

No. 26-2066

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

YI FANG CHEN, individually and on behalf of her minor children M.P., MA.P., and
P.P.,
Plaintiff-Appellant,

v.

ZOHRAN MAMDANI, in his official capacity as Mayor of the City of New York;
KAMAR H. SAMUELS, in his official capacity as Chancellor of the New York City
Department of Education; and NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant-Appellees,

and

TEENS TAKE CHARGE; DESIS RISING UP AND MOVING; COALITION FOR ASIAN
AMERICAN CHILDREN AND FAMILIES; K.D., a minor by and through their parent
and next friend, HALIMATOU DIALLO; G.R., a minor by and through their parent
and next friend, JENNIFER VELEZ; A.C., a minor by and through their parent and
next friend, VERONICA CARRASQUILLO; and A.Z., a minor by and through their
parent and next friend, WANG JIN HUA,
Defendant-Intervenor-Appellees.

On Appeal from the United States District Court
for the Southern District of New York
Honorable Edgardo Ramos, District Judge

**DEFENDANT-INTERVENOR-APPELLEES' OPPOSITION TO
APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL**

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PRELIMINARY STATEMENT

Appellant Yi Fang Chen is not entitled to a mandatory injunction pending appeal, as she has not provided a “significantly higher justification” than required on her failed motion below. *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 226 (2d Cir. 2020). She cannot meet this heightened burden, which requires a clear or substantial likelihood of success on the merits. Chen challenges a facially-neutral, evenly applied policy adopted to mitigate a history of inequities. But she fails to provide any evidence of an intent to discriminate and, instead, attempts to evade the controlling legal standard. She attempts to shift her burden entirely, arguing “modern” equal protection law newly places the burden on the Defendants to justify their facially-neutral policy. This is unsupported by law. Applying the proper standard, she cannot establish a clear or substantial likelihood of success on the merits of either her Equal Protection or Title VI claim. Accordingly, this Court should deny the motion.

BACKGROUND

Access to the Specialized High Schools (“SHSs”) is determined by a student’s rank-order score on the Specialized High School Admissions Test (“SHSAT”). *See* N.Y. Educ. Law § 2590-g(12)(b) (1997). State law also permits the use of a “[D]iscovery [P]rogram,” which is open to students who (1) take the SHSAT and score highly but narrowly miss the SHSAT score cut-off; (2) are certified by their

local schools as “disadvantaged”; (3) are recommended by their middle school “as having high potential for the special high school program”; and (4) attend, and subsequently pass, a summer preparatory program administered by the school. N.Y. Educ. Law § 2590-g(12)(d). The New York City Department of Education (“DOE”) has discretion to determine the capacity allotted to the Discovery Program.

Since its adoption in 1971, serious concerns persist that the SHSAT underpredicts the potential of Black and Latinx examinees. The SHSAT was adopted despite awareness that it was “‘screen[ing]’ out [B]lack and Puerto Rican students who could succeed at the school[s]”.¹ In 2012, a multiracial, multiethnic coalition of community organizations filed a complaint with the U.S. Department of Education, challenging the single-test admissions process as ineffective and racially discriminatory.² The complaint argued that exclusive reliance on the SHSAT does not fully capture the wide range of intellectual capacities and abilities that indicate a student has the potential to thrive in academically rigorous programs, especially for students of color and those from low-income backgrounds.³ Further, in middle

¹ M.S. Handler, *Bronx High School of Science Accused of Bias in Admissions* 44, N.Y. Times (Jan. 22, 1971), <https://www.nytimes.com/1971/01/22/archives/bronx-high-school-of-science-accused-of-bias-in-admissions.html>.

² Compl. from NAACP Legal Def. Fund et al. to U.S. Dep’t. of Educ. 18 (Sep. 27, 2012), <https://www.naacpldf.org/wp-content/uploads/Specialized-High-Schools-Complaint.pdf>.

³ See Carolyn M. Callahan, *Identifying Gifted Students from Underrepresented Populations*, 44 Theory Into Prac. 98, 102–03 (2005), https://doi.org/10.1207/s15430421tip4402_4.

schools with high concentrations of low-income Black and Latinx students, there was no opportunity to learn the material tested on the SHSAT because the requisite courses were not offered.⁴

The current Discovery Program admissions policy (“Policy”) took effect in 2018, to address inequitable access to the SHSs. Under the Policy, each SHS is required to use the program to fill at least 20% of its seats. Second, to qualify as “disadvantaged,” a student must attend a high-poverty middle school according to the City’s Economic Need Index (“ENI”)—a school with an ENI of 60% or above—to be eligible for the program.⁵ This is a particularly apt metric because low-income students who attend high-poverty schools have less opportunities to develop latent talent than even low-income students who attend schools with a lower concentration of poverty.⁶

⁴ See Shirley M. Malcolm, *Equity and Excellence Through Authentic Science Assessment*, in *Science Assessment in the Service of Reform* 313, 318 (Gerald Kulm & Shirley M. Malcolm eds., 1991), <https://files.eric.ed.gov/fulltext/ED342652.pdf>.

⁵ To qualify as disadvantaged under the revised criteria, a student must attend a school with an ENI of 60% or above and “(1) qualify for free or reduced-price lunch; (2) receive assistance from the New York City Human Resources Administration; (3) be a foster child, a ward of the state, or in temporary housing; or (4) have been an English Language Learner within the last two years and have enrolled in a DOE school for the first time within the last four years.” *McAuliffe*, 364 F. Supp. 3d 253, 267 (S.D.N.Y. 2019).

⁶ See, e.g., Rashea Hamilton et al., *Disentangling the Roles of Institutional and Individual Poverty in the Identification of Gifted Students*, 62 *Gifted Child Q.* 6, 16 (2018), <https://files.eric.ed.gov/fulltext/ED580859.pdf>.

Chen also challenged this same Policy in the related case of *Christa McAuliffe Intermediate School PTO v. de Blasio*, No. 1:18-cv-11657 (S.D.N.Y.) [hereinafter *McAuliffe*]. In *McAuliffe*, Chen’s son M.P. was dismissed for lack of standing. 364 F. Supp. 3d 253, 272, 276 (S.D.N.Y. 2019), *aff’d*, 788 F. App’x 85 (2d Cir. 2019). Years later, Chen filed the instant case on April 23, 2026, again challenging the Policy after M.P., now a rising ninth grader, was admitted to his second-choice SHS but failed to qualify for admission to his first-choice, Stuyvesant. Chen sought a mandatory injunction that would order the Defendants to admit M.P. to Stuyvesant for the 2026–27 school year.

On July 21, 2026, the district court heard argument and denied the request, finding that Chen had not shown that the Policy was enacted to discriminate against Asian American students, and thus was unlikely to succeed on the merits. App. Mot., Ex. A at 50:21–51:3; 53:14–55:8 [hereinafter “Tr.”]. On July 24, 2026, the district court denied Chen’s request for injunction pending appeal. On August 3, 2026, Chen filed the present motion.

LEGAL STANDARD

Chen asks this Court to admit M.P. to Stuyvesant, relief already denied by the district court. Such an injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Where, as here, Chen seeks a

mandatory injunction that “disrupt[s] the status quo, [she] must meet a heightened legal standard by showing ‘a clear or substantial likelihood of success on the merits.’” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quoting *N.Y.C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)). She must also show that M.P. is “likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

A request to this Court for such relief is “more drastic” than requests for a stay, and “demands a significantly higher justification,” because it “does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Agudath Israel of Am.*, 980 F.3d at 226 (quoting *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010)). Chen failed to justify an injunction below and certainly does not make the heightened showing required here.

ARGUMENT

I. Chen Cannot Show a Clear Likelihood of Success on the Merits

As the district court found, Chen failed to meet her burden to show that the Policy was intended to discriminate against Asian American students.

A. The Policy Is a Race-Neutral, Evenly Applied Rule That Was Not Motivated by Discriminatory Animus

To establish a violation of the Equal Protection Clause, Chen must show that the Defendants intentionally discriminated based on race. *Hayden v. Cnty. of*

Nassau, 180 F.3d 42, 48 (2d Cir. 1999). There are three categories of intentional discrimination claims:

First, a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender. In addition, a law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. Lastly, a facially neutral statute violates equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect.

Id. (citation modified); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227–29 (1995); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977).

First, Chen’s attempt to cast the Policy as a racial classification fails. “A statute or policy utilizes a ‘racial classification’ when, on its face, it explicitly distinguishes between people on the basis of some protected category.” *Hayden*, 180 F.3d at 48. Race is not a factor for participation in the Discovery Program. Second, this facially-neutral policy is not administered in a discriminatory fashion. *Id.* All students who meet the race-neutral criteria are eligible to participate, regardless of race.

Thus, to prevail, Chen must prove the Policy was motivated by “invidious discriminatory purpose through such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266. This is fundamentally distinct from review of facial racial classifications, where the defendant bears the burden of strict scrutiny, even if their intent was “benign.” *Regents of Univ. of Cal. v. Bakke*,

438 U.S. 265, 294–95 (1978); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) [hereinafter *SFFA*] (finding an equal protection violation despite “commendable goals.”).

Chen must establish not just intent as volition, but an intent to disadvantage a specific group. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘[D]iscriminatory purpose,’ . . . 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.”). “Discriminatory intent or purpose typically refers to those instances when a government actor seeks to disadvantage or negatively impact a group of persons.” *Hayden*, 180 F.3d at 50. The allegation that intent “to mitigate the negative impact” of an admissions program on certain racial groups “is akin to an intent to discriminate . . . is wholly insufficient” and “does not demonstrate [action] ‘because of’ some desire to adversely affect [plaintiff].” *Id.* at 50–51 (citing *Feeney*, 442 U.S. at 279); *see also Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 211 (2d Cir. 2006) (“[I]t is not enough for the plaintiffs to demonstrate that [a government policy] was designed to benefit certain included groups They must show [the government’s] intent to harm the groups . . . that were excluded.”).

Whether discriminatory purpose was a motivating factor behind a policy “demands a sensitive inquiry into such circumstantial and direct evidence of intent

as may be available.” *Chinese Am. Citizens All. of Greater N.Y. v. Adams*, 116 F.4th 161, 172 (2d Cir. 2024) (quoting *Arlington Heights*, 429 U.S. at 266) [hereinafter *CACAGNY*]. On the evidence proffered here, Chen cannot demonstrate a “clear or substantial likelihood of success” on her Equal Protection claim.

B. There is No Evidence of Discriminatory Intent

To determine intent, courts consider circumstantial and direct evidence, including: (1) whether the action “bears more heavily on one race than another”; (2) the historical background of the decision; (3) substantive and procedural departures from the normal process; and (4) contemporaneous statements from the legislative or administrative record in determining whether a facially race-neutral and evenly applied policy evinces discriminatory intent. *Arlington Heights*, 429 U.S. at 266–68. The first three factors are largely not in dispute. With respect to the fourth factor, Chen mischaracterizes the record.

1. The Policy does not bear more heavily on Asian American students

“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” *Arlington Heights*, 429 U.S. at 266. That is not the case here. After the adoption of the Policy, only 11 majority-Asian American middle schools were deemed ineligible for the Discovery Program, which constituted only

10.4% of the excluded schools.⁷ In comparison, 15 majority-Black middle schools were excluded, constituting 14% of the excluded schools.⁸ Moreover, Asian American students continue to be admitted to the SHSs in high numbers, well above their proportion of the student body. After the adoption of the Policy, the number of Asian American students admitted through the Discovery Program has also remained high. In 2025, Asian American students were 32.4% of SHSAT test takers and received 53.5% of the non-Discovery Program admissions offers and 63.3% of Discovery Program offers.⁹ This year, the number of offers to Asian American students increased to 56.5%, and of this year's 800 Discovery Program participants, 62% are Asian American. In contrast, only 11% of the Discovery Program participants are Black and 16% are Latinx.¹⁰ Chen's allegation that the Policy was motivated by a desire to discriminate against Asian American students by favoring

⁷ See *Demographic Snapshot 2020-21*, <https://infohub.nyced.org/docs/default-source/default-document-library/demographic-snapshot-2016-17-to-2020-21-public.xlsx>; see also App. Mot. 10 n.7.

⁸ See *Demographic Snapshot 2020-21*, *supra* note 7.

⁹ See NYC OpenData, *2025 SHSAT Discovery Overall Summary Website*, https://data.cityofnewyork.us/Education/Specialized-High-Schools-Admissions-Overall-Summar/unse-x4pq/about_data. While these statistics are not included in the record, Defendant-Intervenors-Appellees request that this Court take judicial notice of this information as “relevant matters of public record.” See *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012).

¹⁰ Amy Zimmer & Michael Elsen-Rooney, *Just 1 Black Student Gets into Staten Island Tech as Racial Gaps at Specialized High Schools Persist*, Chalkbeat (July 10, 2026, 5:52 ET), <https://www.chalkbeat.org/newyork/2026/07/10/nyc-specialized-high-admissions-data-racial-disparities-shsat/>.

Black and Latinx students is further belied by the continuing single digit admissions of Black and Latinx students. This year, only 3 of the 777 offers of admission to Stuyvesant went to Black students.¹¹

2. The historical background does not warrant an inference of discriminatory purpose

Here, the historical context also counsels against an inference of intent to discriminate, and Chen does not contend that DOE deviated from normal substantive and procedural processes. The test-only process was adopted despite evidence that it screened out qualified Black and Latinx students. *See supra* Background. In the intervening decades, DOE largely ignored the tools it had to mitigate unfairness in the admissions process. In 2018, the School District was under investigation for civil rights violations because of its SHSs admissions practices. Community members increasingly raised concerns that the single-test admissions policy to the schools was out of step with the best educational practices and led to the under-identification of qualified students. *Id.* Against this backdrop, DOE debated and adopted the Policy.

¹¹ Matthew Haag, *An Elite N.Y.C. Public School Admitted 777 Students. Only 3 Were Black*, N.Y. Times (July 14, 2026) <https://www.nytimes.com/2026/07/14/nyregion/nyc-specialized-schools-black-hispanic.html>.

3. Contemporaneous public statements by decisionmakers do not evince an intent to discriminate

The statements by then-Mayor de Blasio in an op-ed, then-Chancellor Carranza in response to a reporter's questions, and the June 2018 press release, do not show an intent to discriminate against Asian American applicants. *C.f.* App. Mot. 18. Instead, these statements show DOE's intent (and indeed obligation) to mitigate the discriminatory effect of its prior admissions policies. In the op-ed, the Mayor explained that the goal of the changes was to "give a wider range of excellent students a fair shot at the specialized high schools[,] including "from a wider number of middle schools."¹² The op-ed recognized that the prior policy failed to objectively identify qualified students from certain neighborhoods, which had a racially disparate impact on Black and Latinx students. Chancellor Carranza's contemporaneous statements in response to a reporter's question about whether the policy pitted "minority against minority," also reflect a concern with fairness in admissions for students of all races and ethnicities. He said he did not "buy into the narrative that any one ethnic group owns admission to these schools," App. Mot. 7, rejecting the premise that a policy designed to open opportunities more fairly to students of all races would unfairly disadvantage any minority group. And as the

¹² Bill de Blasio, *Mayor Bill de Blasio: Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, Chalkbeat N.Y. (June 2, 2018) <https://www.chalkbeat.org/newyork/2018/6/2/21105076/mayor-bill-de-blasio-our-specialized-schools-have-a-diversity-problem-let-s-fix-it/>.

district court already recognized when evaluating this exact statement in *McAuliffe*, context matters. 364 F. Supp. 3d at 278. There, the district court determined that “[i]n context, Chancellor Carranza’s response is best understood” not as intent to exclude Asian Americans, but “as a rebuke of what he saw as the idea suggested by *the interviewer*—that minority ethnic groups must compete with each other for their right to specialized school seats.” *Id.* Moreover, an isolated statement like this cannot demonstrate discriminatory intent by the decision-making body, especially given the heightened standard here. Finally, the press release, including a projection by the City that the Policy would likely almost double the number of Black and Latinx students admitted to the SHSs, App Mot. 5 n.3, is not evidence of intent. Instead, it shows an awareness that removing artificial barriers to admission would likely result in improved identification of qualified students.

Chen’s reliance on *Herrera v. New York City Department of Education* does not change the calculus. No. 1:21-CV-7555-MKV, 2024 WL 245960, at *1–2, *7–8 (S.D.N.Y. Jan. 23, 2024). In *Herrera*, the court found that statements by then-Mayor de Blasio and then-Chancellor Carranza expressing a desire for DOE leadership to “reflect the diversity of the city” or “look like New York City,” when combined with concrete evidence of adverse race-based employment actions, were sufficient to create a genuine dispute of material fact, reversing summary judgment against the plaintiff. *Id.* at *8, *14–15. Here, Chen is seeking an extraordinary remedy that can

only be justified by a strong showing of clear or substantial likelihood of success on the merits, and points only to statements demonstrating an interest in addressing inequities on the basis of race, geography, and economic need through modest changes to an admissions process.

American Council of Learned Societies v. National Endowment for the Humanities is likewise distinguishable. No. 25-CV-3657-CM, 2026 WL 1256545, at *55, *57 (S.D.N.Y. May 7, 2026). In that case, “the Government expressly employed . . . classifications,” using the terms “‘BIPOC (Black, Indigenous, People of Color),’ ‘Minorities,’ ‘Native,’ ‘Tribal,’ ‘Indigenous,’ ‘Immigrant,’ ‘LGBTQ,’ ‘Homosexual,’ and ‘Gay’” as the operative criteria for terminating federal grants. *Id.* at *55. No such classifications are part of the challenged Policy.

4. Internal DOE documents do not evince discriminatory intent

Chen also relies on documents reflecting the course of developing changes before the Policy was presented to ultimate decisionmakers: email discussions between DOE employees who did not have ultimate decision-making authority, a 2018 DOE slide deck, chart, and a pro/con document (together, “internal DOE documents”). These do not show the decisionmaker’s intent, nor do they show any discriminatory intent.

Chen relies on a May 30, 2018, email from DOE employee Nadiya Chadha referring to the Discovery program as a “lever to admit more Black and Hispanic

students.” App. Mot. 7 (citing Ex. 2 at ChMc_E_066808). Chen incorrectly argues that this is evidence of “racial balancing,” when this statement only shows that Chadha had a desire to address the under-identification of qualified Black and Latinx students because the prior policy unfairly excluded many. This is not remotely like “racial balancing” the Supreme Court has previously examined in striking down the use of facial racial classifications, which involved the use of “quotas” or “set asides” and the express consideration of an individual’s race as a factor. *See Bakke*, 438 U.S. at 315 (“Nor would the state interest in genuine diversity be served by . . . [a] set aside for each [ethnic group].”) Chen cannot point to any quotas, set asides, or even targets at use in adopting the Policy, and the Policy does not include any consideration of an applicant’s race. Awareness that the prior policy failed to address inequities, and a desire to address those inequities is both appropriate and constitutional. *See Hayden*, 180 F.3d at 50–51. Further, Chen does not provide evidence that Chadha was a decisionmaker in adopting the Policy. Thus, Chadha’s statements are not reflective of the motivation of decisionmakers.

Chen also relies on an April 2018 DOE slide deck titled, “Specialized High Schools Admissions Process,” pointing to the fourth slide, which lists increasing “the diversity of the Specialized High Schools” as a “guiding principle.” App. Mot. 8 (citing Ex. 3 at ChMc_E_114807, 114809) (internal quotations omitted). As noted, “there is nothing constitutionally impermissible about a school district including

racial diversity as a consideration and goal in the enactment of a facially neutral plan.” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 62 (1st Cir. 2023), *cert. denied*, 145 S. Ct. 15 (2024). Ignoring the fact that the Policy’s methods are themselves race-neutral, Chen also points to slide 5 to argue that DOE “dismiss[ed] alternative race-neutral options—recommendation letters, interviews, writing assessments,” App. Mot. 8. But Chen omits key context that demonstrates DOE rejected these alternatives not because of race, but because research showed these measures “can introduce new types of bias to the process.” *See* App. Mot., Ex. 7 at ChMc_E_114809.

Further, Chen wrongly claims that the chart on App. Mot. 9 shows that the ENI threshold was a “proxy [chosen] to achieve a desired racial result.” App. Mot. 21. Chen mischaracterizes the data, arguing that the chart shows that “under the [Policy] the Asian American share of Discovery admittees would drop from 64 percent to 38 percent.” App. Mot. 9 (emphasis added); *id.* at 21 (arguing the City Defendants projected the ENI measure to “cut the Asian-American share of Discovery offers nearly in half”). Not so. While the left column in the chart shows the demographic breakdown of the Discovery Program admittees in Fall 2018 prior to the implementation of the Policy, the right column shows the projected demographic breakdown of the pool of students who would satisfy the ENI requirement—not the predicted admittees. *See* App. Mot, Ex. 4 at ChMc_E_065914.

To participate in the Discovery Program, a student must not only satisfy the ENI requirement but also individual disadvantage requirements. Chen ignores that the chart states that it does not “reflect income eligibility or student interest in participating,” App. Mot. 9, indicating that the right column is not reflective of the percentage of students who would ultimately be selected to participate in the Discovery Program.

Additionally, internal emails within the same exchange show that DOE expected the percentage of Asian American admittees to drop by just one percentage point—not 26 percentage points—once the Policy was implemented. *See* App. Mot, Ex. 4 at ChMc_E_065911.

Chen misleadingly argues that discriminatory intent should be inferred by the fact that “11 of 24 majority Asian-American middle schools were rendered ineligible” by the revised ENI threshold. App. Mot. 9. But she ignores that, in 2017–2018—the same year that these 11 middle schools were excluded—106 middle schools were ineligible in total.¹³ The 11 majority-Asian American middle schools deemed ineligible constituted only 10.4% of the excluded schools, while 15 majority-Black schools were excluded.¹⁴ Consistent with Mayor de Blasio’s op-ed,

¹³ *See Demographic Snapshot 2020-21, supra* note 7.

¹⁴ *Id.*

this shows the SHSs had a geographic diversity issue that Defendants were trying to mitigate.

Chen also fails to address the emails in Exhibit 4 that provide further context for Defendants’ decision to select the 60% ENI threshold, which discuss that the 60% threshold is “grounded in the citywide average” of students in poverty. *See App. Mot.*, Ex. 4 at ChMc_E_065910. These emails show that DOE employees rejected an 80% threshold—despite it being projected to increase the percent of Black students who were eligible more than the 60% threshold—because the 80% threshold would be “skipping over legitimately resource-challenged students.” *Id.*

Finally, Chen claims an internal “pro/con” list shows that some policy makers were aware of possible “vociferous” opposition to the Policy from Asian Americans. *App. Mot.* 8. She argues that this is evidence that Defendants knew the challenged Policy would harm other racial groups. *Id.* But the “vociferous” opposition from Asian Americans is listed as a “con” of phasing out the SHSAT, which is not at issue in this case. *See App. Mot. Ex.7.* Further, awareness of possible opposition does not equate to discriminatory animus.

Whether read together or separately, the documents Chen relies on show, at most, that DOE was aware of demographics in SHS admissions and took modest steps to mitigate unfair barriers based on race, geography, and income. This evidence

falls far short of “clear or substantial” evidence that the Policy was motivated by a discriminatory purpose.

C. Nothing in *SFFA* Requires a Facially Race-Neutral Policy Devoid of Discriminatory Intent to Satisfy Strict Scrutiny

There is no record evidence of Defendants’ intent to discriminate against Asian American students. And the Supreme Court is clear that a school district’s mere awareness of race in designing its policies is *not* evidence of per se racial discrimination. Indeed, in certain circumstances, a state can use race to address the continuing effects of past discrimination. “When setting their larger goals, local [] authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.” *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015).

Despite Chen’s arguments, this remains true after *SFFA* and *Louisiana v. Callais*, 146 S. Ct. 1131 (2026). Neither case casts doubt on the validity of facially-neutral policies designed to improve diversity. Indeed, as Justice Kavanaugh noted in *SFFA*, “racial discrimination still occurs and the effects of past racial discrimination still 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) (citation omitted). And while Chen cites the admonition in *SFFA* that schools should

not attempt to circumvent their order, App. Mot. 19, she ignores the Court’s clear statement that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” *SFFA*, 600 U.S. at 230. This was meant to ensure that universities did not circumvent *SFFA*’s anti-classification principle, which is inapplicable here, where the Policy does not classify based on race.

Callais similarly did not change the standard for evaluating the constitutionality of facially race-neutral policies. Indeed, the Court in *Callais* repeatedly cited to *Alexander v. South Carolina State Conference of the NAACP*, a case that made clear “there is nothing nefarious” about such an “awareness” of race when making policy decisions. 602 U.S. 1, 37 (2024). *Callais* also reaffirmed that it is lawful to use race to remediate “specific, identified instances of past discrimination that violate[] the Constitution or a statute.” *Callais*, 146 S. Ct. at 1152 (citing *SFFA*, 600 U.S. at 208).

The Third Circuit’s decision in *Sargent* should not guide this Court either. *See* App. Mot. 20 (discussing *Sargent v. Sch. Dist. of Phila.*, 165 F.4th 727 (3d Cir. 2026)). *Sargent* is both out of circuit and wrongly decided. The court’s analysis with respect to intent was incorrect and inconsistent with Supreme Court precedent. A

school district's commitment to remedying past discrimination and racial equality is not probative of discriminatory intent. *See Alexander*, 602 U.S. at 37.

And in any event, *Sargent* is also distinguishable. *Sargent* dealt with whether there was enough evidence to proceed to trial, not whether plaintiffs were entitled to the extraordinary relief of an injunction pending appeal. Second, the *Sargent* court analyzed the unique circumstantial evidence at issue in that case, which of course cannot substitute for a sensitive inquiry into the facts here. Finally, although the *Sargent* court discussed *SFFA*, Chen points to no support that it altered the applicable equal protection standards based on *SFFA*—something *SFFA* itself did not purport to do. This Court should not depart from its own precedent and the clear body of Supreme Court precedent based on vague assertions regarding a non-controlling case.

Chen has not met her heightened burden of showing a clear or substantial likelihood of success on her Equal Protection Claim, and on that basis alone, the Court must deny the motion.¹⁵ Because she fails to show that the Policy was motivated by intent to discriminate, the discriminatory effect inquiry will fail too. *CACAGNY*, 116 F.4th at 173.

¹⁵ For the same reasons, the Title VI claim is also unsuccessful. Title VI is coextensive with the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003).

II. Chen Failed to Make a Strong Showing of Irreparable Harm

Chen has not demonstrated irreparable harm. Because the irreparable harm inquiry is tied to the likelihood of success on the merits of the constitutional claim, *Seventh Regiment Armory Conservancy, Inc. v. Knight*, 811 F. Supp. 3d 467, 478 (S.D.N.Y. 2025); see Tr. 16:1–4; 55:14–22, and she fails to make the “strong showing” of success on the merits, *New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020), she also cannot meet the irreparable harm prong.

As the district court correctly held, Chen’s alleged injury is also “remote or speculative,” Tr. 56:2–3, not “actual and imminent . . .” *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002). There is “insufficient evidence” of whether M.P. would have met the Stuyvesant cutoff score but-for the 2018 changes to the Discovery Program. Tr. 56:2–10. Chen points to a 2019 study, App. Mot. 12, which does not establish the effect of the Policy on Stuyvesant’s cutoff score in 2026. Cutoff scores for non-Discovery Program seats vary year to year due to variety of factors, including the number of students who apply, the overall strength of the applicant pool with respect to test scores, and how students decide to rank schools.

Further, in the absence of the challenged Policy, each SHS would have retained the discretion to choose the size of their Discovery Program, and in fact, could have chosen to retain even more seats for Discovery Program participants.

Absent an injunction, the status quo is not a guarantee that M.P. would get into the school of his choice.

III. The Balance of Equities and the Public Interest Weigh Against an Injunction

Because Chen “failed to demonstrate that the Policy is “unconstitutional or contrary to federal law, the balance of equities and public interest favor maintaining the status quo.” Tr. 56:16–19. Admitting M.P. to Stuyvesant would create inequities for other students who likewise missed the cutoff score but will not receive admission to their top choice, while simultaneously casting unwarranted doubt about the qualifications of students admitted through the Discovery Program. The balance of equities and public interest counsel against an injunction.

CONCLUSION

Defendant-Intervenor-Appellees respectfully request that the Court deny Chen’s motion.

Dated: August 13, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A), as it contains 5,129 words. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font, and all footnotes are in 14-point Times New Roman font.

Dated: August 13, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2026, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the CM/ECF system, which sent notification of such filing to all registered CM/ECF users.

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