

CASE NO. 22-1280

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

COALITION FOR T.J.,*Plaintiff - Appellee,*

v.

FAIRFAX COUNTY SCHOOL BOARD,*Defendant - Appellant*

On Appeal from the United States District Court
for the Eastern District of Virginia
Civil Action No. 2 1:21-cv-00296

**BRIEF OF *AMICI CURIAE* NATIONAL COALITION FOR SCHOOL
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS,
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STATEMENT OF INTEREST¹

Founded in 2009, the National Coalition on School Diversity (NCSD) is a network of 50+ national civil rights organizations, university-based research centers, and state and local coalitions working to expand support for government policies that promote school diversity and reduce racial and economic isolation in elementary and secondary schools. NCSD serves as the central hub of the school diversity field, supporting brave, bold, visionary changemakers and bridgebuilders as they design, enact, implement, and uplift K-12 public school integration policies and practices. Our work is informed by an advisory panel of scholars and academic researchers working on issues of equity, diversity, and desegregation/integration.

The Poverty & Race Research Action Council (PRRAC) is a civil rights law and policy organization promoting research-based advocacy strategies to address structural racial inequality. Its work focuses on developing actionable policies to overcome the mechanisms that continue to reproduce historical patterns of racial and economic segregation in schools and communities and is informed by a national network of researchers, organizers, attorneys, educators, and housing professionals. PRRAC is a founding member and fiscal sponsor of NCSD.

The American Civil Liberties Union Foundation (“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

¹ No counsel for either party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief.

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*, 141 S. Ct. 2038 (2021); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The American Civil Liberties Union Foundation of Virginia is an Affiliate of the national ACLU.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. As a part of this work, the Lawyers' Committee's Educational Opportunities Project promotes integration and diversity in K-12 public schools and higher education as a foundational principle, representing students and alumni as intervenors or amici in the three active race-conscious college admissions cases, and in several other educational opportunity cases. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14CV954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021) cert. granted, 142 S.Ct. 896 (2022); *In re Renewal Application of TEAM Acad. Charter Sch.*, 252 A.3d 1008 (2021).

The Washington Lawyers' Committee for Civil Rights and Urban Affairs works to create legal, economic and social equity through litigation, client and public education and policy advocacy. The Committee recognizes the central role of current and historic race discrimination in sustaining inequity and the critical importance of identifying, exposing, combating and dismantling the systems that sustain racial oppression. The Committee has been on the cutting edge of civil rights advocacy in the region, bringing precedent-setting litigation to address discrimination, including education discrimination. *E.g.*, *Hanover County NAACP v. Hanover Cnty.*, 461 F. Supp. 3d 280 (E.D. Va. 2020); *Seaman v. Virginia*, No. 3:22-cv-00006, 2022 WL 872023 (W.D. Va. Mar. 23, 2022); *Charles H. v. D.C.*, No. 1:21-cv-00997, 2021 WL 2946127 (D.D.C. June 16, 2021).

INTRODUCTION

This case concerns whether a public school board may modify a school's admissions requirements to remove arbitrary and unfair barriers and to ensure all eligible students have a meaningful chance at attending. Challengers argue the goal of equity and inclusion for students of all races—considered alongside related issues including socioeconomic and geographic exclusion—constitutes racial discrimination. On a thin record of disputed evidence proffered by Plaintiff at summary judgment, the District Court remarkably agreed. Such a ruling threatens to strip school communities of the power to address unjustified barriers to equal educational opportunity. The consequences would be particularly harmful for Black and Brown students and other historically marginalized and under-served

groups—including English learners, students with disabilities, and economically disadvantaged students—and detrimental to all students and to society. Seeking to provide public education equitably to students of all races and characteristics is consistent with settled law and essential to furthering the democratic values served by public schools.

Education is not only crucial to individual success, but also “the very foundation of good citizenship,” a predicate for performing “our most basic public responsibilities,” and “a principle instrument in awakening the child to cultural values.” *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954). The Supreme Court has recognized both that diversity in education enhances the cultivation of these values and that segregation and inequality undermine them. Consequently, the Court has recognized that school boards, like Fairfax County, may pursue and “adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment).

As discussed below, while education plays a pivotal role in a democracy, in Virginia and across the country, public school students are educated in classrooms that are increasingly isolated along racial lines. Indeed, students’ racial isolation is becoming more pronounced even while the state and country grow more diverse. Thomas Jefferson High School (“TJ”) is just one example of these segregated educational opportunities, but an important one. Such specialized schools enroll students from across school zones using admissions methods that can promote diversity or exacerbate divisions. TJ enrolls only a small number of students within

the region it serves, and these students receive educational benefits perceived as superior to those of other local public high schools. When a single public high school stands in such a position of advantage, the means of access must be open to all students if it is to further the democratic values promoted through public education.

Recognizing the importance of diversity and access, the Fairfax County School Board sought to address its own arbitrary barriers to admission at TJ by modifying its admissions plan to ensure more equitable access for students across its schools. These changes included abandoning three standardized tests that had seriously impaired the fairness of admissions. *See Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21CV296, 2022 WL 579809, at *1 (E.D. Va. Feb. 25, 2022). In its place, and as explained in greater detail by Fairfax County, Opening Br. of Def.-Appellant, ECF No. 35, 6–12, the Board changed the evaluation process, moving to a one-round holistic evaluation that factors in a student’s GPA, a Student Portrait Sheet, a Problem Solving Essay, and certain “Experience Factors,” which included an applicant's (a) attendance at a middle school deemed historically underrepresented at TJ; (b) eligibility for free and reduced price meals;(c) status as an English language learner; and (d) status as a special education student. *Coal. for TJ v. Fairfax Cnty.*, 2022 WL 579809, at *2. The Board also implemented a percentage plan that guaranteed seats for 1.5 percent of the school’s eighth grade class size at each participating middle school, with seats offered first to the highest-evaluated applicants from each school. *Id.* These changes led to marked improvement for many underrepresented students. Fairfax County’s reflection on

its own institutional barriers and efforts to ensure that all students have a meaningful opportunity to access TJ's educational benefits is the type of action school communities should be able to undertake to further education equity.

Plaintiffs' position in this case and the District Court's misapplication of the law jeopardize more than the enrollment at TJ. They stand to limit school communities' ability to further diversity and equity to prepare young people to engage fully and respectfully with one another in an increasingly heterogeneous democratic society. This Court should reverse the ruling of the court below.

ARGUMENT

I. Consideration of Student Diversity and Inclusion Furthers the Democratic Values of Education.

Fairfax's decision to revisit and revise its prior policy, which created real and unnecessary barriers to admission for many students across its schools, is lawful and especially appropriate when viewed in light of the Supreme Court's recognition that "America's public schools are the nurseries of democracy." *Mahanoy*, 141 S. Ct. at 2046; *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government.") (citation omitted). Education has been described as "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and public schools as a place where young people learn "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Learning these values includes preparation "for citizenship in our pluralistic society," the ability "to live in harmony and mutual respect" with people of other races,

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982) (citations omitted), and “wide exposure to that robust exchange of ideas which discovers [t]ruth out of a multitude of tongues.” *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967)).

Education in a diverse setting furthers the civic function of public schools. “[E]nrolling a diverse student body ‘promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.’” *Fisher II*, 579 U.S. at 381 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)); *see also Mendez v. Westminster Sch. Dist. of Orange Cnty.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946), *aff’d sub nom. Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (finding unlawful segregation of Mexican-American and Spanish speaking students and concluding “that commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals”). Diverse student bodies also facilitate critical learning by opening up students to diverse viewpoints and generating a “robust exchange of ideas.” *Grutter*, 539 U.S. at 324. Further, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Fisher II*, 579 U.S. at 381 (internal quotation marks and citation omitted); *see also Parents Involved*, 551 U.S. at 783 (Kennedy, J.) (“Diversity . . . is a compelling educational goal a school district may pursue.”); *id.* at 743 (Roberts, C.J.) (describing student body diversity as “a worthy goal”).

Research also shows that “students. . . isolated from peers of different racial/ethnic, linguistic, or socioeconomic backgrounds. . . are deprived of appropriate occasions for inter-group interactions” and are “deprived of the opportunity to develop the sociocultural knowledge, shared understandings, and behavior patterns that they will need as adults in order to function harmoniously and productively in ethnically heterogeneous settings—a serious problem for a society as increasingly diverse as ours.”² The two-way benefits of diversity begin in K-12 schools.³ Primary and secondary education is a particularly “critical time”

² Luis Laosa, *The New Segregation*, 10 Educ. Testing Service 1, 6 (2001), <https://origin-www.ets.org/Media/Research/pdf/PICPNV10N1.pdf>.

Amici focus in this brief on the benefits of racial diversity and harms of racial segregation because these are the considerations Plaintiffs challenge. However, the benefits of diversity and harms of segregation in education extend to other characteristics. For example, when students with disabilities are educated with their peers, “they have more access to the general curriculum and effective instructional methods,” “achieve at higher rates of academic performance,” and “acquire better social and behavioral outcomes.” Nat’l Council on Disability, *The Segregation of Students with Disabilities*, 37–38 (Feb. 7, 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf. Research also demonstrates the important impacts of inclusive school and classroom setting for students without disabilities, including reduced fear of human differences, increased comfort and awareness of differences, growth in social cognition, improvements in self-concept, growth of ethical principles, and caring friendships. *Id.* at 39.

³ See, e.g., Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students* (2016), https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf; James Laurence et al., *Prejudice, Contact, and Threat at the Diversity-Segregation Nexus: A Cross-Sectional and Longitudinal Analysis of How Ethnic Out-Group Size and Segregation Interrelate for Inter-Group Relations*, 97 *Social Forces* 1029 (2019); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Personality & Soc. Psych.* 751 (2006); Robert L. Linn & Kevin G. Welner, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and Supreme Court Cases*, Nat’l Acad. of Educ. (2007), <https://files.eric.ed.gov/fulltext/ED531144.pdf> (benefits of diverse schools include higher academic attainment, better problem solving skills, and increased cultural competency); Roslyn Arlin Mickelson, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence*, Nat’l Coal. on Sch. Diversity, 4 (2016), <https://files.eric.ed.gov/fulltext/ED571629.pdf> (attending racially diverse schools reduces individual bias).

because “the racial attitudes children develop early on can become entrenched, life-long beliefs.”⁴

When selective public schools like TJ stand apart from other public high schools in their perceived quality of education and prestige, attention to diversity is even more important. For example, TJ alumni include numerous leaders who shape our democracy including judges, politicians, journalists, and others.⁵ Student body diversity demonstrates to all students that they can “have confidence in the openness and integrity” of the system. *Grutter*, 539 U.S. at 332. Conversely, where the benefits of education are distributed along racial lines, stigma and division grow. While “[t]he impact is greater when it has the sanction of law,” *de facto* segregation may still produce these effects.⁶ *Brown*, 347 U.S. at 494; *see also Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment) (“[A]n injury stemming from racial prejudice can hurt as much when the demeaning treatment . . . stems from bias masked deep within the social order as when it is imposed by law.”).

Again, research supports these findings. For example, segregation (by race or otherwise) teaches children to understand these characteristics as a valid means of distinguishing people and, in turn, treating them differently.⁷ Research shows

⁴ Robert A. Garda, Jr., *The White Interest in School Integration*, 63 Fla. L. Rev. 599, 626 (2011).

⁵ *Thomas Jefferson High School for Science and Technology*, Wikipedia, https://en.wikipedia.org/wiki/Thomas_Jefferson_High_School_for_Science_and_Technology#Notable_alumni (last accessed May 12, 2022).

⁶ Courts have also recognized the negative impacts of segregation for Latinx students, Native American students, and English learners. *See, e.g., Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Lau v. Nichols*, 414 U.S. 563 (1974).

⁷ Ryan Enos & Christopher Celaya, *The Effect of Segregation on Intergroup Relations*, 5 J. Exper. Pol. Sci. 26 (2018), <https://scholar.harvard.edu/files/renos/files/enoscelaya.pdf>.

that students who attended segregated schools continue to feel socially distanced as young adults and are more likely to prefer same race neighborhoods.⁸ These negative consequences of segregation are the very reason that our laws require serious attention to policies and practices that divide students on the basis of race, and school communities are rightly concerned with these harms. *See, e.g., Parents Involved*, 551 U.S. at 746 (Roberts, C.J., for the plurality) (“Government action dividing us by race is inherently suspect because such classifications promote ‘notions of racial inferiority and . . . the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.’”) (internal quotation marks and citations omitted).

II. School Communities Can and Should be Able to Lawfully Consider Impacts of Admissions Policies on Diversity and Access as Schools Across the Country and in Virginia are Increasingly Racially Segregated and Unequal.

A. Segregation by Race is Increasing in Schools Across the Country.

The United States’ population and its public school enrollment are increasingly diverse. Between 1968 and 2019, “the nation’s enrollment of white students [] declined by 11 million . . . while the enrollment of Latinos [] increased by 11 million” and additionally, “there are now nearly three million Asian students and two million students who identify as multiracial [in the United States].”⁹ In

⁸ Jomills Henry Braddock & Amaryllis Del Carmen Gonzales, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 112 Teachers Coll. Rec. 1631 (2010), <http://www.tcrecord.org/PrintContent.asp?ContentID=15692>.

⁹ Erica Frankenberg et al., *Harming our Common Future: America’s Segregated Schools 65 Years After Brown*, Univ. Cal. L.A. Civil Rights Project, 4 (2019), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our->

light of these changing demographics, education must prepare students to participate in a heterogeneous democratic society.

Yet since the 1990's, segregation has been increasing in many schools across the nation.¹⁰ Although the Supreme Court's decisions in *Brown*, and subsequent enforcement efforts, led to a sharp decline in Black-White school segregation, particularly in the South,¹¹ desegregation peaked in the 1980s.¹² Scholars have found a steep rise in segregation in districts where federal court orders were lifted, while today schools in the northeast are the most segregated.¹³

common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf. Additionally, in 2018, English Learners constituted 10% of the total U.S. student population. *See English Language Learners in Public Schools*, Nat'l Ctr. for Educ. Stat. (2021), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>. In 2019, 14% of all public school students received special education services under the IDEA. *Students With Disabilities*, Nat'l Ctr. for Educ. Stat. (2021), https://nces.ed.gov/programs/coe/pdf/2021/cgg_508c.pdf.

¹⁰ Anna Runcie, *School Segregation on the rise 65 years after Brown v. Board of Education*, CBS News (May 19, 2019), <https://www.cbsnews.com/news/school-segregation-on-the-rise-65-years-after-brown-v-board-of-education/> (interview with Gary Orfield, citing Frankenberg et al., *supra* note 9).

¹¹ Will McGrew, *U.S. School Segregation in the 21st Century*, Wash. Ctr. for Equitable Growth, 5 (Oct. 15, 2019), <https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/>.

¹² Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, Univ. Cal. L.A. Civil Rights Project, 11 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

¹³ Sean Reardon et al., *Brown Fades: The End of Court Ordered School Desegregation and the Resegregation of America Public Schools*, 31 J. Pol'y Analysis & Mgmt. 876 (2012).

In 2016, the average White, Black, and Latinx¹⁴ student attended a school in which the largest share of schoolmates were same-race peers.¹⁵ Asian American and Pacific Islander (AAPI) students also attended schools with disparately large numbers of same-race peers.¹⁶ White and Latinx students are the most segregated, with the average White student attending schools in which 69% of the students are White and the average Latinx student attending schools in which 55% of the students are Latinx.¹⁷ Segregation for Black students is less pronounced but rising across the U.S., with the average Black student attending schools in which 47% of students are Black.¹⁸ Additionally, scholars highlight a rising national trend of

¹⁴ Latinx describes a person of Latin American origin or descent and is used as a gender-neutral or nonbinary alternative to Latino or Latina. *Latinx*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/Latinx#:~:text=Definition%20of%20Latinx,alternative%20to%20Latino%20or%20Latina%20%E2%80%A6> (last visited May 3, 2022).

¹⁵ Frankenberg et. al., *supra* note 9, at 22.

¹⁶ *Id.* at 22–23.

Researchers point out that data collection as well as state and federal policy grouping together all AAPI identities overlook the immense diversity and needs within the growing population of AAPI public school students, suggesting the need for more, not less, attention to multifaceted diversity in education. *See generally*, Roby Chatterji & Jessica Yin, *Education Policies Need to Address the Unique Needs of Asian American and Pacific Islander Communities*, Ctr. for Am. Progress (2022), <https://www.americanprogress.org/article/education-policies-need-to-address-the-unique-needs-of-asian-american-and-pacific-islander-communities/>. For example, research finds that examining educational performance of AAPI subgroups revealed significant differences and needs and posit that “[m]any AAPI students are English Language Learners,” and “[i]f literacy materials describe culturally unfamiliar experiences, students may have difficulty learning new reading skills and vocabulary while they struggle with cultural displacement.” Valerie Ooka Pang & Peggy P. Han, *Asian American and Pacific Islander Students: Equity and the Achievement Gap*, 40 *Educ. Rscher.* 378, 385 (2011).

¹⁷ Frankenberg et. al., *supra* note 9, at 4. White students have the lowest degree of exposure to students of other races overall in the Midwest, Border, and Northeast regions, where the average White student attends a school in which 80% of their peers are also White. *See* Gary Orfield et al., *E Pluribus...Separation: Deepening Double Segregation for More Students*, Univ. Cal. L.A. Civil Rights Project, 35 tab. 12 (2012), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

¹⁸ Frankenberg et al., *supra* note 9, at 4.

“intensely segregated schools,” where either non-White or White students make up 90 percent or more of enrollment.¹⁹ Both Black and Latinx students are increasingly educated in intensely segregated schools.²⁰

Past and contemporary housing segregation has long contributed to the racial isolation of students.²¹ Government-sponsored housing programs intentionally excluded Black families and other people of color in the past,²² and racial red-lining and the racially disparate impacts of the subprime mortgage crisis²³ have entrenched housing segregation and, in turn, school segregation. As the Supreme

¹⁹ *Id.* at 21.

²⁰ Orfield et al., *supra* note 12, at 5.

²¹ Paul M. Ong & Jordan Rickles, *The Continued Nexus Between School and Residential Segregation*, in *symposium, Rekindling the Spirit of Brown v. Board of Education*, 11 *Asian L.J.* 260, 261 (2004) (“School segregation is tethered to residential segregation because of the prevalence of neighborhood schools in the public education system. This linkage is especially strong at the lower grades. Because of relatively localized enrollment and the simple fact that most young children attend a nearby campus, a typical elementary school mirrors the demographic composition of its immediate neighborhood.”); *see also* Genevieve Siegel-Hawley et al., *School Segregation by Boundary Line in Virginia: Scope, Significance and State Policy Solutions*, *Ctr. for Educ. & Civil Rights/Va. Commonwealth Univ.*, 18, 19 (2020), https://cecr.ed.psu.edu/sites/default/files/School_Segregation_by_Boundary_Line_in_Virginia_Nov_2020.pdf (“A combination of restrictive covenants, ghettoization, urban renewal, discriminatory buying, selling and lending practices, federal highway construction, along with suburban planning and subsidization centered on exclusion contributes to stark, ongoing neighborhood isolation by race and, increasingly, class.”); *id.* at 19 n.29 (collecting additional sources).

²² *See* Richard Rothstein, *The Color Of Law: A Forgotten History Of How Our Government Segregated America* (2017).

²³ *See, e.g.*, Kathleen V. Engel & Patricia McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps*, 81, 85 (2011); Bill Dedman, *Atlanta Blacks Losing in Home Loans Scramble*, *Atlanta Journal Constitution*, May 1, 1988, at A1; Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data*, 86 *Amer. Econ. Rev.* 25, 26 (1996); *Br. for the Am. Civil Liberties Union et al. as Amicus Curiae Supporting Resp’t, Magner v. Gallagher*, No. 10-1032 (U.S. Jan. 27, 2012), https://www.aclu.org/sites/default/files/field_document/magner_v_gallagher_10-1032_aclu_amicus.pdf.

Court observed in *Swann v. Charlotte-Mecklenburg Board of Education*, “[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development,” and in turn, “neighborhood zoning” in segregated communities may “lock the school system” into these patterns of separation. 402 U.S. 1, 20–21 (1971). Today, about 70% of students attend schools assigned based on the neighborhood in which they live,²⁴ and the link between housing segregation and school segregation is strengthening.²⁵

In Virginia, as across the country, school enrollment has become increasingly diverse, yet students attend increasingly segregated schools.²⁶ In the 2018-19 school year, more than half of Virginia public school students were students of color (22% Black, 16% Latinx, 7% AAPI, and 6% multiracial).²⁷ Black and Latinx students are increasingly likely to attend schools that are segregated and that have fewer resources and course offerings than schools with larger shares of

²⁴ Siegel-Hawley et al., *supra* note 21, at 19, 20 n.35 (citing *Digest of Education Statistics*, Nat’l Ctr. for Educ. Stat., Ch. 2 (2018)).

²⁵ Sean F. Reardon & John Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. Rev. 1563 (2003).

²⁶ Siegel-Hawley et al., *supra* note 21, at 4–5. Virginia has a troubled past with respect to school desegregation. After the *Brown* ruling, school districts across the state resisted desegregation, with many closing for periods of time, and White student leaving the public school system for “segregation academies.” In the 1970s, redlining, blockbusting, White flight and violence shut out Black residents from opportunity and maintained segregation in Virginia’s public schools. See *Desegregation of Virginia Education (DOVE): Timeline*, Old Dominion Univ., 1, <http://www.odu.edu/library/special-collections/dove/timeline> (last accessed Apr. 20, 2022); see also Kathy Mendes & Chris Duncombe, *Addressing the Lasting Impacts of Racist Choices on Virginia’s Education System*, Commonwealth Institute, 10 (2020), <https://thecommonwealthinstitute.org/wp-content/uploads/2021/03/Modern-Day-School-Segregation.pdf>.

²⁷ Siegel-Hawley et al., *supra* note 21, at 5.

White students.²⁸ Black and Latinx students also continue to attend schools with high levels of poverty.²⁹ As of 2018, the average Black student in Virginia attended a school where nearly 60% of students qualified for Free or Reduced Priced Lunch (FRL), whereas Asian students attended a school in which 28% of students qualified for FRL, with Latinx and White students falling between these two extremes.³⁰ Black students, both economically disadvantaged and not, are the most exposed to student poverty and the most racially isolated.³¹ Latinx students were more likely to experience racial isolation when they were also economically disadvantaged, and to experience more racially diverse schools as family income rose.³² Conversely, Asian students were less racially isolated when they experienced economic disadvantage, while greater economic stability increased isolation from Black and Latinx peers.³³

B. Racially Segregated Schools are Also Increasingly Unequal.

As a result of this intense and increasing segregation, many Black and Latinx families do not receive an education on par with White students.³⁴ The confluence of housing segregation and growing income inequality has led to the

²⁸ Mendes & Duncombe, *supra* note 26, at 1.

²⁹ *Id.*

³⁰ Genevieve Siegel-Hawley et al., *Double Segregation by Race and Poverty in Virginia Schools*, Penn State Ctr. for Educ. & Civil Rights, 3 (2021), https://cecr.ed.psu.edu/sites/default/files/Double_Segregation_by_Race_and_Poverty_Virginia_Schools_2021.pdf.

³¹ *Id.* at 9–10.

³² *Id.* at 10.

³³ *Id.*

³⁴ See, e.g., Emma García, *Schools are still segregated, and black children are paying a price*, Econ. Pol’y Inst. (Feb. 12, 2020), <https://files.epi.org/pdf/185814.pdf>; Siegel-Hawley et al., *supra* note 30, at 1.

“double-segregation” of Black and Latinx students, meaning that in addition to attending racially segregated schools, Black and Latinx students are significantly more likely to attend high poverty schools.³⁵ By contrast, students in schools enrolling more White and AAPI students³⁶ attend school alongside far fewer low-income students.³⁷

This double-segregation occurs because Black and Latinx families are disproportionately concentrated, at all income levels, in segregated neighborhoods with fewer resources than predominantly White communities with similar income demographics.³⁸ Thus, public schools with higher densities of Black and Latinx students receive fewer resources, on average, despite higher needs.³⁹ This double segregation puts students behind academically, creating performance gaps that have long lasting effects on Black and Latinx students’ future career prospects.⁴⁰ Although, the achievement gap between White students and Asian non-English Learners (non-ELs) has greatly increased in favor of Asian students in recent years,

³⁵ Orfield et al., *supra* note 17, at 12, 39.

³⁶ It is important to note, however, that national data sets do not disaggregate the multiple communities reported as AAPI which may obscure variations in subgroup experiences of segregation.

³⁷ Orfield et al., *supra* note 12, at 16 (finding that of schools that are overwhelmingly White and Asian (0-10% Black & Latino schools), only 4% have 80% or more students living in poverty).

³⁸ McGrew, *supra* note 11, at 11.

³⁹ Siegel-Hawley et al., *supra* note 30, at 1.; *see also* Katherine Rose, *Separate and Unequal: School Funding in ‘Post-racial’ America*, 45 Soc. Pol’y 32 (2015).

⁴⁰ *See, e.g.*, García, *supra* note 34, at 4; Siegel-Hawley et al., *supra* note 30, at 1; *see generally* Rucker C. Johnson, *Children of the Dream: Why School Integration Works* (2019); *Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, U.S. Gov’t Accountability Off. (2016), <https://www.gao.gov/products/gao-16-345>.

Asian EL students, like Latinx EL students, have fallen behind White students in mathematics and reading achievement.⁴¹

Black and Latinx students fair better in desegregated schools by completing more years of education, achieving higher earnings and better health, and having a reduced chance of incarceration.⁴² White student achievement in schools with the highest Black student density is unaffected as measured by test scores,⁴³ and as noted above, research demonstrates that education in racially diverse classrooms has other academic and social benefits.⁴⁴

Data reflects that while students in Virginia and across the country are increasingly diverse, schools are growing more segregated. This is detrimental to individual students and communities as well as to democracy and society as a whole. School systems need flexibility to address both growing diversity and increasing racial isolation in order to sustain schools as “nurseries of democracy.” *Mahanoy*, 141 S. Ct. at 2046.

⁴¹ Martin Carnoy & Emma García, *Five key trends in U.S. student performance*, 4, Econ. Pol’y Inst. (Jan. 12, 2017), <https://files.epi.org/pdf/113217.pdf>.

⁴² Rucker C. Johnson, *Long-run Impacts of School Desegregation & School Quality on Adult Attainments*, Working Paper 16664, Nat’l Bureau of Econ. Rsch. (2011), <https://www.nber.org/papers/w16664>; *see also* Francisca M. Antman & Kalena Cortes, *The Long-run Impacts of Mexican-American School Desegregation*, Working Paper 29200, Nat’l Bureau of Econ. Rsch, (2021), https://www.nber.org/system/files/working_papers/w29200/w29200.pdf.

⁴³ *School Composition and the Black-White Achievement Gap*, NCES 2015-018, U.S. Dep’t of Educ., 1, (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf.

⁴⁴ *See supra* Section I and notes 2-7.

III. School Communities, like those in Fairfax, that Strive for Diversity and Integration are Furthering Constitutional Values.

Efforts by school communities, like those in Fairfax County, to consider the impacts of existing admissions and school assignment policies on school integration, diversity and access are fully consistent with equal protection principles and federal policies and further constitutional values. Indeed, the policies and decision-making process at issue here align with permissible assignment plans recognized by the Supreme Court:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition . . . School boards may pursue the goal of bringing together students of diverse backgrounds and races . . . 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.

Parents Involved, 551 U.S. at 788–89 (Kennedy, J., concurring in part and concurring in the judgment) (internal citation omitted).

The court's decision below, however, places such long-overdue actions by school communities within the Fourth Circuit, and potentially across the country, at risk by holding that a school board's mere consideration of the impact of admissions policies on access for historically marginalized students of color may, in part, be a factor in inferring discriminatory intent. That ruling, together with the court's empty and flawed consideration of the *Arlington Heights* factors discussed by the Defendant and other amici, would constrain rather than advance the

principles of equal protection with far-reaching implications. As Fairfax argues, the ruling below would bind school districts to the status quo, however inequitable. ECF No. 35, 53-54. The Court below cited the Fairfax’s broad goal to have “TJ’s demographics represent the [Northern Virginia] region,” as well as the examination of the impact of the proposed changes on enrollment by race, as indicative of racial balancing and discrimination. JA2979–2980. To the contrary, these goals are consistent with and further the constitutional and democratic values of public education.

The Supreme Court has made clear that such goals and approaches are not equivalent to the use of illegal racial classifications. *See Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and concurring in the judgment) (acknowledging lawfulness of a variety of measures school districts may pursue in achieving greater racial diversity); *id.* at 745 (Roberts, C.J., for the plurality) (stating that activities such as “setting measurable objectives to track the achievement of students from major racial and ethnic groups . . . have nothing to do with [the use of racial classifications]”); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory intent requires more than mere awareness of the potential consequence that may result).

In fact, guidance funded by the U.S. Department of Education for school and district leaders discourage schools from enacting policies like the pre-2020

admission policies that may further segregate schools because of reliance on test scores and recognize that communities may consider racial and other demographics to ensure they enact inclusive policies. For example, the federally-funded equity assistance centers, which provide nationwide technical assistance to charter schools and school districts experiencing race- and national origin-equity issues under Title VI of the Civil Rights Act of 1964, note in their Equity-based Framework for Integrated Schooling manual that “[s]ome magnet schools, for example, with competitive admissions criteria such as standardized test scores, result in further segregating students along race and class.”⁴⁵ The equity centers encourage school communities to, instead, pursue open enrollment policies and, or weighted lotteries that may consider metrics other than race.⁴⁶

Many charter schools, which frequently extend their admissions across regions similar to TJ, similarly struggle with enrolling historically marginalized students and more diverse student bodies.⁴⁷ Overall, segregation within charter

⁴⁵ See *Equity-Based Framework for Achieving Integrated Schooling*, Reg’l Equity Assistance Ctrs., 6, <https://files.eric.ed.gov/fulltext/ED591358.pdf> (last accessed May 9, 2022) (citing Jennifer Ayscue et al., *Choices Worth Making: Creating, Sustaining and Expanding Diverse Magnet Schools*, Univ. Cal. L.A. Civil Rights Project (2017), <https://files.eric.ed.gov/fulltext/ED586367.pdf>) [hereinafter Reg’l Equity Assistance Ctrs].

⁴⁶ Reg’l Equity Assistance Ctrs, *supra* note 45, at 13.

⁴⁷ Erica Frankenberg et al., *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standards*, Univ. Cal. Civil Rights Project (2010), <https://eric.ed.gov/?id=ED509773>; Julian Vasquez Heilig et al., *Choice without Inclusion?: Comparing the Intensity of Racial Segregation in Charters and Public Schools at the Local, State and National Levels*, 9 Educ. Sci. 205 (2019); Tomas Monarrez, et al., *Charter School Effects on School Segregation*, Urb. Pol’y Inst. (2019), [https://www.urban.org/sites/default/files/publication/100689/charter_school_effects_on_school_segregation_0.pdf](https://www.urban.org/sites/default/files/publication/100689/charter_school_effects_on_school_seggregation_0.pdf); Ivan Moreno et al., *US charter schools put growing numbers in racial isolation*, AP News (Dec. 3, 2017), <https://apnews.com/e9c25534dfd44851a5e56bd57454b4f5>; Gary Miron et al., *Schools Without Diversity: Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System*, Univ. Colo. Educ.

schools is more common and extensive compared to traditional public school districts, causing racial isolation, exacerbating concentrated poverty, and failing to adequately serve English learner students, students with disabilities, and students of all races and ethnicities.⁴⁸ Recognizing the social and academic benefits that more diverse, integrated schools can bring to the students and the communities they serve, the National Charter School Resource Center—which is funded by the U.S. Department of Education—created a toolkit for charter school leaders to help ensure their school designs attract more culturally, linguistically, racially, and socioeconomically diverse student bodies.⁴⁹ The toolkit lays out various practices that schools may pursue, without using race as a sole factor in individual assignments, including the consideration of racial demographics, in setting broader diversity goals. Among those serviced include ninety-three charter school members located across fifteen states and the District of Columbia, reflecting the growing interests of charter schools in diversifying their enrollment.⁵⁰ Across the U.S., numerous school districts have used constitutionally permissible metrics, such as

& Pub. Interest Ctr. & Ariz. State Univ. Educ. Pol’y Rsch. Unit (2010); Peter Bergman & Isaac McFarlin, *Education for All? A Nationwide Audit Study of School Choice*, IZA Inst. of Labor Econ. (2020), <https://docs.iza.org/dp13007.pdf>.

⁴⁸ See, e.g., Monarrez, *supra* note 47, at 33–39; Erica Frankenberg et al., *Exploring School Choice and the Consequences for Student Racial Segregation within Pennsylvania’s Charter School Transfers*, 25 Educ. Pol’y Analysis Archives, 1 (2017), <https://epaa.asu.edu/index.php/epaa/article/view/2601/1883>; Frankenberg et al., *supra* note 47; Miron et al., *supra* note 47.

⁴⁹ Nora Kern, *Intentionally Diverse Charter Schools: A Toolkit for Charter School Leaders*, Nat’l Charter Sch. Res. Ctr., 4–5 (2016), https://charterschoolcenter.ed.gov/sites/default/files/files/field_publication_attachment/NCSRC%20Intentionally%20Diverse%20Charter%20School%20Toolkit.pdf.

⁵⁰ *Id.* at 5.

neighborhood racial composition.⁵¹ Another report identified 140 school districts and charter schools pursuing policies using socioeconomic factors to ensure access for a more racially and ethnically diverse pool of students.⁵² These include several in Maryland, North Carolina and Virginia.⁵³

That public schools should strive to further the purpose of equal protection is woven throughout state and federal policy. As stated by Justice Kennedy, “our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race.” *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, the ability of governments to act in furtherance of the purpose of the Fourteenth Amendment is a cornerstone of federal law and policy, including Title VI, Title XI, and the Individuals with Disabilities Act (IDEA).

The IDEA, for example, was enacted to “ensur[e] equal opportunity [and] full participation” of individuals with disabilities in society, and to address the exclusion of children with disabilities “from the public school system and from being educated with their peers.” 20 U.S.C. § 1400 (c). Title VI and its implementing regulations require equitable treatment and integration of English

⁵¹ Kendra Taylor et al., *School and Residential Segregation in Districts with Voluntary Integration Policies*, 94 Peabody J. of Educ. 371 (2019); see also Genevieve Siegel-Hawley, *A Single Garment: Creating Intentionally Diverse Schools that Benefit All Children* (2020) (discussing integration efforts in four Virginia public schools).

⁵² See Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, Century Found. (Dec. 2, 2020), <https://tcf.org/content/report/school-integration-america-looks-like-today/>.

⁵³ *Id.*

Learner students. *See, e.g., Lau*, 414 U.S. 563. Congress established the Department of Education in its current form recognizing that “the importance of education is increasing . . . as society becomes more complex, and as equal opportunities in education and employment are promoted.” Department of Education Organization Act, Pub. L. No. 96–88, § 101, 93 Stat. 668 (1979).

The ability of public schools, like Fairfax County, to further the goals of equal protection by pursuing diversity and integration are increasingly imperative as our society grows more complexly diverse. Schools that pursue diversity and integration achieve marked positive results for the students and communities they serve.⁵⁴ Schools that give deep and considered attention to advancing equity and integration, including by race, provide great benefits for their students. These are not the type of prohibited actions that use race as a factor for admissions. Nothing in the law prohibits school districts like Fairfax County from pursuing these objectives, and the good of our democratic society urges it.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling of the District Court.

Signature block follows.

⁵⁴ *See supra* note 2.

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Respectfully submitted,

s/Sarah Hinger _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 6,483 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft 2010 in Times New Roman 14-point font.

Dated: May 13, 2022

/s/ Sarah Hinger
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on May 13, 2022.

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