No. 22-1280

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COALITION FOR TJ,

Plaintiff-Appellee,

v.

SCOTT BRABAND, in his Official Capacity as Superintendent of the Fairfax County School Board,

Defendant-Appellant.

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

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AND THE MANHATTAN INSTITUTE AS AMICI CURIAE IN SUPPORT OF THE APPELLEE

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RULE 29(a)(4)(A) CORPORATE DISCLOSURE STATEMENT

The ACR Project is a nonprofit corporation organized under the laws of Texas. The Manhattan Institute is a nonprofit corporation organized under the laws of New York. Neither *amicus* issues stock, nor is owned by or the owner of any corporate entity in whole or in part.

STATEMENT OF COMPLIANCE WITH RULE 29

All parties have granted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored any part of this brief. And no one other than the *amici curiae*, their members, or their counsel financed the preparation or submission or this brief.

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INTEREST OF *AMICI CURIAE*

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law. The ACR Project believes its expertise will benefit the Court in its consideration of this case.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley and Wai Wah Chin, continue this research, including at the policy nexus of education and race underlying this litigation. Most recently, MI has brought on as a senior fellow one of this brief's counsel, Ilya Shapiro, to direct our constitutional studies program.

This case interests *amici* both because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on educational excellence and racial nondiscrimination, policy commitments that we share.

SUMMARY OF THE ARGUMENT

Less than 60 years ago, Prince Edward County became the last Virginia jurisdiction to abandon the state's campaign of "massive resistance" to school integration.[1] This belatedly brought Virginia into compliance with the national consensus that a child's race should have no bearing on that child's education. So ended, for a time, the most glaring example of our failure to live up to the promise of the Declaration of Independence, the Fourteenth Amendment, and (by Prince Edward's move) the Civil Rights Act of 1964.

But there remain those who reject the national consensus and insist on allocating our K-12-children's education based on race. They were wrong to do so during Jim Crow. They were wrong to do so 15 years ago, in Washington State, as the Supreme Court ruled in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). They're wrong today in adopting a race-balancing mechanism to exclude "overrepresented" Asian applicants from Thomas Jefferson High School ("TJ").

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[1] Katy June-Friesen, *Humanities*, Sept./Oct. 2013, Vol. 34, No. 5, Nat. Endowment for the Humanities, https://www.neh.gov/humanities/2013/septemberoctober/feature/massive-resistance-in-small-town.

American law simply does not allow this kind of intentional racial discrimination. And they cannot win their appeal, because they failed to argue below – and so waived – any argument that they have satisfied (or can satisfy) the strict scrutiny properly in play. They're also wrong, on a policy level, because their intentional-if-thinly-veiled racial discrimination appears (from the data available) to be failing to deliver better educational outcomes (in ways consistent with the "mismatch hypothesis").

The district court rightly granted the plaintiff-appellee summary judgment and enjoined the use of the facially neutral but intentionally discriminatory admissions policy the Fairfax County School Board (the "Board") crafted to exclude more Asian kids from TJ. This Court should affirm the lower court's judgment and injunction in all respects.

ARGUMENT

I. The Board Waived Any Argument That It Has Satisfied (or Can Satisfy) the Strict Scrutiny That Applies Here

In this litigation, the appellee pled that the Board violated the Fourteenth Amendment's Equal Protection Clause by adopting a policy intended to achieve racial discrimination against Asian Americans. After considering the evidence, the district court found that, indeed, the Board's adoption of a new admission policy

for TJ in late 2020 acted on "a consensus that, in the [Board's] view, the racial makeup of TJ was problematic and should be changed." *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, 2022 U.S. Dist. LEXIS 33684, *12 (E.D. Vir. 2022). The court specifically found that: (a) "[t]hroughout the process, Board members and high-level FCPS officials expressed their desire to remake TJ admissions because they were dissatisfied with the racial composition of the school," *id.*, at *14-15; (b) the Board's related "discussion of TJ admissions changes was infected with talk of racial balancing from its inception," *id.* at *29; (c) the Board sought "to accomplish their goal of achieving racial balance" by "decreas[ing] enrollment of the only racial group 'overrepresented' at TJ—Asian Americans," *id*., at *15; (e) the Board pursued that end by designing a new admissions policy that would "increase Black and Hispanic enrollment [and,] by necessity, decrease the representation of Asian-Americans," *id*., at *32; and (f) the Board achieved its end—the new program they adopted "has had, and will have, a substantial disparate impact on Asian American applicants to TJ," *id*. at *16-17.

The Board would seemingly have the Court believe that this is a disparate-impact suit, rather than an intentional-discrimination one, see Appellant's Opening Brief, Dkt. 43, at 23-30, but that misunderstands the role the district court's disparate-impact analysis played in its decision. *No* equal protection claim *can* be

a disparate-impact based claim, because "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The district court did not make "disparate impact . . . the starting point" of its analysis for its own sake, but only as a launch-point "for determining whether the Board acted with discriminatory intent." *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *16.

The district court found such intent, based both on the presence of a disparate impact and on the on-point, contemporaneous admissions by Board members and "high-level FCPS officials" throughout their crafting of the challenged policy. Accordingly, any claim that the new policy lacked a disparate impact is basically irrelevant. To wit, the district court found that the Board *intended to harm* TJ's Asian applicants, that it *had harmed* them, and that its policies *will continue to harm* them as long as they remain in effect. No further "disparity" finding is required.

Having found that the Board had engaged in intentional racial discrimination, the district court held that the Board's intentional racial discrimination triggered strict scrutiny. *Id.* at *33. This, too, was correct. The

Supreme Court has long held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (citing cases ranging from *Shaw v. Reno*, 509 U.S. 630, 644 (1993) to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

The Board appears unhappy that the district court uncovered its poorly hidden racial motivations, but neither that unhappiness, nor any Supreme Court precedent, exempts this case from judicial strict scrutiny. When the Board nonetheless contends that the district court erred in applying strict scrutiny, on the purported basis that the Supreme Court has "long held that seeking to improve *racial diversity* is not the same as pursuing *racial balancing*, and that the former goal may be pursued lawfully through race-neutral methods," Appellant's Opening Brief, Dkt. 43, at p. 52 (emphasis in original) (citing *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-510 (1989)), it misrepresents cases that say no such thing. Both *Grutter* and *Croson* involved policies that openly racially discriminated; neither involved a race-neutral policy of any kind. *Grutter*, 539 U.S. at 321, *Croson*, 488 U.S. at 477-478. In both cases, the Court applied strict scrutiny. *Grutter*, 539 U.S. at 326, *Croson*, 488

U.S. at 493. In both, as part of the Court's assessment of whether the discriminatory policy was sufficiently narrowly tailored to survive strict-scrutiny, it discussed the degree to which the defendant had considered less discriminatory and race-neutral alternatives. *Grutter*, 539 U.S. at 339, *Croson*, 488 U.S. at 509.

These discussions were *part* of the Court's strict scrutiny analysis, not an exemption of discriminatory policies couched in race-neutral language from it. They mattered to the Court's decisions only to the extent that a compelling interest had been asserted and held to be in play. The cases provide no justification for the Board's proposal that intentional discrimination, if presented under a label of "Diversity!" and couched in race-neutral language, can skip strict scrutiny entirely.

When the district court rightly applied strict scrutiny, it held that the Board had not met its high standard. *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *15. The Board identified below no "compelling" purpose for its alteration of TJ's admissions policy and failed to establish the "narrowness" of the tailoring of that policy. More importantly for present purposes, the district court found that "[t]he Board *has not argued that its actions satisfy strict scrutiny*." *Id.* at *33 (emphasis added). It cannot now legitimately even *try* to shelter under the purported cover of *Grutter* and *Croson*, or seek to backdoor its way into an argument that the challenged admissions policy satisfies strict scrutiny under them. The Board

simply waived these arguments below, so the Court should not even need to address all the ways the Board's discrimination fails to meet strict scrutiny.[2]

II. The Supreme Court Has Made Clear That Intentional Race-Balancing of Children in K-12 Schools is Unconstitutional

To the extent the Court reaches the merits of the district court's application of strict scrutiny, it should enthusiastically affirm. It should do so, because, in *Parents Involved*, the Supreme Court established bright red-lines for school districts to respect, which the Board clearly violated.

The multiplicity of opinions in *Parents Involved* may obscure the clarity of its majority holdings. But, once extracted from the 3 majority opinions, those holdings are clear. Chief Justice Roberts wrote the lead opinion. *Parents Inv.*, 551 U.S. at 707. Justices Alito and Scalia joined it in full. *Id.* So did Justice Thomas, while also writing a concurrence. *Id*., at 748. Justice Kennedy wrote separately, but joined parts I, II, III-A, and III-C of the Chief Justice's opinion. *Id*., at 782.

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[2] *See Muhler Co. v. State Farm Fire & Cas. Co.*, 2022 U.S. App. LEXIS 3141 (4th Cir. 2022) (holding that a failure to raise an argument at the district court largely waives the argument on appeal) (citing *JTH Tax, Inc. v. Aime*, 984 F.3d 284, 290 (4th Cir. 2021) (barring consideration of "arguments which could have been raised prior to the issuance of the judgment") and *Zoroastrian Ctr. & Darb-E-Mehr of Metro. Wash., D.C. v. Rustam Guiv Found. of N.Y.*, 822 F.3d 739, 753-54 (4th Cir. 2016) (issues first raised on appeal generally are waived absent exceptional circumstances)).

Part III-A of Chief Justice Robert's opinion, then, constitutes the opinion of a clear majority of the Court. It applied strict scrutiny to gauge the Constitutionality of the districts' racially discriminatory policy of assigning children to schools. It restated that in its modern jurisprudence, the Court had only ever allowed race-conscious assignments of children to schools in two contexts: (a) where undertaken to "remedy[] the effects of past intentional discrimination," *Id*., at 720; and (b) "in higher education" where serving to create a "diversity . . . not focused on race alone." *Id.*, at 722. It noted the first had no application to the cases before it, because neither school district at issue remained under a court-ordered desegregation decree. *Id.*, at 720-721. It noted that the second had no application to "elementary and secondary schools" or anywhere else outside "the unique context of higher education." *Id.*, at 725. It specifically held that "an effort to achieve racial balance . . . would be 'patently unconstitutional.'" *Id*., at 723.

In part III-B, four justices further faulted the districts at issue for tying children's access to schools to "each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." *Id*., at 726. They specifically attacked the districts' assumption, supported by "no evidence that the level of racial diversity necessary

to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts." *Id.*, at 727. They described such engineering of a school's demography as "working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits . . . a fatal flaw under our existing precedent [as] 'racial balance is not to be achieved for its own sake.'" *Id*., at 729-730 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

Admittedly, Justice Kennedy did not join this portion of the opinion. But in his own, separate opinion, he went nearly as far. He specified that

> [s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means [than race-based admissions], 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.

Id., at 789. But he recognized a "compelling interest" only "in avoiding racial isolation." *Id.*, at 797.

The resulting rules with respect to race-balancing in K-12 schools are these:

- Strict scrutiny applies;
- Strict scrutiny requires of a racially-motivated school system considering an alteration of admissions policies:
    - an underlying, recent history of intentional discrimination to be redressed;
    - a higher education context for the policy; or, maybe,
    - a goal for the policy of ending documented racial isolation;
- Strict scrutiny cannot be met by a goal of balancing schools' demography to match that of the surrounding districts; and
- Intentional racial balancing of students in K-12 education is "patently unconstitutional."

The district court found the Board to have been motivated, like the districts in *Parents Involved*, by a desire to racially balance TJ, not by any goal of ending the purported racial isolation of any community in Northern Virginia. *Coal. for TJ*, 2022 U.S. Dist. LEXIS33684, at *29. It had to so find, as it was presented with no evidence of any racial isolation in either modern Northern Virginia as a whole or specifically in the five (5) jurisdictions TJ serves: Arlington County, Fairfax

County, Falls Church, Loudoun County, and Prince William County (together, the "TJ Region"), *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *4; no recent history of intentional segregation in either; and no ongoing desegregation case. None of this should be surprising, given that eminent researchers have concluded that the TJ Region's public schools exhibit dramatically *less* racial isolation than the typical American metro area. Memo. from Prof. Richard Sander and Dr. Henry Kim, UCLA Law School, to Dan Morenoff, Amer. Civil Rights Project, School Segregation in Northern Virginia (Jun. 15, 2022) (on file with the ACR Project).[3]

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[3] Prof. Sander and Dr. Kim have an ongoing in-depth national study of school segregation levels in the one hundred largest metropolitan areas of the United States. As part of this ongoing study, Prof. Sander and Dr. Kim assessed, specifically, the TJ Region's segregation using 2019 data compiled by the National Center for Education Statistics, and 2 different, applicable metrics: (a) the "index of dissimilarity," which measures "the proportion of Group A that would need to change schools to achieve an identical proportion of Group A to Group B students at all schools," for the TJ Region's Black and Hispanic populations (as measured against its White population); and (b) an "exposure index" adjusted to reflect the underlying demography, by "calculat[ing] the share of Group A students attending high schools in which the presence of Group B is at least 50% of the general area average" for the TJ Region's Black and Hispanic populations (each as measured by "exposure" to the TJ Region's White population). Prof. Sander and Dr. Kim concluded that the TJ Region's "index of dissimilarity" scores for both groups (each equaling 0.43) were dramatically lower than "the 100-MSA average[s]" (of 0.59 and 0.49), while the TJ Region's adjusted "index of exposure" scores for both groups (of 67% and 63%) were dramatically higher than "the 100-MSA average[s]" (of 44% and 52%). So the TJ Region's scores under both metrics, for both groups, reflect greater integration and less racial isolation than national norms.

An additional reason dictates that the district court's conclusion must be correct that the Board pursued racial balancing rather than an end to racial isolation: context. The policy at issue affects only TJ, a single magnet school with a total enrollment of approximately 1,800. Complaint, Dkt. 1, at p. 8 (¶ 22). The TJ Region is home to approximately 2.2 million people, including approximately 380,000 public school students.

Nothing the Board could do at or to TJ could affect the racial isolation of any group across the TJ Region, if any such isolation existed. TJ's entire population amounts to less than 0.5% of the TJ Region's student body. If the TJ Region *had* an underlying racial isolation problem (which it does not), the Board's alteration to TJ's admissions process could not have meaningfully addressed that problem. *No* policy affecting so small a subset of the TJ Region's student population could *possibly* have been "narrowly tailored" to address a hypothetical community's racial isolation.

For all these reasons, this case presents the fact pattern that part III-A of *Parents Involved* identified as "patently unconstitutional," not Justice Kennedy's hypothetical, where a district's governing body valiantly seeks to break children out of an isolated, educational ghetto.

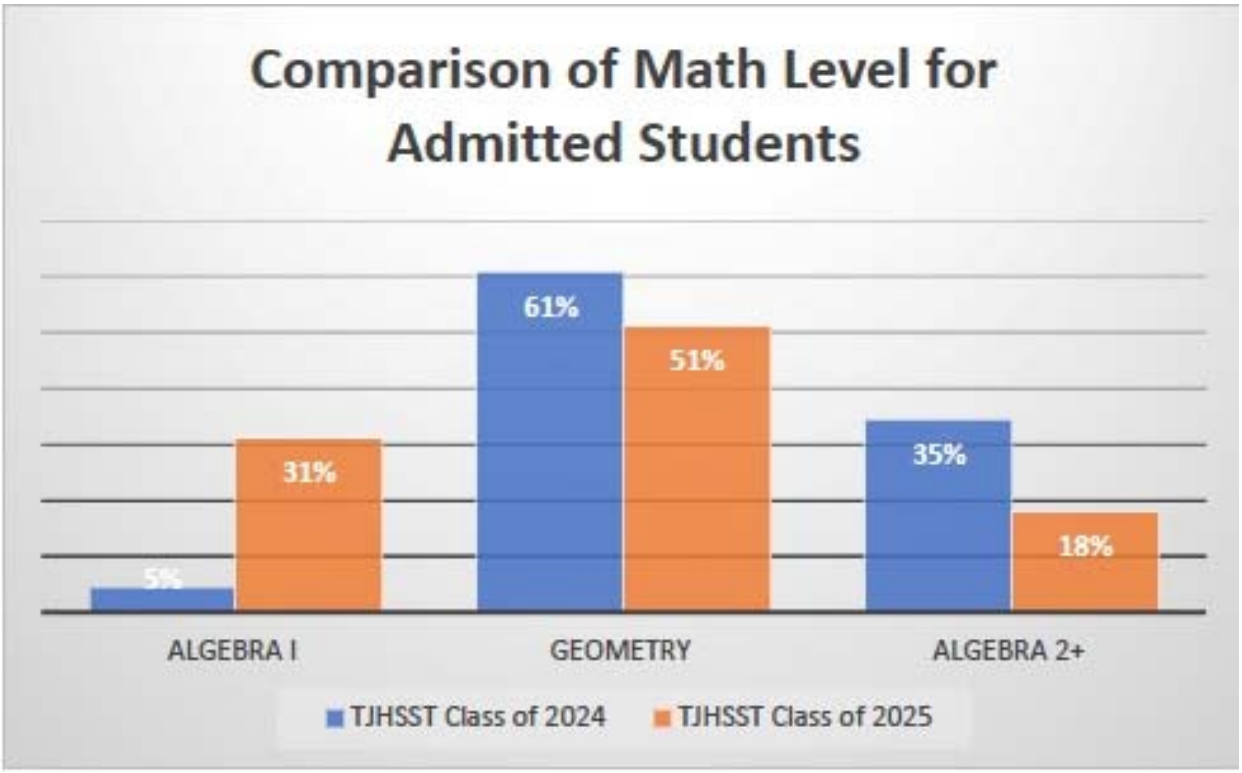
As in *Parents Involved*, the district court found the Board to have *sought* to move TJ's enrollment toward that of the surrounding community, without *any* pedagogic assessment of whether achieving such a student population at TJ would bear any educational fruit. *Coal. for TJ*, 2022 U.S. Dist. LEXIS 33684, at *17 and *22. That their policy has not sufficiently altered TJ's student population in its first year to produce the desired "match" is irrelevant. They undertook their policy change to reduce the "overrepresentation" of Asian students and achieve "proportionality" with the larger community within four (4) years. In year one, they saw their changes reduce Asian representation and bring nearer the achievement of that end. It would be obscene for the Court to rule that, before the judiciary may act to halt the ongoing Constitutional violation, the plaintiffs must wait until the Board's discrimination against local Asians has achieved its clearly documented goal of reducing their numbers at what was America's best public high school to what the Board feels would be racially appropriate.

The Court need not take that extreme step. Indeed, the Supreme Court's binding *Parents Involved* decision dictates that it should not.

III. TJ's Experience after the Changes to Its Admissions Policy That Restrict Asians Fails to Reflect Educational Gains from Enhanced Race-Based "Diversity"

Purely on a policy level, TJ's experience since the Board's alteration of its admissions policy also calls into question whether the increased race-based "diversity" the Board has engineered through its racial balancing has improved the education of anyone at TJ.

Unquestionably, the Board's intervention produced an incoming Class of 2025 dramatically less prepared to thrive than its predecessors. FOIA-d data shows that TJ's admitted class of 2025 (the first to matriculate after the alteration) included a share of students entering after completing the highest possible math class approximately *half* as large as that for the class of 2024, while its share of students entering after completing the *lowest* qualifying math class exceeded that for the class of 2024 by *seven times*. Fairfax County Association for the Gifted, *TJHSST Class of 2025 Admissions: FCAG Analysis* (on file with the ACR Project).



Recent reports have suggested that, since their arrival, TJ's Class of 2025 performed far worse, scholastically, than their older peers. E.g., Asra Q. Nomani, *#1 HS Math Teachers Note "Lowering Standards" – Still: TJ Math 4 Students Had "Lowest Scores We've Ever Seen,"* Asra Investigates, Jun. 11, 2022, https://bit.ly/3mYjBl3. An exemplary email to students from the school's math teachers (specifically, some or all those teaching "Math 4" to, primarily, the Class of 2025) makes the point, by admitting that:

- Teachers crafted their exam to be "'substantially easier' than final exams given to previous classes";

- The school provided "unprecedented supports . . . this semester, including extra practice quizzes, bonus quizzes, practice worksheets, and a practice final exam, all things that were not given to previous students";
- Teachers "expected to see scores rise, not drop, with our lowering of standards"; but
- "[T]he average score . . . was 'in the low 70s with a substantial minority scoring below 50%,'" results constituting "the lowest scores we've ever seen";
- Which triggered a "curve [for] the exam [of] 10 percentage points" to mask results, which the teachers felt their students "should know . . . is artificial and not deserved." *Id*.

This experience is hard to square with the notion that enhancing racial "diversity," alone, improves the resulting education at an institution. Instead, coupled with the available data on how the Board's changes to TJ's admissions policy altered the preparedness of its incoming students, it calls to mind the "mismatch hypothesis" developed elsewhere.

For a generation, researchers have delved through data on the performance of students at colleges with and without race-based admissions preferences, seeking to understand the impact of those policies on their purported beneficiaries. Such research has culminated in the theory, usually labeled the "mismatch hypothesis," that preferential admissions harm their purported beneficiaries. *See generally* Richard Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students Its Intended to Help, and Why Universities Won't Admit It* (2012); Gail Heriot & Maimon Schwarzschild, *A Dubious Expediency: How Race Preferences Damage Higher Education* (2021).

The hypothesis predicts that interventions that increase populations at selective institutions by systematically admitting those who would not otherwise have qualified based on objective metrics: (a) tend to result in those so admitted faring less well than their classmates academically; (b) tend to see such students abandon the more demanding courses of study they preferred at enrollment (and, with them, the pursuit of related high-earning or high-status careers) at rates far greater than such students would have attritted at the institutions to which they would otherwise have matriculated; and (c) as a result—eventually—the "mismatch" produced by such interventions results in fewer of their beneficiaries

emerging as engineers, scientists, professors, doctors, and lawyers than would have resulted if no intervention had occurred.

One might expect TJ's experience to follow suit. To the extent that the Board intended to primarily benefit Black and Hispanic students through its race-balancing, "holistic" admissions process, and that its intervention led to the admission of students with far weaker math backgrounds, predominantly from those groups, one might expect the effort to backfire. One might expect the intended beneficiaries, on average, to suffer rather than benefit from the Board's retreat from a race-blind, merit-based admissions policy.

Has TJ recapitulated this lesson? Given TJ's small size and short experience to date under the Board's race-balancing policy, we cannot yet tell. At most we can say that the early data appears consistent with the Board's intervention having produced a "mismatch" at the high school level.[4]

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[4] A second inconclusive data set points in the same direction: TJ's 2021-2022 in-year student attrition. FCPS makes available 15 years of data on student attrition. https://bit.ly/3HO2s7v. Over the 14 years before the Board altered TJ's admissions process, TJ averaged 4.6 freshman leaving the program annually; in 2021-2022, it saw 12. That figure is both higher than TJ's average over the preceding years and higher than TJ's prior attrition in *any* such year. Such an observed increase in exits from TJ is consistent with the "mismatch" hypothesis, but insufficient to conclude that the Board has created a "mismatch," when we have no visibility into the demography of the attritted students, no information on whether those students would have been admitted under the prior policy, and face data suffering from a host of compounding factors, ranging from the increased size

Nonetheless, the data to date shows no educational gains at TJ from the Board's engineered increase in race-based "diversity" and is sufficiently divergent from prior experience to red-flag its radical departure from pattern.

CONCLUSION

The Court should affirm the district court's grant of summary judgment and issuance of a final injunction. Our law demands no less.

Respectfully submitted,

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June 21, 2022

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of TJ's Class of 2025 to the potential impact of the pandemic on student performance.

CERTIFICATE OF COMPLIANCE

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Dated: June 21, 2022

/s/ Daniel I. Morenoff
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CERTIFICATE OF SERVICE

I hereby certify that, on June 21, 2022, an electronic copy of the foregoing Brief of the American Civil Rights Project and the Manhattan Institute as Amici Curiae in Support of the Appellee was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

Dated: June 21, 2022

/s/ Daniel I. Morenoff
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