put forward no reason for changing the policy apart from increasing "diversity," and the record demonstrates that the "diversity" the Board wanted to achieve was racial rather than "the broader diversity" at issue in some higher-education policies. *Parents Involved*, 551 U.S. at 726 (opinion of Roberts, C.J.); *supra* at 3–4; see App. 168a (policy change intended to "increas[e] diversity through redefining merit").[3] Indeed, the Board rejected a lottery-based admissions system because of concerns that a lottery would "leave too much to chance" and might not achieve the precise racial balance the Board sought. App. 48a. Thus, just as in *Parents Involved*, "the goal established by the school board [was] attaining a level of diversity within the schools that approximates the district's overall demographics." 551 U.S. at 727 (opinion of Roberts, C.J.).

[3] The Board in the district court and Fourth Circuit invoked this Court's decision in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), to defend its admissions policy as "pursu[ing] 'the educational benefits of diversity.'" App. 86a (quoting *Grutter*, 539 U.S. at 340); Appellant's Motion to Stay Pending Appeal at 16, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 2022 WL 986994 (4th Cir. 2022) (No. 22-1280). Setting aside that this Court has not applied *Grutter* outside of the higher-education context, *see Parents Involved*, 551 U.S. at 725 (describing "the unique context of higher education" as a "key limitation[ ]" of the holding in *Grutter*), the reasoning of *Grutter* simply would not apply here. Just like the "diversity" programs rejected in *Parents Involved*, the animating purpose of the Board's admissions policy was to align the enrollment at TJ with the "specific racial demographics" of the region—precisely the sort of "working backward to achieve a particular type of racial balance" that this Court has forbidden. *Id.* at 726, 729 (opinion of Roberts, C.J.).

This Court has made clear that this sort of racial balancing for its own sake is "patently unconstitutional." *Fisher* v. *Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (quotation marks omitted). The prohibition on racial balancing "is one of substance, not semantics"; racial balancing "is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved*, 551 U.S. at 732 (opinion of Roberts, C.J.). While the Board chose facially neutral means to achieve this end, "racial balancing is no less pernicious if, instead of using a facial quota, the government uses a facially neutral proxy motivated by discriminatory intent." App. 18a (Rushing, J., dissenting).

Second, the Board members candidly (and, they believed, privately) recognized that "this process" "discriminated against" Asian-Americans and that "there has been anti [A]sian feel underlying some of this" "made obvious" by "racist" and "demeaning" references made by Superintendent Brabrand. App. 170a, 178a (text message exchange between Board members Abrar Omeish and Stella Pekarsky) (quoting Brabrand's derogatory comments on Asian-Americans "pay[ing] to play"). Board members even acknowledged the deliberate racism in the new policy. App. 170a (Pekarsky) (explaining that Brabrand "[c]ame right out of the gate blaming" Asian-Americans). As the district court explained, the Board members "need not harbor racial animus to act with discriminatory intent." App. 35a.; see also *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995) (rejecting constitutional distinction between "benign" racial classifications and those based on "illegitimate notions of racial inferiority or simple racial politics" (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.))). "What matters is that the Board acted at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group." App. 49a; *Feeney*, 442 U.S. at 279. The contemporaneous statements of the Superintendent and Board members make clear

that the policy was intended, at least in part, to decrease admissions of Asian-American students.

2. The constitutional analysis in Judge Heytens' concurrence is erroneous for several reasons. The concurrence concluded that the district court "relie[d] on the wrong comparator" in concluding that the policy had a discriminatory impact because "the number and proportion of Asian American students offered admission to TJ fell following the challenged changes." App. 7a. According to Judge Heytens, the "more obviously relevant comparator" is "the percentage of applicants versus the percentage of offers." *Ibid.* Under this analysis, the concurrence concluded, the policy had no "disparate impact whatsoever" because "Asian American applicants made up a *higher* percentage of students offered a spot at TJ (54.36%) than of total applicants (48.69%)." App. 8a. In other words, the concurrence would not find a policy to be racially discriminatory so long as the rate of offers to members of each racial group are at least equal to each group's proportion of the entire applicant pool.

This reasoning is hopelessly irreconcilable with the command of equal protection. For one thing, it would bless unadorned racial balancing for its own sake, which is "patently unconstitutional." *Grutter*, 539 U.S. at 330; see also *Fisher*, 570 U.S. at 311; *Parents Involved*, 551 U.S. at 723. Moreover, this theory would sanction a policy dangerously close to a quota system, in which a school board would be free to engineer a system to align the number of offers extended to members of a particular racial group to the proportion that racial group comprised of the applicant pool. Such a system strikes "at the heart of the Constitution's guarantee of equal protection," which "command[s] that the Government must treat citizens as individuals, not simply as components of a racial . . . class." *Parents Involved*, 551 U.S. at 730 (opinion of Roberts, C.J.) (quoting *Miller*, 515 U.S. at 911) (brackets omitted); see *Grutter*, 539 U.S. at 334 ("[A] race-conscious admissions program cannot use a quota system—it

cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'" (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.) (brackets omitted)).

The concurrence's reasoning is also contrary to this Court's instruction to consider the "impact of the official action" in determining whether a facially neutral law is discriminatory. *Arlington Heights*, 429 U.S. at 266; *Feeney*, 442 U.S. at 274–75. Measuring a policy change's impact on a particular racial group is impossible without comparing the racial group's treatment under the new policy to its treatment under the old policy. Cf. App. 19a (Rushing, J., dissenting). Here, the Board's policy clearly had a disparate impact on Asian-American applicants; the proportion of Asian-American applicants extended offers for the class of 2025 dropped 19% from the previous year, *ibid.*, while offers extended to students of *every other* racial group increased.[4]

Of course, disparate impact does not necessarily prove that a facially neutral law violates the Fourteenth Amendment; "the disproportionate impact must be traced to a purpose to discriminate on the basis of race." *Feeney*, 442 U.S. at 260. But as the record below made clear, the discriminatory effect of the Board's admissions policy—that "[i]t will whiten [the] schools and kick our [sic] Asians"—was not an unfortunate byproduct; it was the policy's purpose. App. 170a, 178a (Omeish and Pekarsky); see also *supra* at 10.

The concurrence also incorrectly insists that "Asian American students are not differently situated from any other students when it comes to the 1.5% allocation or the preference for underrepresented middle schools." App. 8a. Asian-American applicants *are* differently situated from other students because they

[4] See Fairfax County Association for the Gifted, *TJHSST Offers Admission to 550 Students; Broadens Access to Students Who Have an Aptitude for STEM* (June 23, 2021), https://tinyurl.com/3pduh7ep.

disproportionately attend a handful of gifted centers that have disproportionately high percentages of eligible applicants. See *supra* at 2–5. These centers draw middle-school students from multiple schools who have scored highly on aptitude tests, and offer them advanced classes. See *supra* at 2–3. The 1.5% set-aside thus "disproportionately forces Asian-American students to compete against more eligible and interested applicants" attending these top gifted centers, rather than competing against all students in the participating divisions. App. 37a. The preference for "underrepresented" middle schools—which excludes these top gifted centers—compounds this disadvantage. App. 37a–38a. There is no apparent reason for the Board to make it disproportionately difficult for students who attend these middle-school gifted centers to obtain admission to its magnet high school, apart from the Board's desire to change that school's racial composition. Indeed, the Board's racial-balancing policies are targeted at Asian-American applicants with such precision that it is difficult to account for them apart from their discriminatory purpose. See *Feeney*, 442 U.S. at 275; *Arlington Heights*, 429 U.S. at 266.

Allowing the Board to use the challenged policy for at least another class of applicants (likely multiple classes) will result in irreparable harm. Appl. 15 (noting that, even with an expedited appeal, the stay will likely affect at least *two* application cycles). As long as the policy remains in place, Asian-American applicants will suffer the irreparable injury of "being forced to compete in a race-based system" that disadvantages them. *Parents Involved*, 551 U.S. at 719. This Court should vacate the stay.

II. The Fourth Circuit Demonstrably Erred In Applying The Equitable Stay Factors.

The Fourth Circuit was also demonstrably wrong in its application of the equitable stay factors, including its consideration of injury to the Board and its weighing of the public interest. See *Nken* v. *Holder*, 556 U.S. 418, 426 (2009).

The concurrence concludes the Board would have been irreparably injured absent a stay because "there is no way for [the Board] simply to revert to the previous admissions policy," and consequently, the district court's order would "requir[e] the Board to design a new admissions policy and then solicit and review applications under a new process, all on a highly compressed timetable and with little opportunity for community input or outreach." App. 12a–13a. As this Court has made clear, however, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Although "designing and implementing a new admissions policy on a short timeline may be inconvenient, it is not irreparable." App. 16a (Rushing, J., dissenting).

Further, the concurrence is wrong that the Board must create a new policy from whole cloth. It contends that the Board could not revert to the previous admissions policy because "[n]one of the current applicants was required to take the formerly mandated standardized tests, two-thirds of which are no longer commercially available." App. 12a. But the previous policy was not just a series of standardized tests; it was a comprehensive policy with several layers of requirements. See App. 25a.

The perfect need not be the enemy of the good. Even assuming that it would not be feasible to require standardized tests for this class of applicants, the Board could use the remaining factors upon which it previously relied to make admissions decisions. At the very least, the Board could easily eliminate the 1.5% set-aside for each middle school, and could eliminate consideration of whether an applicant attends a "historically underrepresented" middle school, both policies that the district court found disproportionately discriminated against Asian-American students. App. 37a–38a. And as the Board acknowledged, "it can move the April deadline—as it did

last year due to this same litigation—and still field a superlative class of students." App. 16a (Rushing, J., dissenting).

Thus, there is no basis to conclude that vacating the stay would irreparably damage the Board's "credibility and reputation in the community" and "TJ's ability to compete for students." App. 13a (Heytens, J., concurring). And, in any event, this Court has held that "damage to reputation" is not a "basis for a finding of irreparable injury." *Sampson*, 415 U.S. at 89.

As Judge Rushing explained, while it would be "frustrating to receive an admissions decision later than expected," the harms the Board posits "simply do not outweigh the infringement of constitutional rights." App. 19a. To the contrary, vacating the stay would best serve the public interest, as it would prevent the Board from subjecting Asian-American applicants to an unconstitutional policy that was designed to harm them, and in fact does so. See *United States* v. *Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all constitutional guarantees.").

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"It is a sordid business, this divvying us up by race." *League of Latin United Am. Citizens* v. *Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.). The sort of race-based exclusion from educational benefits intended by the Board "is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provokes resentment among those who believe that they have been wronged by the government's use of race." *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (brackets and quotation marks omitted). The Fourth Circuit's extraordinary resurrection of this policy of exclusion should not be permitted to stand.

CONCLUSION

The Emergency Application should be granted and the stay pending appeal vacated.

Respectfully submitted.

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