Case No. 22-1280

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Coalition for TJ,

Plaintiff – Appellee,

v.

Fairfax County School Board,

Defendant – Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, Case No. 1:21-cv-00296-CMH
The Hon. Claude M. Hilton

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for reclaiming civil liberties, protecting free speech, combatting government overreach, and securing private property rights in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993); and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). This case concerns SLF because SLF advocates for a color-blind interpretation of the Constitution and preservation of the rights granted all citizens in the Equal Protection Clause, and it defends the rights to educational opportunities regardless of race. This case is important to SLF because Fairfax County threatens to erode the achievements our nation has made regarding race in school admissions.

[1] Pursuant to Federal Rule of Appellate Procedure 29, all parties consented to the filing of this brief and no one other than Amicus and their counsel wrote any part of this brief or paid for its preparation or submission.

STATEMENT OF THE ISSUES

Whether the district court correctly held that the Fairfax County School Board discriminated against Asian-American applicants in violation of the Equal Protection Clause of the Fourteenth Amendment when it changed TJ's admissions policy in a manner that was facially race neutral but was undertaken for an impermissible racial purpose and had a disparate impact on Asian-American applicants.

SUMMARY OF ARGUMENT

Racial classifications of any nature are inherently unconstitutional. Yet to this day, school districts like Fairfax County take it upon themselves to manipulate policies and practices to achieve a certain racial makeup among their students, often in the name of so-called diversity. Following racial justice protests in 2020 and both nationwide and statewide calls for more "diversity," Fairfax County changed the admissions policy at Thomas Jefferson High School ("TJ"). Although TJ's new policy appears race-neutral at first glance, it is now clear that it was adopted to increase black and Hispanic enrollment and to cut Asian-American enrollment. Such racial balancing does not and cannot have a place in our nation's public schools. Not only does racial balancing give the government carte blanche to engage in social experiments, but it also "would support indefinite use of racial classifications."

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007) (plurality op.).

ARGUMENT

I. It is well settled that racial balancing is patently unconstitutional.

The Supreme Court "has repeatedly condemned as illegitimate" the practice of racial balancing, especially in schools. *Id*. at 726. Racial balancing occurs when the government reconfigures its policies to increase or decrease representation of certain races, thereby grouping students according to their race. *See id*. at 733. Because "state entities may not experiment with race-based means to achieve ends they deem socially desirable," *id*. at 748 (Thomas, J., concurring), a perceived imbalance in the racial makeup of schools does not give school districts free rein to tinker with enrollment until numbers are just right. *Id*. at 736 (plurality op.); *Milliken v. Bradley*, 433 U.S. 267, 280-81, n.14 (1977) ("[T]he Constitution is not violated by racial imbalance in the schools, without more."); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.").

If racial balancing were constitutional, it would never end. Constantly maintaining a "proportional representation of various races . . . would support

indefinite use of racial classifications" in violation of the Equal Protection Clause. *Parents Involved*, 551 U.S. at 731 (plurality op.) (quoting *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J., dissenting)). "[T]here is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing demographics." *Id*. at 756-57 (Thomas, J., concurring); *Freeman*, 503 U.S. at 495 ("In such a society it is inevitable that the demographic makeup of school districts, based as they are on political subdivisions such as counties and municipalities, may undergo rapid change."). For this reason, the Supreme Court has long held racial balancing as "patently unconstitutional," *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and "not to be achieved for its own sake," *Freeman*, 503 U.S. at 494.

Although *Brown v. Board of Education* established that school districts must eliminate the vestiges of *de jure* segregation, 347 U.S. 483 (1954), such remediation "is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary." *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). Nearly seventy years have passed since that landmark decision. School districts can no longer sort students by race under *any* circumstances. They also

cannot hide behind seemingly race-neutral policies to manipulate the racial makeup of their student bodies, particularly in the name of so-called "diversity." *Parents Involved*, 551 U.S. at 732 (plurality op.) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"). But as explained more fully below, Fairfax County is doing exactly that.

When admissions policies are tied to the racial demographics of a surrounding region, there is a heavy presumption that a school district is engaged in racial balancing. *Id*. at 726. Manipulating admissions policies to reduce representation of one racial group and to increase representation of another racial group is a quintessential example of racial balancing to achieve a socially desirable outcome. *Id*. at 726-27. The act of racial balancing does not need to be achieved through quotas and set asides. The mere act of adjusting policies and procedures to alter a school's demographics—just as Fairfax County did—is enough to find unconstitutional racial balancing.

II. The district court correctly found that through TJ's admissions policy, Fairfax County is engaged in unconstitutional racial balancing.

Although TJ's admissions policy may appear race-neutral at first glance, the evidence undeniably shows that in changing the policy, Fairfax County aimed at altering the racial makeup of TJ's student body. Put simply, Fairfax County is

"experiment[ing] with race-based means to achieve ends [it] deem[s] socially desirable." *Id*. at 748 (Thomas, J., concurring).

"The discussion of TJ admissions changes was infected with talk of racial balancing from its inception." JA2977. First, the Virginia General Assembly passed a budget bill requiring Governor's Schools, like TJ, to release reports on their diversity goals—including information about how the schools were targeting "historically underserved" students. Br. of Pl.-Appellee at 47. Second, the summer of 2020 witnessed the death of George Floyd and ushered in racial justice protests across the country. *Id*. at 40.

In the wake of those events, the TJ principal "lamented that TJ 'does not reflect the racial composition in FCPS'" because its student body was predominately Asian-American. *Id*. She added that if TJ did reflect the racial composition of FCPS, it would enroll a specific number of students: 180 black students and 460 Hispanic students. JA0060. By setting a target number of students to enroll by race, this statement alone reflected an intent to racially balance the TJ student body.

But that was not all. Following the principal's remarks, the Fairfax County School Board ("Board") held frequent meetings and conversations regarding the racial composition of its schools. One Board member wrote in an email that "the Board and FCPS needed to be explicit in how we are going to address the under-representation of Black and Hispanic students." Br. of Pl.-Appellee at 41. Another

wrote that George Floyd's death required the Board to re-examine "unacceptable" practices, including the "unacceptable numbers of African-Americans that have been accepted to T.J." *Id*. at 41. Again, these comments strongly suggest a desire to use the full force of government authority to balance out the racial composition of the TJ student body.

Also in the summer of 2020, the Fairfax County superintendent, the TJ admissions director, and a Board member attended state task force meetings on diversity. JA2958. The takeaway from those meetings was that each public school in Fairfax County needed to reflect the "diversity" of their surroundings within a certain percentage range. JA2970. This was evident in a slideshow presentation to the Fairfax County Board that fall, which "declared that TJ should reflect the diversity of FCPS, the community and Northern Virginia [NOVA]." JA2977. It was solidified a few weeks later, when the Board unanimously passed a resolution stating that its "goal is to have TJ's demographics represent the NOVA region." JA2978. But as the Supreme Court found in *Parents Involved*, intentionally manipulating admissions practices so that a student body reflects the demographics of the local area is evidence of unconstitutional racial balancing. *Parents Involved*, 551 U.S. at 726 (plurality op.).

Fairfax County did not stop there. To achieve its goal of reflecting the diversity of the region, the district first considered establishing a lottery system. It

relied on modeling that projected how future classes would shape up by race because of the lottery. Br. of Pl.-Appellee at 47-48. The model indicated that Asian-American enrollment would decrease, paving the way for more proportional representation of each racial group. *Id*. Of course, taking such action to make representation more proportional among the student body is "patently unconstitutional," as the Supreme Court has long held. *Grutter*, 539 U.S. at 330; *accord Freeman*, 503 U.S. at 494.

Despite the modeling, one Board member expressed concern that the proposed lottery did not go far enough to manipulate TJ's demographics. She argued it would "leave too much to chance" and may not "give us the diversity we are after[.]" Br. of Pl.-Appellee at 48. And the district court found that "[s]ome Board members['] opposition to the lottery was at least in part due to a fear that a lottery might not go far enough to achieve racial balancing." JA2978. As a result, the Board settled on the set aside program that is now before this Court.

Through that program, TJ guarantees admission to the top 1.5% of each graduating middle school class in Fairfax County. The remaining unallocated seats are awarded to students based on a holistic review, which includes examining whether a student comes from an "underrepresented" middle school. Br. of Pl.-Appellee at 31-32. In turn, the district defines "underrepresented" to mean students who are not of white or Asian descent. *See id*. at 50. But as the Supreme Court reasoned in *Parents Involved*, "[t]he principle that racial balancing is not permitted

is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" 551 U.S. at 732 (plurality op.). Likewise, Fairfax County cannot simply use buzz words like "underrepresentation" to mask racial balancing.

Because the lottery did not go far enough to achieve its goals, the Board approved the 1.5% set aside program to achieve an even more racially balanced student body. As a result of the new policy, Asian-American students received "56 fewer offers than they had under the previous policy, even though FCPS extended 64 more total offers." Br. of Pl.-Appellee at 18-19. While Asian-American enrollment "plummeted from 73% to 54%," the enrollment of white, black, and Hispanic students increased across the board. *Id*. at 19.

The Board's statements, actions, and policy changes indicate overt racial balancing. The catalyst for these changes began in 2020 under the guise of "diversity." But Board members' and administrators' statements made clear that when Fairfax County sought to increase "diversity" and give more opportunities to "underrepresented" students, it really meant increasing the number of black and Hispanic enrollment at TJ. In turn, that meant decreasing the number of Asian-American students enrolled at the school.[2] The Board has made no secret that it

[2] *Grutter* has already established that when a school attempts to increase admissions of one race, it naturally disfavors another race and is therefore unconstitutional. 539 U.S. at 316-17, 326-27.

wanted TJ to reflect the demographics of the region more closely. But it is well settled, and the district court correctly held, that this kind of racial balancing to achieve a socially desirable outcome is unconstitutional.

CONCLUSION

This Court should affirm the district court's grant of summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32 because it contains 2125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Local Rule 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Times New Roman, in 14-point font.

June 20, 2022.

/s/ Celia H. O'Leary
Celia Howard O'Leary

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile. Parties may access the filing through the Court's electronic filing system.

June 20, 2022.

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