UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-3112

SHERICE SARGENT, individually, as next friend of her minor child, and on behalf of those similarly situated; MICHELE SHERIDAN, individually, as next friend of her minor child, and on behalf of those similarly situated; and JOSHUA MEYER, individually, as next friend of his minor child, and on behalf of those similarly situated,

Plaintiffs-Appellants,

v.

The SCHOOL DISTRICT OF PHILADELPHIA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, Philadelphia Division
Case No. 2:22-cv-01509-CFK

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; ASIAN AMERICANS ADVANCING JUSTICE-AAJC; LATINOJUSTICE PRLDEF; THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND SIX OTHER CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLEES

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American Civil Liberties Union Foundation

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Asian Americans Advancing Justice-AAJC

Asian American Legal Defense & Educational Fund

Equal Justice Society

LatinoJustice PRLDEF

NAACP Legal Defense & Educational Fund, Inc.

National Women's Law Center

National Partnership for Women & Families

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel for *amici curiae* certifies that (1) *amici* are not publicly held corporations; (2) *amici* do not have parent corporations; and (3) no publicly held corporation owns 10% or more of stock in the respective *amici*.

RULE 29 STATEMENT

Amici curiae file this brief with the consent of all parties. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici curiae* and its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

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INTEREST OF *AMICI CURIAE*

Amici curiae are ten civil rights organizations dedicated to advancing equal access to educational opportunities. They include:

The NAACP Legal Defense & Educational Fund, Inc. ("LDF"): Founded in 1940 by Justice Thurgood Marshall, LDF strives to secure equal justice under the law for all Americans, and to eliminate barriers that prevent Black Americans from realizing their basic civil and human rights. For more than eight decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity for all students, most prominently in the groundbreaking case, *Brown v. Board of Education*, 347 U.S. 483 (1954).

Asian Americans Advancing Justice-AAJC ("Advancing Justice-AAJC"): Advancing Justice-AAJC is an advocacy group that seeks to advance civil and human rights for Asian Americans. Founded in 1991, Advancing Justice-AAJC has a strong history of promoting equal protection on the social, legal, and political stages. Advancing Justice-AAJC has filed numerous amicus briefs in support of educational equity, and it has represented a group of Asian American and other students of color who testified and presented evidence as student-*amici* plus in support of race-conscious admissions, sharing how consideration of race safeguards

against discrimination and ensures candidates' full life experience can be shared and recognized.

LatinoJustice PRLDEF ("LatinoJustice"): Founded in 1972, LatinoJustice PRLDEF's mission is to use and challenge laws to create a more just and equitable society, transform harmful systems, empower Latino communities, fight for racial justice, and grow the next generation of leaders. For over fifty-three years, LatinoJustice has litigated landmark cases and advanced policy reforms in areas of practice, including economic justice, and immigrants' rights. LatinoJustice has filed and participated in hundreds of briefs in support of equal opportunity and racial equity, including *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Coalition for T.J. v. Fairfax County School Board,* 68 F.4th 864 (4th Cir. 2023); *Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 89 F.4th 46 (1st Cir. 2023).

The American Civil Liberties Union Foundation ("ACLU"): The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared as direct counsel or amicus curiae in numerous cases concerning educational equity and the rights of students. *E.g.*, *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 549 U.S. 180 (2021); *Fisher v. Univ. of Tex. At Ustin (Fisher II)*, 579 U.S. 365

(2016); *Parents Involved in Cmty. Schs. v .Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Together, *amici* submit this brief in support of Defendants-Appellees because they believe public schools further the foundational promise of our Constitution when they adopt race-neutral reforms to allocate educational opportunities, funded by public dollars, more fairly. *Amici* view this lawsuit as an attempt to deter school systems from pursuing such beneficial measures—even when they are urgently necessary to remedy longstanding denials of equal educational opportunities to disadvantaged students, especially Black, Latinx, and underserved Asian American students.

INTRODUCTION

The School District of Philadelphia's (the "District's") criteria-based high schools are public, taxpayer-funded schools that offer an enriched curriculum and significant educational opportunities for students. In 2017, an independent study showed that students living in certain parts of Philadelphia who met these schools' prerequisites for admission were less likely to apply, be admitted after applying, or to accept offers. The study also found that the schools were significantly more likely to reject Black and Latinx students with test scores that met these schools' admissions requirements than white and Asian students with similar scores. The

District's flawed prior admissions process thus prevented qualified students from accessing the tremendous resources the criteria-based high schools offer. To eliminate some of the barriers denying these students an equal opportunity to compete for admission, the District adopted modest, race-neutral policy changes ("reforms") for the 2021-2022 admissions cycle. This included eliminating principal discretion in admission decisions and adopting a zip code preference for qualified applicants from Philadelphia neighborhoods underrepresented in the criteria-based high schools.

Such race-neutral, objective reforms do not violate the Equal Protection Clause, as multiple Courts of Appeals have recently reaffirmed, and the Supreme Court has repeatedly declined to disturb. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46 (1st Cir. 2023), *cert. denied*, No. 23-1137, 2024 WL 5036302 (U.S. Dec. 9, 2024); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (Feb. 20, 2024). Appellants' challenge to the District's race-neutral reforms plainly misconstrues Equal Protection precedent and attacks a lawful effort to remove unfair barriers that have long denied qualified students equal access to the District's criteria-based high schools. Considering the District's history of racial segregation and consistent under-identification of qualified Black and Latinx students for admission to these schools, the District can, and should, adopt race-neutral reforms to ensure that all

students have an equal opportunity to compete for admission to the city's criteria-based high schools.

BACKGROUND

I. The District Has a Long History of Failed Efforts to Provide Equal Educational Opportunities to Students of Color.

The District's history of segregation and failed efforts to equalize educational opportunity provides necessary context for its modest steps to expand access to the criteria-based high schools at issue here. Though the Commonwealth of Pennsylvania prohibited discrimination in education by statute in 1881, Philadelphia officials largely ignored the law and continued to racially segregate students and teachers, even after the Supreme Court's *Brown v. Board of Education* decision.[1] In 1968, 226 of the District's 279 schools were still racially segregated, and in 1971, the Pennsylvania Human Rights Commission ("PHRC") finally ordered the District to develop and implement a desegregation plan, beginning more than three decades of litigation in which PHRC sought to compel the District to integrate its schools.[2]

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[1] Dale Mezzacappa, *Phila. School Fight Difficult, Enduring*, Philly.com (July 11, 2004), https://perma.cc/AV8Q-XQLM.

[2] Michael D. Hinds, *Schools Ordered to Desegregate in Philadelphia*, N.Y. Times (Feb. 5. 1994), https://www.nytimes.com/1994/02/05/us/schools-ordered-to-desegregate-in-philadelphia.html; *see generally* Steven L. Nelson & Alison C. Tyler, *Examining Pennsylvania Human Relations Commission v. School District of Philadelphia: Considering How the Supreme Court's Waning Support of School Desegregation Affected Desegregation Efforts Based on State Law*, 40 Seattle U. L. Rev. 1049, 1057 (2017), https://digitalcommons.law.seattleu.edu/sulr/vol40/iss3/5/.

In 1982, as part of PHRC's repeated petitions for comprehensive desegregation plans, the Commonwealth Court of Pennsylvania found that the District's desegregation policies were ineffective as more than two-thirds of Black students continued to attend racially isolated schools. *Pa. Hum. Rels. Comm'n v. Sch. Dist. of Phila.,* 443 A.2d 1343, 1352 (Pa. Commw. Ct. 1982). The court refused to "grant [its] imprimatur to a desegregation effort which . . . is unsuccessful in accomplishing the desegregation of schools which contain all or nearly all [B]lack students" and ordered the District to adopt a mandatory alternative. *Id.* at 1353.

More than a decade later, the District was still not integrated. In a landmark 1994 decision, the Commonwealth Court held that the District "continues to maintain a racially segregated school environment where all of the students do not receive equal educational opportunities or a quality education mandated by the laws of this Commonwealth." *Pa. Hum. Rels. Comm'n v. Sch. Dist. of Phila.,* 638 A.2d 304, 328 (Pa. Commw. Ct. 1994). The court arrived at this conclusion after reviewing a "voluminous record" detailing the District's failure to "provide to Black and Hispanic students equal access to, among other things, the best qualified and most experienced teachers[,] . . . advanced or special admissions academic course offerings, [and] resources." *Id.* at 308, 328. With respect to the District's special admissions programs for high schools, akin to today's criteria-based high schools, the court found that the District had an "informal policy" of reserving half of all

spots for white students, although they comprised only 22% of the student population. *Id.* at 317.

In 2009, PHRC, the District, and ASPIRA, a Latinx youth advocacy organization that had intervened as a plaintiff to represent the burgeoning Latinx population in the District, entered a consent decree wherein the District agreed to implement a strategic plan focused on increasing achievement and closing opportunity gaps for all students and ensuring the equitable allocation of all District resources. Nelson & Tyler, *supra* note 2*,* at 1066, 1074; *Pa. Hum. Rels. Comm'n v. Sch. Dist. of Phila.,* No. 1056 C.D. 1973, slip op. at 3, 5-6 (Pa. Commw. Ct. July 13, 2009) (consent order settling the case), https://perma.cc/LLP8-DYQ9.

II. The District's Criteria-Based High School Admissions Process Prior to Reforms Was Inequitable.

Despite some progress, unequal educational opportunities persist in the District, especially for students of color. Though it serves a multiracial, multi-ethnic population,[3] the District falls in the top ten most racially segregated school districts

[3] Approximately 49% of Philadelphia's 200,000 public school students identify as Black, 25% of students identify as Latinx, 14% identify as white, 8% identify as Asian American, and 5% identify as multiracial/other. *See Demographics*, Sch. Dist. of Phila, https://dashboards.philasd.org/extensions/enrollment-public/index.html#/demographics (last visited Mar. 20, 2025).

in the country for white-Black, white-Latinx, and white-Asian segregation.[4] And the District's criteria-based high schools have continued to exclude qualified Black and Latinx students.

Appellants inaccurately describe the prior system as "based on academic merit," *see* Appellants' Br. at 2, but before the race-neutral reforms were enacted, the District's admission process heavily relied on individualized discretion and other measures susceptible to bias. *See* Appx4-5; Appx39-40. In addition to standardized test scores, which research shows are dubious markers of merit,[5] the prior process

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[4] *See New 'Segregation Index' Shows American Schools Remain Highly Segregated by Race, Ethnicity, and Economic Status*, Stanford Graduate Sch. Educ. (May 17, 2022), https://ed.stanford.edu/news/new-segregation-index-shows-american-schools-remain-highly-segregated-race-ethnicity-and.

[5] Standardized tests underpredict the potential of Black and Latinx students. For example, in studies of the SAT, Black and Latinx examinees consistently outperformed white students on hard questions (which use vocabulary taught at school), while white students outperformed Black and Latinx examinees on easy questions (which use words with varying colloquial meanings, with the exam crediting answers that reflect the meaning most frequently used in white, middle-class homes like those of the test creators). Because correct answers on easy questions—those infected with cultural bias—yielded the same amount of credit as correct answers to hard questions, test scores for Black examinees were artificially depressed by as much as 200 or 300 points. *See generally* Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 Harv. Educ. Rev. 1, 28-29 (2003), https://psycnet.apa.org/record/2003-03383-001. There is "evidence for this bias pattern across a wide span of tests," including AP exams, the GRE, and high school vocabulary exams. A 2010 study replicated Freedle's findings, showing that the SAT "favors one ethnic group over another" and calling into "question the validity of SAT verbal scores for [Black] examinees." Maria V. Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the*

required letters of recommendation, which can be infected with bias,[6] and gave criteria-based high school principals the final word on admissions, even though "principals . . . have the potential to harbor explicit or implicit racial biases that impact how they run their schools."[7]

This meant that students who failed to meet the minimum standardized test score requirements were sometimes nonetheless admitted to the criteria-based high schools.[8] It also meant that students who met the test score requirements were sometimes excluded.[9] Analysis of the admissions system did not identify a reasonable explanation for the difference in outcomes, and principal discretion

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SAT, and the Standardization Approach to Differential Item Functioning, 80 Harv. Educ. Rev. 106, 126, 128 (2010), https://psycnet.apa.org/record/2010-07755-008.

[6] *See* Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. Rev. Discourse 174, 216 (2016), https://www.uclalawreview.org/privileged-mismatched-lose-lose-position-african-americans-affirmative-action-debate/.

[7] Matt Barnum, *Principals Show Bias in Responses to Black Parents, New Study Finds*, Chalkbeat (Apr. 26, 2021), https://www.chalkbeat.org/2021/4/26/22400039/principals-public-schools-racial-bias-racism-study; *see also, e.g.*, Jordan G. Starck et al., *Teachers Are People Too: Examining the Racial Bias of Teachers Compared to Other American Adults*, 49 Educ. Researcher 273 (2020), https://doi.org/10.3102/0013189X20912758 (finding that teachers exhibit explicit and implicit racial biases, which means that without interventions, "schools are best understood as microcosms of society rather than as antidotes to inequality . . . .").

[8] Pew Charitable Trusts, *Getting Into High School in Philadelphia* (Sept. 2017), https://www.pewtrusts.org/en/research-and-analysis/reports/2017/09/getting-into-high-school-in-philadelphia.

[9] *Id*.

appeared to harm Black and Latinx students' chances for admissions.[10] For example, during the 2015-2016 admissions cycle, 26% of Black students and 34% of Latinx students who satisfied the minimum standardized test score requirements were not admitted to any of the criteria-based high schools to which they applied, as compared with 8% of Asian American students and 20% of white students who scored similarly and were not admitted.[11] Moreover, Asian American and white students who failed to meet the minimum standardized test score requirements were more likely to be admitted to criteria-based high schools (39% and 23%, respectively) than were Black and Latinx students who failed to meet the minimum standardized test score requirements (20% and 15%, respectively).[12] Thus, the District was aware that the prior admissions process under-identified qualified Black and Latinx students while admitting some students who did not meet the admissions criteria.

III. The District Enacted Race-Neutral Admissions Reforms To Attempt To Equalize Educational Opportunities.

The reforms at issue here were enacted to attempt to equalize access to accelerated learning environments. Under the new admissions process, Philadelphia's criteria-based high schools—Academy at Palumbo ("Palumbo"), Carver High School of Engineering ("Carver"), Central High School ("Central"),

[10] *Id.*
[11] *Id.* at 12-13.
[12] *Id.* at 14-15.

and Julia R. Masterman High School ("Masterman")—required students to submit a writing sample graded by a computer program, with schools setting their own minimum qualification scores, and to meet additional criteria set by each school. Appx11-13. Palumbo, for example, required students to maintain As and Bs and a 95% attendance rate, in addition to meeting its minimum score on the writing sample. Appx12. Students who satisfied these criteria and applied—*i.e.*, "qualified applicants"—entered a lottery that determined admissions. Appx14.

Under the new admissions process, schools no longer asked for letters of recommendation or left final admissions decisions to the discretion of principals. Appx12; Appx36. The new process also granted automatic admission to qualified applicants who lived in one of six zip codes identified by the District as the least represented among the criteria-based high schools in that they had the lowest percentages of first-time ninth graders enrolled at Carver, Central, Masterman, and Palumbo in the previous four academic years through 2020-2021. Appx36. The six zip codes identified in 2020-2021 were 19121, 19132, 19133, 19134, 19135, and 19140. Importantly, the six zip codes granted automatic admission change from year to year. For example, in August 2022, the District announced that 19135 was "no longer among the six most under-represented zip codes," and that qualified

applicants in the 19139 zip code would receive automatic admission in the 2022-2023 cycle instead.[13]

As the District's Office of Research and Evaluation noted in a February 2022 research brief, "[t]o the extent that these [criteria-based high] schools are particularly high-achieving, this discrepancy in geographic access may be an indicator of inequities in student access to the opportunities offered by these schools." Appx1433. Indeed, the 2017 study found that "[s]tudents in the ZIP codes with high attendance rates at the special admission schools were more likely to . . . not receive poverty assistance" and that "[e]nrollment [in criteria-based high schools] was lower in ZIP codes where the schools were relatively far away or not readily accessible by public transportation."[14]

The District's reforms help to equalize access to criteria-based high schools, but barriers to access remain. For example, Masterman, unlike the other criteria-based high schools, requires students to take Algebra I in middle school as a prerequisite for admission to ninth grade.[15] However, only 50 (26%) of the District's

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[13] *See* Ltr. from Dr. Tony B. Watlington Sr., Superintendent, to Sch. Dist. Families at 1 (Aug. 16, 2022), https://palumbo.philasd.org/wp-content/uploads/sites/568/2022/08/FAMILY-LETTER_-2022-School-Selection-2.pdf. The 19139 zip code and newly added 19136 and 19124 zip codes are not at issue in this case.

[14] Pew Charitable Trusts, *supra* note 10, at 2, 21.

[15] *See* Julia R. Masterman High School, *At a Glance*, https://masterman.philasd.org/ataglance/ (last visited Mar. 20, 2025).

195 middle schools and K-8 schools offer Algebra I in eighth grade as of November 2023.[16] "In general, the lower the median household income in the school's surrounding neighborhood, the less likely that algebra is available to eighth graders."[17] In the relevant zip codes identified by the District for automatic admission, only five (18%) of the twenty-eight schools that had an eighth grade offered Algebra I.[18] Two of those five schools were not neighborhood schools and had their own admissions requirements.[19] Thus, even in automatic admission zip codes, some students who otherwise meet admissions criteria remain locked out of Masterman simply because Algebra I is not offered in their middle school. This uneven access to Algebra I exemplifies how segregated opportunities create cumulative inequity for students that reverberates throughout their educational trajectories.[20] While the reforms do not fully remedy cumulative educational

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[16] *See* Dale Mezzacappa, *Philly's Premier High School Requires 8th Grade Algebra for Admission. Many Kids Can't Take It*, Chalkbeat (Nov. 13, 2023), https://www.chalkbeat.org/philadelphia/2023/11/13/eighth-grade-algebraaccess-equity-masterman/.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] Research shows that taking Algebra I in eighth grade "helps set students on a path to take high school math classes that are required for admission to many four-year colleges." For example, students who do not take algebra in middle school will not reach calculus in high school unless they double-up on math courses or take summer courses in high school. Moreover, studies show that students who take algebra in eighth grade have higher grade-point averages and ACT scores, and are more likely to graduate high school and go to college. *See Inequities in Advanced Coursework:*

inequity, they are an important step toward attempting to ensure that qualified students, regardless of where they live, have equal and fair access to the district's criteria-based high schools.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's grant of summary judgment for the District and reject Appellants' attack on the District's efforts to remove barriers that have long denied qualified students admission to the criteria-based high schools. As the District Court recognized, the District's reforms advance, rather than violate, equal protection under the law. All Parties agree that the admissions reforms are facially race-neutral and were evenly applied. Thus, because Appellants did not show both that (a) the District was motivated by discriminatory purpose, and (b) the changes to the admissions process had a discriminatory effect, rational basis review was warranted. *See Doe v. Lower Merion Sch. Dist.*, 666 F.3d 524, 543 (3d Cir. 2011).

Appellants failed to show that the plan was enacted with discriminatory purpose. As the District Court correctly concluded, the District's commitments to anti-racism and improving academic outcomes for Black and Latinx students do not

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What's Driving Them and What Leaders Can Do 8, The Education Trust (Jan. 2020), https://edtrust.org/wp-content/uploads/2014/09/Inequities-in-Advanced-Coursework-Whats-Driving-Them-and-What-Leaders-Can-Do-January-2019.pdf.

constitute discriminatory motives, and there is no evidence that District decisionmakers selected automatic admission zip codes to change the racial demographics of any criteria-based high school. Even if the relevant decisionmakers had known the impact of the selected zip codes, mere awareness of a policy's likely impact on demographics is not discriminatory purpose.

Appellants also failed to establish that the changes to the admissions process had a discriminatory effect. The District Court correctly recognized that determining whether the District gave preferential treatment to students based on race requires an analysis of the admissions rate by race. *See Bos. Parent Coal,* 89 F.4th at 57-58; *Coal. for TJ*, 68 F.4th at 879-81. Appellants failed to raise a genuine dispute of material fact because they relied on a twice-rejected "before-and-after" analysis of racial demographics instead.

ARGUMENT

IV. The District Court Properly Found No Evidence of Intentional Racial Discrimination.

The Equal Protection Clause of the Fourteenth Amendment guarantees that all persons receive equal protection of the laws, regardless of their race. U.S. Const. amend. XIV, § 1. In equal protection challenges, courts apply rational basis review to government action unless plaintiffs show that the government acted with discriminatory intent. *Lower Merion*, 665 F.3d at 544. Intentional racial

discrimination can be shown when "(1) a law or policy explicitly classifies a citizen on the basis of race; (2) a facially neutral law or policy is applied differently on the basis of race; or (3) a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact." *Id*. at 543 (citations omitted).

Notably, Appellants "do not argue that the 2022 Admissions Process explicitly classified applicants on the basis of race, or that it was facially neutral but applied differently on the basis of race." Appx22. Instead, Appellants argued that the facially neutral, evenly applied policy was motivated by discriminatory intent and had a discriminatory impact. But Appellants failed to establish a genuine issue of material fact concerning either part of the test.

A. Appellants Failed to Demonstrate Discriminatory Purpose.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). While plaintiffs may establish discriminatory purpose with direct or circumstantial evidence, they must, in either case, show that discriminatory intent was a motivating factor for the government action. *Id.* at 256-66; *Lower Merion*, 665 F.3d at 544. "Racially discriminatory purpose means that the decisionmaker adopted the challenged action at least partially because the action would benefit or burden an identifiable group." *Lower Merion*,

665 F.3d at 552. Importantly, the fact that a policy was designed "'with racial factors in mind' does not constitute[a] racial classification if the policy is facially neutral and administered in a race-neutral fashion." *Id.* at 548 (citing *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)).

As the District Court correctly noted, "whether a discriminatory purpose was a motivating factor" of a government action "requires a 'sensitive inquiry' into the available 'circumstantial and direct evidence of intent.'" Appx32 (citing *Vill. Of Arlington Heights*, 429 U.S. at 266-68). Mere awareness of race or racial demographics is not evidence of discriminatory purpose. *Lower Merion*, 666 F. 3d at 548. "The consideration or awareness of race [by a decisionmaker] while developing or selecting a policy . . . is *not* in and of itself a racial classification." *Id.* at 548 (emphasis added); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (citation omitted).

Nor does a desire to eliminate racial discrimination constitute a racially discriminatory purpose. As the District Court explained, "a desire to safeguard against the potential for race-based-discrimination by moving to an objective system for selecting which students are admitted to the schools they are qualified to attend

does not constitute a racially discriminatory motive. It constitutes the opposite." Appx37. This remains true after the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* ("*SFFA*"), 600 U.S. 181 (2023), which concerned two universities' *race-conscious* admissions policies, and not a PK-12 school system's *race-neutral* admissions policy like the one at issue here. *See Bos. Parent Coal.*, 89 F.4th 46 at 61 ("[W]e find no reason to conclude that [*SFFA*] changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles."). As Justice Kavanaugh has noted, "racial discrimination still occurs and the effects of past racial discrimination persist . . . And governments . . . still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'" *SFFA*, 600 U.S. at 317 (Kavanaugh, J., concurring) (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment)).

What Appellants claim is evidence of discriminatory motive is actually evidence of the District's permissible efforts to address discrimination and equalize educational opportunity. The District's practice of reviewing policies and procedures for bias (the District's "equity lens" review) and its Anti-Racism Declaration expressing its commitment to anti-racist practices are not indicative of

discriminatory intent.[21] Appx34-36. Instead, the District's recognition that the prior admissions process "only truly benefitted a small group of stakeholders, many of whom do not reflect the majority demographic of [the] School District or City" evinces an honest, constitutionally-permissible assessment of an unfair policy that denied many hardworking, qualified students an equal opportunity to compete for admission. Appx37. This assessment is especially justified here given the District's documented history of excluding Black and Latinx students from these educational opportunities. *See* Part I, *supra*. The District's admissions reforms eliminated practices that allowed for unfair bias, including teacher recommendations and principal discretion. *See* Part II, *supra*. Indeed, the District can and should remove additional obstacles to equal opportunity, including the lack of equal access to the Algebra I prerequisite. *Id.* None of these efforts equate to discriminatory purpose. As the Second Circuit explained in *Hayden*, which this Court cited favorably in *Lower Merion*, "nothing in [its] jurisprudence precludes the use of race-neutral means to improve racial and gender representation." 180 F.3d at 51. *See also Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 211 (2d Cir. 2006) ("[T]o equate a 'desire to eliminate the discriminatory impact' on some

[21] The District Court found no link between the challenged reforms and the District's "equity lens" review or its Anti-Racism Declaration, and *amici* have no reason to dispute this finding. We simply assert here that even if these District policies had influenced the reforms, that would in no way constitute evidence of an equal protection violation.

disadvantaged groups with 'an intent to discriminate against' other groups 'could seriously stifle attempts to remedy discrimination.'" (quoting *Hayden*, 180 F.3d at 51)).

In support of their argument, Appellants highlight that Dr. Jubilee, the District's Chief of Equity, was aware of "racial disproportionalities" at the criteria-based high schools. Appx521-25, Appellants' Br. at 14. But as the District Court correctly concluded, "none of Dr. Jubilee's testimony links Defendants' awareness of the racial demographics of the criteria-based high schools to the changes made to the admissions process to those schools." Appx35. Indeed, the six automatic admission zip codes were identified because they had the lowest percentage of qualified students enrolled at Philadelphia's criteria-based high schools between 2017 and 2021, a geography-based distinction that does not implicate the Constitution. *See SFFA*, 600 U.S. at 220 ("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…"). And the racial demographics of the 2021-2022 cycle's automatic admission zip codes matter even less given that the selected zip codes change from year to year, based purely on continued geographic underrepresentation at the criteria-based high schools.

Even if the District's decisionmakers had been aware of the policy's likely impact on the racial demographics of the criteria-based high schools, mere

awareness of a policy's likely impact on racial demographics does not amount to a racially discriminatory motive. As the Fourth Circuit explained in *Coalition for TJ*, "[t]he simple fact that the Board may have been able to discern that expanding TJ's Black and Hispanic student population might—as a 'natural and foreseeable consequence'—impact the enrollment for Asian American students (or students of another racial group), is, under *Feeney*, wholly insufficient from which to infer constitutionally impermissible intent." *Coal. for TJ.*, 68 F.4th at 886. Indeed, many school officials are "likely [to] attempt to predict the effects of admissions changes, if for no other reason than to avoid increasing disparities." *Bos. Parent Coal.*, 89 F.4th at 61. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519, 545 (2015), the Supreme Court explained that "race may be considered in certain circumstances and in a proper fashion," and quoted the portion of Justice Kennedy's *Parents Involved* opinion recognizing that "[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods." *Id.* at 544 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007)).

Finally, despite abandoning the argument below, Appellants now try to revive their argument that language in the District's "Goals and Guardrails" policy

document is evidence of discriminatory purpose. *See, e.g.*, Appellants' Br. at 35. Just as that argument failed at the preliminary injunction stage, it fails here. Appellants argue that the District had a "goal" to increase the percentage of Black and Latinx students who were qualified for admission to the criteria-based high schools, which—per Appellants—could only be achieved by "*reducing* the percentage of Asian-American and white students in the pool of 'qualified' applicants." Appellants' Br. at 45 (emphasis in original). It is entirely contrary to the concept of equal protection to suggest that the District's objective of increasing the percentage of Black and Latinx students *qualified* for criteria-based high schools would in any way constitute a discriminatory motive. Indeed, increasing the pool of students qualified for admission is not the same as making a determination about which students to admit. As the District Court recognized, "improving academic outcomes for Black and Hispanic students" is "a legitimate policy goal". Appx38.

In sum, the District Court correctly concluded that "none of th[e] testimony [relied on by Plaintiffs] indicates that Defendants acted with a racially discriminatory motive; instead, it reveals a desire to correct racial biases that manifested in the previous school selection process." Appx37.

B. Appellants Failed to Demonstrate Discriminatory Impact.

To pursue an Equal Protection challenge against a facially race-neutral, evenly applied policy, Appellants must prove discriminatory impact in addition to

discriminatory purpose. *Lower Merion*, 665 F.3d at 549 ("Although disproportionate impact, alone, is not dispositive, a plaintiff must show discriminatory impact in order to prove an equal protection violation.").[22] Appellants failed to do so here, because they did not show that the admissions reforms "bear[] more heavily on one race than another." *Coal. for TJ v*. 68 F.4th 864 at 879-80 (citing *Vill. of Arlington Heights*, 429 U.S. at 265-66).

i. The District Court Applied the Proper Comparator Analysis.

Appellants incorrectly use the rejected "before-and-after approach," relying solely on the differences in the results of the 2021-2022 and 2022-2023 admissions cycles as evidence of discriminatory impact. That approach to calculating discriminatory impact has been rejected by the Fourth and First Circuits because this "strictly temporal method" of assessing racially discriminatory impact would merely entrench discriminatory and unfair barriers in a school district's prior policy as an

[22] Although *Arlington Heights* may have addressed discriminatory impact as an "important starting point," *see Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.,* 604 U.S. ---- (2024) (Alito, J., dissenting), the question of whether disparate impact remains a necessary element of an Equal Protection claim is not before this Court. In any case, *Arlington Heights* did not change longstanding Supreme Court precedent that legislative intent alone is insufficient to demonstrate an Equal Protection violation. "The pitfalls of such an approach" are many, not least that assessing the different motivations of legislators is difficult, and that a legislature could simply respond by passing a new law for different reasons, if it not struck down "because of its facial content or effect," but based solely on legislative intent. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971).

"immutable quota" against which all future changes, even race neutral ones, would be scrutinized. *Coal. for TJ,* 68 F.4th at 880-81; *see also Boston Parent Coal.*, 89 F.4th at 58. Further, as the District Court correctly concluded, the before-and-after approach Appellants' employ fails to answer the "relevant inquiry"—whether the challenged admissions policy "bears more heavily on one race than another" — because it does not consider factors such as how many students of each racial group actually applied for admission. Appx29 (citation omitted). The proper comparison is each racial or ethnic group's "success rate": their "share of the number of applications to [the schools] versus that group's share of the offers extended" to determine whether any racial group of students "faced proportionally more difficulty in securing admission . . . than do students from other racial or ethnic groups." *Coal. for TJ,* 68 F.4th at 881. And under this proper analysis, the Appellants cannot show discriminatory effect, as the "analysis reveals that the success rates for each racial group are nearly equal; that is, when the percentage of eligible applicants per racial group is compared with the percentage of eligible applicants who are offered admission, the percentages across each racial group appear identical." Appx30, n.11.

The Supreme Court has declined to disturb the Fourth and First Circuit's approach to discriminatory impact in the context of selective admissions programs. *Coal. for TJ,* 68 F.4th 864 (2023) *cert. denied*; *Boston Parent Coal.,* 89 F.4th 46, *cert. denied.* These precedents are consistent with longstanding equal protection

jurisprudence that (a) asks whether the challenged policy "bears more heavily on one race than another," *Vill. of Arlington Heights*, 429 U.S. at 265-66, and (b) allows for policies that further equal opportunity through race-neutral means, especially in the education context, *see, e.g., Inclusive Communities*, 576 U.S. at 545.[23]

ii. The Automatic Admission Zip Codes Are Not a Proxy for Race.

The admissions reforms challenged in this case, including the automatic admission zip codes, distinguish between students solely on the basis of where they live, not their race. This Court's decision in *Lower Merion* is instructive. The Court found that the District's facially neutral, evenly applied plan assigning all students, regardless of their racial identity, to attend a specific school if they lived within an affected area had no discriminatory impact. *Lower Merion*, 665 F.3d at 550-51. Because the plan assigned students to schools "on an equal basis—geography," it had no discriminatory impact absent further evidence that students of different races,

[23] The Second Circuit adopted a different approach to disparate impact, holding that, assuming discriminatory intent is shown—which was not demonstrated here, strict scrutiny is triggered if the challenged policies have a negative effect on even one student. *See Chinese American Citizens Alliance of Greater New York v. Adams*, 116 F.4th 161, 165 (2d. Cir. 2024). By refusing to assess aggregate disparate impact, the Second Circuit's approach is contrary to Supreme Court precedent in that it does not properly weigh whether a challenged policy "bears more heavily on one race than another," *Vill. of Arlington Heights*, 429 U.S. at 265-66. However, even under the Second Circuit's flawed approach, strict scrutiny still would not apply because Appellants have failed to show that the challenged policies were enacted with discriminatory intent.

whether or not they lived within the specified areas, were treated differently, *id.* at 550.

Here, the District Court rejected Appellants' argument that the changes in the number of admitted students from different racial and ethnic groups were a discriminatory effect because those changes could not be attributed to any racial classification. Appx31. Regardless of race, all qualified applicants who lived *within* the automatic admission zip codes were admitted to any criteria-based high school to which they applied; and all qualified applicants who lived *outside* of the automatic admission zip codes had an equal opportunity to be admitted to any criteria-based high school to which they applied through the computerized lottery. *Id.*

V. The District Court Properly Applied Rational Basis Review to Uphold the Admissions Plan.

For the reasons discussed above, the District Court properly applied rational basis review to the District's facially neutral and evenly applied reforms. Rational basis review is "highly deferential," and the reforms are plainly "reasonably related to" the "legitimate" interests of the District. *Lower Merion*, 665 F.3d at 556. First, it is not only legitimate, but commendable for a District to equalize educational opportunities and improve academic achievement, thereby broadening and deepening the pool of qualified applicants to the criteria-based high schools. Indeed, evidence shows that reforms like those at issue here result in the "highest performing

education systems" and benefit society by "improving economic, social and individual outcomes."[24]

Moreover, as a recipient of federal funds, the District is obligated to comply with Title VI of the Civil Rights Act of 1964 and its implementing regulations, which forbid policies that create unjustified barriers with the effect of excluding racially identifiable groups from the benefits of programs like the criteria-based high schools. *See* 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(b)(2) ("A recipient, in determining . . . the class of individuals to be afforded an opportunity to participate in any such program, may not . . . utilize criteria or methods of administration which have the effect of . . . defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin"). Compliance with federal anti-discrimination law is a *compelling* government interest, not just a legitimate one. *See Cooper v. Harris*, 581 U.S. 285, 292 (2017) ("This Court has long assumed that one compelling interest is complying with the operative provisions of the Voting Rights Act . . . .").

[24] *See Equity and Quality in Education: Supporting Disadvantaged Students and Schools*, OECD (2012), http://dx.doi.org/10.1787/9789264130852-en.

CONCLUSION

Amici respectfully urge the Court to affirm the District Court's order granting summary judgment to the District.

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Respectfully submitted,

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CERTIFICATIONS

I hereby certify the following:

1. Pursuant to 3d Cir. L.A.R. 28.3(d), I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. The text of the electronic brief is identical to the text in the paper copies, and Adobe Acrobat's XProtect virus detection program was run on the electronic brief and no virus was detected, which makes this brief compliant with the electronic document limitations of 3d Cir. L.A.R. 31.1(c).
3. The brief complies with the paper size, line spacing, and margin limitations of Fed. R. App. P. 32(a)(4) and 3d Cir. L.A.R. 32.1(b).
4. The brief was prepared with a proportionally spaced typeface and complies with the typeface limitations of Fed. R. App. P. 32(a)(5) and 3d Cir. L.A.R. 32.2(a).
5. Pursuant to Fed. R. App. P. 32(g)(1), the brief contains 6,496 words according to the word count tool in Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 3d Cir. L.A.R. 29.1(b), which complies with the type-volume limitations of Fed. R. App. P. 29(a)(4)(G).

6. I served a copy of this brief on all counsel for the parties electronically through this Court's docketing system.

Date: March 24, 2025

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