UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1303

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,
Plaintiff-Appellant,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; et al.,
Defendants-Appellees,

THE BOSTON BRANCH OF THE NAACP, et al.,
Defendants-Intervenors-Appellees.

No. 22-1144

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,
Plaintiff-Appellant,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; et al.,
Defendants-Appellees,

THE BOSTON BRANCH OF THE NAACP, et al.,
Defendants-Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts
Honorable William G. Young, District Judge

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Dated: September 2, 2022

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STATEMENT OF ISSUES

1. Whether the Equal Protection challenge of Boston Parent Coalition for Academic Excellence ("Coalition") to Boston Public Schools' ("BPS") 2021-2022 Exam School admissions Plan is moot, given that admissions under the Plan, explicitly implemented for a single school year, are long completed and the Plan has been replaced.

2. Whether the Coalition has shown standing to assert and sufficient evidence to support its sole claimed remedy as a result of the Plan's use – the admission of five of its 14 member-students to the Exam Schools based on the individual circumstances of each.

3. Whether the district court properly ruled that the Plan – which bases twenty percent of Exam School admissions on citywide grade point average and eighty percent on grade point average within each of Boston's 29 zip codes – did not violate Equal Protection under rational basis review, where the Plan is facially race-neutral and the Coalition failed to show both that it resulted in disparate impact and was motivated by discriminatory purpose and intent.

4. Whether the district court abused its discretion in denying the Coalition's Fed. R. Civ. P. 60(b) motion for relief from judgment where, with respect to new evidence regarding text messages, the Coalition failed to show both

that the texts would change the underlying result and the Coalition, with due diligence, could not have discovered the texts before trial.

STATEMENT OF THE CASE

Plaintiff-Appellant Boston Parent Coalition for Academic Excellence, Coalition ("Coalition") is a Massachusetts not-for-profit organization.[1/] App. 20, ¶ 4.[2/] Its stated purposes include "promot[ing] merit-based admissions to Boston Exam Schools (including Boston Latin School, Boston Latin Academy and O'Bryant School of Science and Math) and [promoting] diversity in Boston high schools by enhancing K-6 education across all schools in Boston." Id. The Coalition's membership is open to any student, alumni, applicant, or future applicant of the Boston Exam Schools, as well as their family members. Id. ¶ 5. The Coalition brings this action "on behalf of [its] members whose children are students applying for one or more of the Boston Exam Schools for the classes entering in the fall of 2021." Id. ¶ 6.

[1/] The Coalition filed its Articles of Organization with the Secretary of the Commonwealth on November 19, 2020. App. 2570-73.

[2/] Appendix references are cited herein as "App." followed by the relevant page and/or paragraph number(s). References to documents contained in the Addendum to the Coalition's Brief are cited as "Add." followed by the relevant page number(s).

Specifically, the Coalition represents the interests of fourteen students of Asian or White ethnicity and their member-parents. Id. The students reside in four of Boston's 29 zip codes: Chinatown (zip code 02111), Beacon Hill/West End (zip code 02114), Brighton (zip code 02135), and West Roxbury (zip code 02132). Id. Each student "is a sixth-grade student...and an applicant to one or more of the Boston Exam Schools for the class entering in the fall of 2021," and each member-parent supports his or her child's application to the Exam Schools. Id.

Defendant-Appellees School Committee of the City of Boston and its seven voting members at the time suit was brought is the relevant governing body of the Boston Public Schools ("BPS").[3/] App. 27, ¶¶ 1-15.[4/] Several organizations and individuals also intervened in this matter.

On February 26, 2021, the Coalition filed the present action seeking a preliminary injunction.[5/] App. 18-163 (original Complaint); see also App. 2080-

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[3/] "BPS" as used herein includes all Defendant-Appellees – the School Committee of the City of Boston, then-School Committee members Alexandra Oliver-Davila, Michael O'Neil, Hardin Coleman, Lorna Rivera, Jeri Robinson, Quoc Tran, and Ernani DeAraujo, and BPS Superintendent Brenda Cassellius.

[4/] References to the parties' Joint Agreed Statement of Facts ("Joint Statement"), found at App. 164-2039, are intended to include the exhibits referenced in the identified paragraph.

[5/] Before BPS hired outside counsel, Lizotte filed an appearance in district court. Thereafter, Lizotte had minimal involvement in any trial-related matters. See Add. 77.

2224 (First Amended Complaint). Following a March 3, 2022 hearing, the district court collapsed the preliminary injunction motion with a trial on the merits and exhorted the parties to agree on the relevant facts. The parties, through counsel, engaged in the process of stipulating to a Joint Statement. See App. 162-2039.

The Facts

Seventy percent of the approximately 80,000 school aged children in Boston attend BPS. App. 168, ¶ 16; 38-11. Three BPS schools, Boston Latin School, Boston Latin Academy and John D. O'Bryant School of Mathematics and Science (collectively "Exam Schools"), serve students in grades 7-12 who are the highest performing students citywide based on GPA in English Language Arts and Math, a standardized test score, and the applicant's school preference. App. 166-68, ¶¶ 7, 13-15. The majority of students are admitted in their sixth or eight grade years for the seventh and ninth grades respectively. App. 166, ¶¶ 7, 13; 1144-67. In the 2020-2021 school year, approximately thirty-five percent of the almost 4,000 students who applied were admitted. Add. 6-7, 56; App. 1465.

The COVID-19 pandemic caused BPS to be fully remote from March 17, 2020 until October 1, 2020 and partially remote thereafter, that had significant impacts on students. Add. 5-9, 58; App. 170-71, ¶¶ 24-26. BPS focused on its core value of equity addressing "the underlying systemic inequities and barriers facing

too many of [its] students, especially those who are experiencing poverty, have a lack of access and opportunity" by among other things, providing chrome books and hot spots to allow students to access remote education. App 1637; 171, ¶ 25; 1682-1684. See App. 1635-54.

A Working Group was created to address COVID's impact on prospective applicants and Exam School admissions criteria for the 2021-2022 school year. Add. 9, 59; App. 174, 1713-14. The Working Group studied a wide range of information, including the admissions criteria used by other cities (App. 174, ¶ 38; 1719-25), the results of the existing admission criteria (App. 174, ¶ 40; 1749-52), the use of test scores (App. 174, ¶ 37, 1719-25), the population of eligible students in Boston (App. 174, ¶ 40; 1752), median family income by zip code (App. 174, ¶ 39; 1515-91; 1745-47), application and admissions data by race App. 174, ¶ 40; 1749-52), the Exam School populations (App. 175, ¶ 44; 1710-11; 1913-16), grade variability within and outside of BPS (App. 175, ¶¶ 42-43; 1796-1861), and the feasibility, equity, and impacts of potential changes to the admission criteria. App. 174-75, ¶¶ 37-44; 1719-1916. In an effort to understand how various admission criteria would affect the socioeconomic, racial, and geographic representation of sixth-grade students admitted to the Exam Schools, simulations were prepared

based on the available data. App. 174-75, ¶¶ 40-41; 1754-94. See Add. 10-11, 59-60.

The Working Group also completed an Equity Impact Statement using the BPS's Equity Impact Planning Tool ("Tool"), which is a district-mandated six-step process for every major policy program, initiative, and budget decision. App. 176, ¶¶ 46-47; 1918-19; 1925-40. The Tool acknowledges that the BPS "does not consistently provide authentic learning opportunities for [its] students who are most marginalized to develop into self-determined, independent learners, able to pursue their aspirations," and that these "failures lead to disengaged students and significant achievement gaps." App. 1927. To ensure that the consequences of policy decisions are considered, the Tool that requires policy proponents to consider whether and how their proposal aligns with the district's broader goals. App. 1925. It further explains that "[t]o eliminate opportunity gaps persistent for Black and Latinx communities in Boston Public Schools, we must make a hard pivot away from a core value of equality -- everyone receives the same – to equity: those with the highest needs are prioritized." Id. The Working Group's stated desired outcome was to:

> Ensure that students will be enrolled (in the three exam high schools) though a clear and fair process for admissions in the 21-22 school year that takes into account the circumstances of the COVID-19 global pandemic that disproportionately affected families in the city of Boston.

> Work towards an admissions process that will support student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston.

App. 1918. See Add. 11-13, 61-62.

After reviewing its recommendations with the Superintendent, the Working Group presented its initial recommendation to the School Committee on October 8, 2020. App. 175-76, ¶¶ 45-46; 1130-39; 1469-96. The Working Group proposed the elimination of the exam requirement for 2021-22 (App. 1480), the establishment of new eligibility criteria that took into account COVID's impact, and a two-step invitation process. App.1482-85. See Add. 15-18, 64-67.

Following the October 8th meeting with the School Committee, two important changes were made to the proposed plan: 1) a special "zip code" was added for students who were homeless or in the custody of the Department of Children and Families ("DCF"), and 2) the criteria for ordering the zip codes was changed from median household income to median family income (with children under 18). App. 176, ¶ 48; 1949-50; see also Add. 15, 17, 64, 66.

The School Committee adopted the Working Group's 2021-2022 Admissions Plan ("Plan") at its October 21, 2020 meeting. The Plan replaced the Exam School entrance requirements for school year 2021-2022 only, eliminating the exam requirement and establishing a new eligibility, invitation and admission

process. App. 177-80, ¶¶ 48-63. To be eligible, a sixth or eighth grade student had to: 1) be a resident of one of Boston's 29 zip codes or the newly created homeless/DCF code; 2) have a minimum B average in English Language Arts and Math during the fall and winter of the 2019-2020 school year or have received a "Meets Expectations" or "Exceeds Expectations" score in English Language Arts and Math on the Massachusetts Comprehensive Assessment System administered in the spring of 2019; and 3) "[p]rovide verification from the school district (or equivalent) that the student is performing at grade level based on the Massachusetts Curriculum standards." App. 177-78, ¶¶ 51, 54-55. Students were also required to submit their preferences amongst the three Exam Schools. Id. at ¶¶ 54-55.

Eligible applicants were invited to the Exam Schools in two rounds. App. 179-80, ¶¶ 57-61. In the first round, twenty percent of the seats at each Exam School were distributed to students with the highest GPAs citywide. Id. ¶ 57. The student with the highest GPA was invited to his or her first-choice Exam School. Id. If, however, a student's first-choice Exam School was filled, that student was moved to the second round. Id. ¶ 58.

In the second round, eligible applicants were ranked by GPAs within their zip codes. Id. ¶¶ 59-61. Each zip code was allocated a percentage of the remaining

eighty percent of seats according to the proportion of school-age children residing in that zip code. Id. ¶ 59. Students were then assigned to the Exam Schools over ten rounds until each Exam School was filled. Id. ¶ 61. The second round started with the homeless/DCF zip code and proceeded to zip code with the lowest median family income according to the American Community Survey and so on. Within each zip code, the highest ranked applicants were assigned to their first-choice Exam School until ten percent of that zip code's allocated seats were filled. Id. If an applicant's first-choice Exam School was filled, the applicant was assigned to his or her next choice. Id. Once a zip code filled its ten percent of seats for the round, the next zip code's applicants were assigned through ten rounds. Id. Invitations under both processes were issued at the same time. Id.

During the October 21, 2020 meeting, School Committee Chairperson Michael Locanto "made statements that were perceived as mocking the names of Asian members of the community who had come to the meeting to comment on the 2021 Admission Plan." App. 181, ¶ 66. Vice-Chairperson Alexandra Oliver-Davila and voting member, Dr. Lorna Rivera, exchanged text messages recounting what had transpired, offering their sympathies because of anticipated backlash, stating that it was hard not to laugh, and generally not knowing what to do with themselves. Id. ¶ 67; 2025. Oliver-Davila also exchanged text messages with the

Superintendent, in which the Oliver-Davila called the meeting the "[b]est meeting ever." Id. ¶ 68; 2028.

On October 22, 2020, the Boston Globe made a public records request of BPS for all communications by and between School Committee members during the October 21 meeting. App. 2926-27, ¶ 6. Because BPS does not provide phones to School Committee members, BPS asked its members to provide any texts that may be covered by requests. App. 2927, ¶ 7. Transcribed text messages with the redaction of messages deemed unrelated to the member's official capacity as determined by BPS's Legal Advisor, Catherine Lizotte, in consultation with Boston's Corporation Counsel, First Assistant Corporation Counsel for Government Services, and the Director of Public Records redacted were provided to the Globe. App. 181, ¶¶ 67, 68; 2928-29, ¶¶ 8-15. Requests for data related to the Plan and its adoption were also made by the Coalition and an individual, Darragh Murphy, who did not identify as a Coalition member and BPS responded. App. 2929-30, ¶¶ l6-20.

On February 12 and 23, 2021, Murphy made additional requests for data and communications during the October 21st meeting and responses were provided. App. 2930-31, ¶¶ 21-24. The response to Murphy about communications during the October 21st meeting was the same response provided the Globe but without

the explanatory language about the fact that "BPS did omit portions [of text messages] deemed not "related to BPS issues." App. 2929, ¶ 12; 2932, ¶¶ 28-29.

At a status conference on March 3, 2021, following the filing of the Complaint, the district court collapsed the preliminary injunction hearing with a trial on the merits. Add. 4. On March 15, 2021, the parties filed the Joint Statement, which referenced and included 75 exhibits. App. 1163-83, ¶¶ 1-75. The Coalition confirmed to the district court that it was satisfied that the Joint Statement with its seventy-five exhibits and argued that the mere consideration of race required the application of strict scrutiny. App. 2234-53; Add. 52. BPS argued that the Plan was subject to rational basis review and reserved its right to proffer evidence in the event that the district court found that strict scrutiny applied. Add. 4, 31-40.

In the meantime, on March 9, 2021, Lizotte responded to Murphy's February 23rd request by forwarding the text messages previously provided to the Globe, but did not include the same explanatory language regarding redactions in text messages, which stated:

> With respect to the text messages, it is important to note that none of the members possess a mobile phone that is owned by [Boston Public Schools] or the City of Boston. Each member was contacted and asked to provide text message records from the respective personal devices that are responsive to your request. While no portions of texts were redacted based on statutory

> exemptions to the public records law, [Boston Public Schools] did omit portions deemed not "related to [Boston Public Schools] issues."

App. 2929, ¶ 12.[6/] Murphy never appealed or objected to the March 9th response or, indeed, to any of the responses she had received. Add. 77.

In the second draft Joint Statement proffered to BPS by the Coalition, the transcribed text messages provided initially to the Boston Globe, and then to Murphy, were attached. App. 2932-33, ¶ 36-37. In the final Joint Statement, all parties confirmed that the text excerpts produced were true and accurate. App. 181, ¶¶ 67-68.

Following briefing and argument by the parties, the district court on April 15, 2021 issued a decision rejecting the Coalition's claims that the Plan violated Equal Protection under the U.S. Constitution and Mass. Gen. L. c. 76, § 5 (Add. 1-48), and entered judgment. Add. 49. In making that determination, the court found that the one-year Plan for Exam School admission was subject to rational basis review, not strict scrutiny, and that there was insufficient evidence of disparate impact and racial animus. Boston Parent Coal. For Acad. Excellence Corp. v. Sch.

[6/] Citations herein refer to Lizotte's second affidavit regarding the public records requests and the exhibits referenced therein (App. 2925-3250), not her initial affidavit (see App. 2549-59).

Comm. of City of Boston, Civil Action No. 21-10330-WGY, 2021 WL 1422827 (D. Mass. 2021) ("Coalition I"), Add. 1-48.

On April 15, 2021, the Coalition appealed the judgment to this Court and moved to enjoin the Plan's implementation pending appeal. App. 2287. On April 28, 2021, this Court denied the Coalition's motion. Boston Parent Coal. For Acad. Excellence Corp. v. Sch. Comm. of City of Boston, 996 F.3d 37 (1st Cir. 2021) ("Coalition II").

On June 7, 2021, the Boston Globe published an article revealing previously undisclosed text messages between School Committee members Oliver-Davila and Rivera during the October 21, 2020 meeting. App. 2934-35, ¶ 41; 3238-43. The texts included the following exchange:

> Rivera: "Best s[chool] c[ommittee] m[ee]t[in]g ever I am trying not to cry"
>
> Oliver-Davila: "Me too!! Wait [un]til the white racists start yelling [a]t us!"
>
> Rivera: "Whatever ... they are delusional"....
>
> Rivera: "Ouch I guess that was for me!"
>
> Rivera: "I still stand by my statement"
>
> Oliver-Davila: "I said [Boston Public Schools] students should get preference and stand by this."
>
> Rivera: "Oh then it was both of us!"
>
> Oliver-Davila: "This guy wrote to me twice"

> Rivera: "Me too"
>
> Oliver-Davila: "White guy who is silent majority. He writes for [B]oston [H]erald"
>
> Rivera: "Not good"
>
> Oliver-Davila: "He complains becaise [sic] he wants to have a vote. I do think the students should vote. But his tweets are excessive"
>
> Rivera: "Agree"
>
> Rivera: "I hate W[est] R[oxbury]"
>
> Oliver-Davila: "Sick of westie whites"
>
> Rivera: "Me too I really feel [l]ike saying that!!!!"

Add. 72-73.

Thereafter, on June 22, 2021, based on the additional text messages, the Coalition filed a motion under Fed. R. Civ. Proc. 60(b), seeking relief from judgment. App. 2290-92. The district court held a hearing on July 9, 2021 hearing, at which it announced it was withdrawing its April 15, 2021 opinion.[7/] App. 13.

[7/] When the district court withdrew its Coalition I opinion, the case was on appeal before this Court. Therefore, as a technical matter, the district court had no jurisdiction to disturb that opinion. Although not entirely clear, this fact seems to have limited practical effect because the district court's Indicative Ruling (called "Coalition III" herein) effectively reaffirms Coalition I on the stipulated record while simultaneously denying the Coalition's Rule 60(b) motion based on the newly discovered text messages.

After further briefing, the court on October 1, 2021, issued an Indicative Ruling denying the Coalition's Rule 60(b) motion for post-judgment relief, in essence affirming its original judgment. See Boston Parent Coal. For Acad. Excellence Corp. v. Sch. Comm. of City of Boston, Civil Action No. 21-10330-WGY, 2021 WL 3012618 (D. Mass. July 9, 2021) ("Coalition III") (Add. 50-104). On December 2, 2021, this Court granted the district court jurisdiction to issue its Indicative Ruling denying the 60(b) motion and enter judgment, which it did on February 24, 2022. Add. 105-06.

The Coalition appealed from this judgment on February 28, 2022 (App. 3287-88) and this Court, on March 29, 2022, consolidated the Coalition's appeal regarding the original judgment with its appeal of the Indicative Ruling.[8/]

SUMMARY OF THE ARGUMENT

This Court should affirm in all respects both district court decisions at issue: 1) Coalition I, which, on a stipulated record, held that BPS's one-year, Exam School admissions Plan ("Plan") – which based twenty percent of admissions on a student's grade point averages ("GPA") on a citywide basis and eighty percent on GPAs within the student's city zip code – did not violate equal protection; and 2)

[8/]Additional facts will be discussed below as necessary.

Coalition III, which held that the Coalition was not entitled to relief from judgment under Fed. R. Civ. P. 60(b) because of newly-discovered text messages.

To start, the case is moot. The direct result of the COVID pandemic and implemented solely for the now-concluded 2021-2022 school year, the Plan has been replaced by a new plan that abandons zip codes altogether. There is, therefore, no ongoing conduct to enjoin. The Coalition's belated attempt to articulate a new remedy – the admission five of its member-students to the Exam Schools – is improperly based on post-judgment evidence presented to the district court with the Coalition's Rule 60(b) motion, which cannot be used to defeat the mootness of its case-in-chief. See pp. 27-29 below.

Moreover, the Coalition, the sole Plaintiff in this action, has no associational standing to assert a claim for individualized relief based on the particular circumstances of a subset of its members. Indeed, the "evidence" the Coalition proffers about its five member-students is so vague and anonymous as to prevent any verification, precluding a finding that any viable remedy continues to exist. See pp. 29-35 below.

On the merits, the Plan does not violate equal protection. Facially race-neutral and anchored in socioeconomic and geographic factors, not race, the Plan is subject to rational basis review. The Coalition utterly fails to show disparate

impact based on race, improperly and without explanation comparing the Plan's projected demographic results with a hypothetical citywide, GPA-only scheme and the previous year's admissions results. Indeed, the Coalition provides no analysis – expert or otherwise – that could possibly lead to a finding of a statistically significant adverse impact on its member-students, accounts for the many variables other than race that explain the Plan's projections, or supports its ultimate position that the historical status quo – the gross overrepresentation of Whites and Asians at the Exam Schools – is a constitutionally-protected condition. See pp. 35-49 below.

Nor does the Coalition show that the Plan has any racially discriminatory intent or purpose. Flouting the clear, longstanding law that race-conscious considerations and goals are constitutionally permissible, the Coalition ignores the breadth of BPS's reasons for adopting the Plan – including socioeconomic and geographic diversity – and myopically focuses only on race, improperly equating evidence of BPS's race-conscious goals with a constitutional violation. The alleged statements of animus also fail to show that the Plan was chosen for some invidious, racially discriminatory purpose. See pp. 49-54 below.

Finally, the district court did not abuse its discretion in denying the Coalition's motion for post-judgment relief under Rule 60(b)(2). First, properly focusing on the most basic flaw with the Coalition's case – its continuing failure to

show that the Plan disparately impacted its White and Asian student-members – the court rightly found that the newly-discovered Oliver-Davila and Riviera text messages would not have altered its previous ruling that the Plan passed constitutional muster. Second, the district court plainly committed no clear error in finding, as a matter of fact, that the Coalition, strident in its incorrect position that the stipulated record required strict scrutiny review of the Plan, waived discovery despite its belief that Oliver-Davila and Rivera harbored racial animus. The court was thus correct: with due diligence, the Coalition could have uncovered the texts prior to trial, but failed to do so. The district court's rulings should be affirmed. See pp. 55-63 below.

ARGUMENT

I. The Court Should Dismiss This Appeal As Moot.

"The federal courts established pursuant to Article III of the Constitution do not render advisory opinions." Golden v. Zwickler, 394 U.S. 103, 108 (1969) (quotations and citations omitted). "[A]n actual controversy must exist at all stages of the review, not merely at the time the complaint is filed." Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 52 (1st Cir. 2013) ("ACLUM"). If a court "cannot give any 'effectual relief' to the potentially prevailing party," the case is moot. Id. Pronouncing whether "past actions were

right or wrong would be merely advisory." Eves v. LePage, 927 F.3d 575, 590 (1st Cir. 2019) (quotations omitted).

This is especially true where, as here, constitutional issues are at stake. Golden, 394 U.S. at 108 ("For adjudication of constitutional issues[,] concrete legal issues, presented in actual cases, not abstractions are requisite."). As such:

> Mootness is a ground which should ordinarily be decided in advance of any determination on the merits. Further, we are obligated to follow the doctrine of constitutional avoidance, under which federal courts are not to reach constitutional issues where alternative grounds for resolution are available.

ACLUM, 705 F.3d at 52 (internal citations omitted).

A. The Coalition's Claim For Association-Wide Injunctive, Declaratory Relief Is Moot.

The Plan is long dead. It was enacted solely for the now-concluded 2021-2022 school year. Indeed, the Coalition readily concedes that Exam School admissions under the Plan having been completed – indeed, the entire school year has since passed – it can no longer seek to prevent the Plan's use. Appellant's Brief at 4-5. It is further undisputed that BPS has implemented a new Exam School admissions process that abandons zip codes altogether, instead employing grades and census tracts (for the 2022-2023 school year) and thereafter basing admissions on a combination of GPA, an examination (for which the Coalition advocates) and

census tracts. See July 14, 2021 Exam Schools Admissions Policy (found at https://www.bostonpublicschools.org/site/Default.aspx?PageID=9035).

Given the Plan's one-time use and the completion of the challenged admissions process, the Court has no ongoing conduct to enjoin and no extant policy to declare unlawful. See Town of Portsmouth, R.I. v. Lewis, 813 F.3d 54, 58 (1st Cir. 2016). The Plan was a temporary remedy for the conditions imposed by COVID-19 and has been permanently replaced. In short, there is no longer any live controversy between the parties and therefore no effectual relief the Court could award the Coalition – the case is moot. See ACLUM, 705 F.3d at 52; see also Town of Portsmouth, 813 F.3d at 58 ("Inescapably, the Town's claim for injunctive relief is moot because the state has repealed the tolls, so there is no ongoing conduct to enjoin.").

B. The Coalition Has Neither Shown Standing To Assert Nor Sufficient Evidence To Support Its Sole Claimed Remedy – Admittance Of Five Member-Students To The Exam Schools.

The Coalition nevertheless presses on, asserting that five of its member-students denied admission to the Exam Schools under the Plan can still receive a remedy even though they are not parties to the case – that is, that this Court can simply order them admitted. See, e.g., Appellant's Brief at 4-5, 24, 58-59. Although the Coalition does not explicitly argue as much, the implication is clear:

the potential admittance of the five member-students, the sole remedy it continues to seek, establishes a live controversy.[9/] This unsupported position does not save this appeal.

First, this contention is improperly based on "evidence" that is not before this Court for purposes of the Coalition's case-in-chief. Evidence that five of its member-students were not admitted to an Exam School came long after the district court's judgment on the merits in Coalition I (and appeal to this Court), as part of the Rule 60(b) motion.[10/] As the Coalition all but concedes, given this procedural posture – including the district court's withdrawal of its initial decision (but not judgment) when it arguably lacked jurisdiction to do so (see App. 2612) – any

[9/] At the time of the Coalition's Rule 60(b) motion, BPS argued to the district court that this case is moot, a contention the Coalition specifically opposed. See, e.g., 03276-80. Well aware that mootness would be an issue on appeal (and, indeed, anticipating it by focusing on a remedy for the five member-students), the Coalition's Brief makes no mention whatsoever of its Complaint claim for $1 in nominal damages or its prior argument that that claim defeats mootness. See App. 3279. That argument is therefore waived. See, e.g., Ondine Shipping Corp. v. Cataldo, 24 F.3d 353, 356 (1st Cir. 1994) ("[A]n appellant waives arguments which should have been, but were not, raised in its opening brief."). Regardless, "[t]o obtain relief in damages, each member of [an association] who claims injury as a result of respondents' practices must be a party to the suit, and [an association] has no standing to claim damages on his behalf." Warth v. Seldin, 422 U.S. 490, 515 (1975). As such, the Coalition has no associational standing to bring a claim for damages – nominal or otherwise – on behalf of its individual members.

[10/] Significantly, although the district court withdrew its Coalition I opinion, it left in place the judgment based thereon. App. 2645.

post-judgment evidence can only be considered for purposes of resolving the Coalition's appeal of district court's denial of the Rule 60(b) motion (i.e., Coalition III).[11/] This fact is fatal to the Coalition's entire appeal, on which there exists no evidentiary basis for a remedy and is therefore moot.

Yet, even were the Court to consider post-judgment evidence regarding the five member-students as part of the mootness analysis, justiciability problems persist. The Coalition, the sole Plaintiff in this action, has no standing as an association to assert a claim for specific, individualized relief on behalf of a mere subset of its members.[12/]

To establish Article III standing, a plaintiff must show a stake in the outcome that is sufficiently concrete and personal to maintain a justiciable case or

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[11/] This is no mere technicality. As fully discussed below, the standards of review for each district court decision at issue are different. "When reviewing a district court's ruling on a motion for judgment on a stipulated record, we review legal conclusions de novo and factual findings for clear error." Consumer Data Indus. Ass'n v. Frey, 26 F.4th 1, 5 (1st Cir. 2022) (citing Thompson v. Cloud, 764 F.3d 82, 90 (1st Cir. 2014)). In contrast, this Court will review a trial court's denial of a Rule 60(b) motion for abuse of discretion. Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009) (citing Cintrón-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 527 (1st Cir. 2002)).

[12/] Whether labelled "mootness" or "standing," the point is the same: "At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." Uzuegbunam v. Preczewski, — U.S. —, 141 S. Ct. 792, 796 (2021)).

controversy. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). To be sure, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." Warth, 422 U.S. at 511. However, such "[r]epresentative standing is inappropriate for prudential reasons, for example, if 'the nature of the claim and of the relief sought' requires the participation of individual members." Parent/Pro. Advoc. League v. City of Springfield, Massachusetts, 934 F.3d 13, 33-34 (1st Cir. 2019) (quoting Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)).

Here, the Coalition's sole focus was always broad, association-wide injunctive relief, specifically, an order enjoining BPS from using the Plan to make Exam School admission decisions. See App. 2102. Such relief, of general applicability to all Coalition members equally, supported associational standing. See, e.g., Coll. Dental Surgeons P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 41 (1st Cir. 2009) (upholding associational standing of dentist association where "the injunctive and declaratory relief that the [association] seeks can be granted without the participation of individual dentists as parties…This relief, if granted, would inure to the benefit of all the affected dentists equally, regardless of their individual circumstances.").

Indeed, in Coalition I, the district court held as much. See Add. 24-29. But now that a Coalition-wide injunction is off the table, a very different remedy is sought – an order that five individual Coalition members be admitted to the Exam Schools, based on the factual circumstances specific to each, that is, his/her specific citywide GPA ranking. See Appellant's Brief at 4-5.

The law is clear: associations generally have no standing to press matters requiring individualized proof. See, e.g., Parent/Pro. Advoc. League, 934 F.3d at 35 ("Efficient and successful judicial resolution of the claims would thus require participation and cooperation by numerous students and parents. And, as we stated, representative standing is inappropriate where such participation is necessary."). Indeed, "[c]ourts have rejected [associational] claims for injunctive relief that seek, in effect, remedies applicable only to specific individuals." Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 326 (D. Mass. 2013)) (citing Bano v. Union Carbide Corp., 361 F.3d 696, 716 (2d Cir. 2004) (rejecting associational standing where the group sought an injunction ordering remediation of individual private properties)).

Now exclusively seeking a remedy applicable only to specific member-students, based on each's factual circumstances, which require individualized proof, the Coalition has no standing. This appeal should therefore be dismissed.

In any event, the "evidence" the Coalition proffers is wholly insufficient. As discussed, evidence about the five member-students was presented in the post-judgment Declaration of Darragh Murphy, purportedly a Coalition member, as part of the Rule 60(b) motion. App. 2884-86. In it, Murphy baldly asserts that "[o]f the six (6) students who were denied admission to any of the Exam Schools, five (5) would have been admitted under a citywide competition because they ranked in the top 974 student applicants in Boston – the number of 7th grade seats filled for the School Year 2021-2022." App. 2885. She then claims to identify each of the five's ethnicity, zip code and GPA, and state that their citywide GPA rankings were "below 974." App. 2886.

It is on this basis – and only on this basis – that the Coalition impliedly claims this case is a live matter. Of course, this "evidence" was not part of any stipulated record, nor could it have been, offered after judgment and presenting only the most bare-bones, vague and anonymous information. It's lack of specificity makes it is impossible for BPS (never mind this Court) to verify. Nor was it proffered as part of any adversarial process that would have given BPS any opportunity to question its veracity or cross-examine. Indeed, to this day, BPS has no idea who *any* of the Coalition's member-students are, never mind the five non-admittees supposedly still at issue.

Nor does the Coalition offer any necessary detail about the specific remedy to which these five are purportedly entitled, instead baldly repeating that the Court should order BPS "to admit these five students." See, e.g., Appellant's Brief at 4. Into which Exam School each of the five should be admitted and on what basis remains entirely unknown. And, as both the district court and this Court have already recognized as to its case generally, the Coalition fails to explain why any purported remedy should be based solely on citywide GPA, an admissions standard the City has not used for over twenty years.

As such, even were the Court to consider the post-judgment evidence regarding the five for purposes of the mootness/standing analysis, it is woefully insufficient to support any claim for a viable remedy. Nonjusticiable in its current form, this appeal should be dismissed.

II. The Plan -- Race Neutral And Therefore Subject Only To Rational Basis Review And Not Strict Scrutiny -- Did Not Violate Equal Protection Because It Did Not Result In Disparate Impact And Was Not Motivated By A Discriminatory Intent Or Purpose.

Mootness aside, BPS wins on the "merits" of the Coalition's case. The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." "Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw v. Reno, 509 U.S. 630, 642

(1993). Accordingly, "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."[13/] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

A. Standard of Review.

As this Court has held:

> We accord deferential review to specific findings of fact emanating from a bench trial. However, when the issues on appeal raise either questions of law or questions about how the law applies to discerned facts, such as whether the proffered evidence establishes a discriminatory purpose or a disproportionate racial impact, our review is essentially plenary. Similarly, we review *de novo* the district court's other legal conclusions, including the level of scrutiny it applied when evaluating the constitutionality of the New Plan….

Anderson ex rel. Dowd v. City of Boston, 375 F.3d 71, 80 (1st Cir. 2004) (internal punctuation and citations omitted). See also Coalition II, 996 F.3d at 45.

As this Court stated:

> In general, a plaintiff may establish that a discriminatory purpose motivated a facially neutral governmental action – and thus that strict scrutiny of that action is warranted – in two ways. See Anderson, 375 F.3d at 82-83. The first is to show that "a clear pattern, unexplainable on grounds other than

[13/] In addition to its Equal Protection claim (brought through 42 U.S.C. § 1983), the Coalition asserts a second claim under Mass. Gen. L. c. 76, § 5, which prohibits race discrimination in public schools. Its brief does not mention this claim and it is therefore waived. See Ondine Shipping Corp., 24 F.3d at 356. Regardless, the c. 76, § 5 claim fails for the same reasons as the Coalition's equal protection claim. See Coalition I, Add. 46.

> race emerges from the effect of the state action." Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)….[Alternatively, the Coalition] urges us to follow a second approach described in Arlington Heights, calling for "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Factors bearing on discriminatory intent may include the degree of disproportionate racial effect, if any, of the policy; the justification, or lack thereof, for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision." Anderson, 375 F.3d at 83 (citing Arlington Heights, 429 U.S. at 266-68).

Coalition II, 996 F.3d at 45.

Although the facts in this case are not in dispute (Add. 2, 52), the parties dispute the import of those facts on the level of review. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 179 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022) (legal conclusions reviewed de novo). On appeal, the Coalition continues to argue that the race-neutral Plan should be subject to strict scrutiny. That argument has been rejected twice by the district court (Coalition I, (Add. 1-49) and Coalition III (Add. 50-104)) and by this Court in its Order denying an emergency injunction pending appeal (Coalition II, 996 F.3d 37). And it should be rejected again.

B. The Factual Circumstances Resulting In The Plan And Its Use Of Zip Codes Is Entirely Race-Neutral.

As it must, the Coalition fully acknowledges that the Plan is facially race-neutral. It argues instead that the Plan's use of zip codes was a proxy for race.

However, there is no support for that conclusion and the district court's finding to that effect should not be disturbed.

Faced with the COVID pandemic and its impact on BPS and its students (App. 170, ¶¶ 22-26), BPS was forced to abandon its historic use of a standardized examination as an admission requirement for the 2021-2022 school year.[14/] App. 1134-35; 1480. The Working Group looked at considerable data and sought to create "a clear and fair process for admission process for admission" that took into account the disproportionate impact of COVID on Boston's families while working towards an admission process that "better reflects the racial, socioeconomic and geographic diversity of all students in the city of Boston."[15/] App. 172-77, ¶¶ 31-47, 1130-37, 1918.

The Working Group had particular concerns about the lack of any consistency in grading within BPS and between BPS and the non-BPS schools. App. 175, ¶ 42; 1135-36. For example, the Group considered evidence that at one

[14/] BPS had every intention of using a standardized exam for 2021-2022 Exam School admissions having just, on July 2, 2020, adopted a new standardized assessment examination. App. 172, ¶¶ 28-29.

[15/] Among other things, BPS went fully remote for all students and had to provide additional supports to students and families, including chrome books and hot spots. App. 170-171, ¶¶ 24-26.

West Roxbury private school, 69% of the students had A+ GPAs and 10% of those students were admitted to Boston Latin School in 2016. App. 175, ¶43.

To address the many concerns, the Working Group recommended that admissions invitations be distributed twenty percent on a citywide basis and eighty percent using zip codes covering Boston's 29 zip codes. App. 174, ¶ 39. As this Court has already observed, BPS's use of zip codes was understandable given its interest in ensuring that all areas of the district had equal access to the Exam Schools. Coalition II, 996 F.3d at 48 ("One can readily see why a school system would prefer to curry citywide support for high-profile, pace-setting schools. And one can easily see why selective schools might favor students who achieve academic success without the resources available to those who are capable of paying for summer schooling, tutoring, and the like."). This conclusion is particularly true where the Massachusetts Department of Elementary and Secondary Education's ("DESE") has specifically criticized BPS for the low number of economically disadvantaged students at Exam Schools, particularly Boston Latin School. App. 169, ¶ 17; 1175.

Moreover, all zip codes were treated the same. In the second, eighty percent round, each zip code was allocated ten percent of the remaining seats based on the

number of school aged children and all students, regardless of race, were subject to the same criteria and process.

Further, any suggestion that race was a motivating factor in the selection of zip codes for use in the Plan is belied by the undisputed fact that the only changes the School Committee made to the Working Group's suggested plan between October 8th and October 21st had nothing to do with race, but focused on socioeconomic and geographic factors. Those changes were the addition of a special code for students who were homeless or in DCF custody and the use of median family income with children under 18, instead of median household income, in ordering the zip codes. Add. 15-18, 64-67; App. 176, ¶ 48. This latter addition specifically addressed DESE's criticism about the Exam Schools' socioeconomic diversity. App. 169, ¶ 17; 1175-76.

Based on the context and the agreed-upon facts, there was compelling support for the district court's conclusion that the Plan was "anchored by geography" not race and supportive of the goal of greater "socioeconomic, geographic and racial diversity." Add. 37-38; App. 13, 62. The use of zip codes was not a proxy for race and district court's conclusions to that effect should be affirmed. See Coalition I (Add. 32-33) and Coalition III (Add. 79). BPS's consciousness of the racial makeup of Boston's zip codes does not require that

strict scrutiny apply. See Parents Involved, 551 U.S. at 789 (allowing "drawing attendance zones with general recognition of the demographics of neighborhoods") (Kennedy, J., concurring in part and concurring in judgment); Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race…Electoral district lines are facially race neutral, so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of classifications based explicitly on race.") (internal quotations omitted)); see also Anderson, 375 F.3d at 87; Coalition I, Add. 31-34; Coalition II, 996 F.3d at 46; Coalition III, Add. 81-82. As this Court observed, "[r]egardless of whether all aspects of his opinion are binding, Justice Kennedy's concurrence reinforces, rather than undercuts, our reasoning and holding in Anderson." Coalition II, 996 F.3d at 48-49.

Notably, since Parents Involved, at least three Courts of Appeal have agreed that school-assignment policies based on geography are facially race-neutral and do not employ racial classifications despite arguments that geography was a surrogate or proxy for race. All three courts concluded that a school board's consideration of race in the development of race-neutral polices does not trigger strict scrutiny review. See Lewis v. Ascension Parish School Bd., 806 F.3d 344

(5th Cir. 2015), cert. denied, 136 S.Ct. 1662 (2016); Spurlock v. Fox, 716 F.3d 383 (6th Cir. 2013), cert. denied, 571 U.S. 954 (2013); Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524 (3d Cir. 2011), cert. denied, 567 U.S. 916 (2012).

Similarly, the Coalition's suggestion that BPS's consideration of demographics or express desire of some for greater diversity (addressed below) is "racial balancing" lacks any factual or legal basis. Racial balancing is a strict quota. See Students for Fair Admissions, Inc., 980 F.3d at 188. Despite the Coalition's repeated use of the misleading label "Zip Code Quota Plan," the Plan created no quota. Rather, the Plan is race neutral – any student regardless of race could gain a seat at one of the Exam Schools based on GPA. Indeed, the district court made clear that the Plan did not "substitute equality of result for equality of opportunity along racial lines." Coalition I, Add. 37-38.

As strict scrutiny is inapplicable, the Court need only determine whether BPS's implementation of the Plan rationally relates to a legitimate government interest. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam). In general, plans are rationally related to such interests "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications Inc., 508 U.S. 307, 313 (1993); see also Lewis, 806 F.3d at 348 (holding where there is no proof of *either* discriminatory purpose

or discriminatory impact, the government action at issue is subject to rational basis review and the burden is on challenger to rebut the "strong presumption of validity" accorded the action and prove that the action is not rationally related to a legitimate government purpose) (citing Heller v. Doe, 509 U.S. 312, 319-20 (1993)).

Under rational basis review, the Plan is unquestionably constitutional. Indeed, the Coalition makes no argument otherwise. The Plan is rationally related to BPS's need for an equitable, citywide means for selecting students for Exam Schools for the 2021-2022 school year when COVID precluded an exam.

C. The Coalition Fails To Establish Disparate Impact.

To succeed on its Equal Protection claim, the Coalition must also show that the Plan disparately impacted its member-students based on race. The starting point for measuring discriminatory impact is always "the impact on the total group to which a policy or decision applies." Hallmark Developers, Inc. v. Fulton Cty. Ga., 466 F.3d 1276 (11th Cir. 2006); see also Carpenter v. Boeing Co., 456 F.3d 1183, 1188 (10th Cir. 2006) ("The essential requirement is that the data concern those persons subject to the challenged…practice."). While the discriminatory impact element of an equal protection claim may be satisfied with statistical evidence, "'[t]he statistics proffered must address the crucial question of whether

one class is being treated differently from another class that is otherwise similarly situated.'" Lewis, 806 F.3d at 360 (quoting Chavez v. Ill. State Police, 251 F.3d 612, 638 (7th Cir. 2001)).

Disparate impact analyzes whether a particular policy or practice, neutral on its face, nevertheless unequally impacts one or more groups. Here, the Coalition fails to offer any analysis, expert or otherwise, of the Plan's admissions procedures on different racial groups.[16/] See Add. 40-43, 97-100; Coalition II, 996 F.3d at 45-46, 49. Rather, the Coalition asks this Court to compare the Plan's projected results with the results of a hypothetical admissions process based only on citywide GPA, which would (allegedly) result in more White and Asian admissions. All that the Coalition has shown is that a different plan would have been more favorable to them than the one BPS implemented. See, e.g., Anderson, 375 F.3d at 88-89 (rejecting expert's comparison of racial demographics of students admitted under new plan with those who would have been eligible under alternative plan without "any systemwide analysis of the racial impact"). Indeed, BPS has not used GPA-only in selecting students for Exam Schools in at least twenty years. App. 168, ¶

[16/] This case involves Exam School admissions, that is, selection rates. The proper disparate impact analysis would compare selection rates amongst different racial groups. Disparate impact would exist if there is a statistically significant difference in the selection rates of students of one race as compared with others.

15. The Court should reject the premise of the Coalition's disparate impact argument, so clearly premised on the straw man of its preferred GPA-only model.

The Coalition simply has not proven, and cannot prove, disparate impact through back-of-the-envelope math based on cherry-picked data from different parts of the record at its whim. See Anderson, 375 F.3d at 86 ("Plaintiffs' reliance on selected excerpts ignores the totality of the evidence."). As held by the district court (Coalition I, Add. 42) and this Court (Coalition II, 996 F.3d at 45-46), the law requires a statistical analysis and proof by experts. The Coalition proffers no such expert evidence.

Instead, the Coalition continues to rely on the simulations[17/] and/or its own speculation about the Plan's results to compare the cohort of students admitted in 2020-2021 and those admitted under the Plan without addressing the issue explicitly raised by this Court – why 2020-2021 admissions should be the proper baseline against which Plan admissions should be compared for purposes of disparate impact. Coalition II, 996 F.3d at 46. This Court also questioned why "the

[17/] As the simulations were based on 2020-2021 school year data, not 2021-2022, any analysis is necessarily speculative.

decrease in overrepresentation of whites and Asians under the Plan is statistically significant as is required by the law of this Circuit."[18/] Id.

Indeed, although the Coalition provides several pages of alleged analysis, none of it attempts to show, through expert opinion or otherwise, statistical significance. For example, even using the most basic eyeball test, the projected difference in Asian admissions between a citywide GPA-only scheme and the Plan (i.e., nine fewer Asians (183 instead of 192) out of 315 applicants) is almost certainly not statistically significant.[19/]

In Lewis, the court rejected plaintiff's discriminatory impact claim because he "offered no evidence of statistical significance at trial…nor, for that matter, does he cite any case law in support of his contention that his evidence proved

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[18/] "Statistical significance," a required element of proof of disparate impact, describes "whether the outcomes of a…practice are correlated with a specified characteristic, such as race, and, if so, whether the correlation can reasonably be attributed to random chance." Jones v. City of Boston, 752 F.3d 38, 43-44 (1st Cir. 2014). As Jones teaches, a probability value (or "p-value") for admissions by race is statistically significant only when the disparate impact measured is five percent (0.05) or less – that is, when there is a five percent or less chance that any measured disparate impact is merely random. Id. at 43-44; 46-47; n.9 (citing Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977), the Federal Judicial Center's Reference Manual on Scientific Evidence (2011), and other courts of appeals). The Coalition makes no attempt whatsoever to offer this required level of proof.

[19/] In other words, even assuming the Coalition's hypothetical citywide GPA-only plan is the proper comparator, the difference between projected Asian admission rates under a citywide GPA-only plan (192/315 = .610) and the Plan (183/315 = .581) is not statistically different.

discriminatory impact as a matter of law." 806 F.3d at 362 (footnote omitted). The same conclusion applies here.

Another problem inherent with the Coalition's "statistics" is their failure to account for the fact that eligible students of virtually all races live in all but a few zip codes. App. 1749-52. Thus, for example, although under the Plan the Chinatown and West Roxbury zip codes had a cap on seats, other zip codes with significant numbers of Asian students gained total seats – particularly, Dorchester's three zip codes, in which 145 Asian BPS 6th graders reside – and would likely benefit. At the very least, the Coalition's assumption that Exam School seats "lost" to Whites and Asians in certain zip codes would not be gained by White and Asian students in others is purely speculative.

Despite this Court's clear direction regarding the proof necessary for disparate impact, the Coalition persists and continues to make statistically unsupported comparisons and analyses, albeit with what they claim are the actual results of Plan's admission process. See Appellant's Brief at 29-32. Regardless of whether the simulations or alleged actual results are used, the fact remains that the evidence is wholly insufficient because there could be multiple explanations for the year-to-year differences and race is merely one of the possibilities. See Anderson, 375 F.3d at 88-89.

For example, Exam School admissions data over the preceding three-year period (school years 2018-2019, 2019-2020 and 2020-2021) illustrates that the number of Asians and Whites varied year-to-year. App. 1465. The variations are also apparent from a review of the Exam School enrollment in 2020-2021 as the number of students by race in each grade varies significantly. App. 1124. Where such variations occurred when the same criteria (exam plus GPA) was used in all the years, the Coalition's suggestion that the racial variation constitutes disparate impact against Asians and White is unsupportable and cannot substitute for careful statistical analysis by experts that would through regression analysis determine whether race was the reason for the alleged difference.

Finally, as the district court pointedly explained, the Coalition ultimately relies on the status quo as its disparate impact starting point. Under that theory, Asians and Whites would be able to maintain their overrepresentation in the Exam Schools with impunity, as any change to Exam School admission would almost certainly reduce those groups' overrepresentation. See Coalition III, Add. 41, n. 19 (noting "that when a group is as overrepresented as White and Asian students at the Exam Schools, it would appear that nearly any changes to the admission process would have resulted in some reduction, if only from the law of averages.").

Put another way:

> While the increase of a zero-sum resource to one group necessitates the reduction of the resource to others, the case law is clear – the concern is action taken because of animus toward a group, not in spite of an action's necessary effect on a group or groups. The Plan's criteria are all facially race neutral. The precedent is clear that when the governmental action is facially race neutral, good faith is presumed in the absence of a showing to the contrary, i.e., unless the plaintiff proves disparate impact and discriminatory animus under Arlington Heights.

App. 96. (internal citations and punctuation omitted)

The Coalition simply does not establish that the Plan "creates disproportionate racial results." Anderson, 375 F.3d at 90; see also Id. ("If plaintiffs had been able to show that the New Plan resulted in stark systemwide racial disparities regarding assignments to first choice schools, we might – depending on the circumstances – have reached the conclusion that intentional discrimination occurred and so adopt a stricter standard of scrutiny in assessing justification.") (emphasis supplied). As such, the Coalition's disparate analysis impact fails.

D. The Coalition Has Shown No Discriminatory Intent Or Purpose.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights, 429 U.S. at 266. "Racially discriminatory purpose means that the decisionmaker adopted the challenged action at least partially because the action would benefit or burden an identifiable group." Lower Merion, 665 F.3d at 552. The decisionmaker's

"awareness or consideration of racial demographics" is not enough. Lewis, 806 F.3d at 355. Rather, "the challenger must demonstrate that race was 'the predominant factor motivating [the body's] decision." Miller v. Johnson, 515 U.S. 900, 916 (1995). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266.

Here, the Coalition's evidence of BPS's invidious discriminatory purpose involves merely pointing to (and only to) those instances in the record where race is mentioned. As an overarching matter, this "evidence" ignores the above-described case law firmly holding that race-neutral school selection policies – even undertaken with race-conscious considerations and goals – are constitutionally permissible. That the Working Group considered the potential racial impact of the Plan and various comments about a desire for, among other things, enhanced racial diversity at the Exam Schools, simply does not establish that that BPS acted with an invidious discriminatory purpose. See Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998) ("the plaintiffs are mistaken in treating 'racial motive' as a synonym for a constitutional violation").

In fact, if anything, it shows the opposite – that is, that BPS considered race in an overt attempt not to discriminate. See, e.g., Lower Merion, 665 F.3d at 553

(no discriminatory purpose where statements by school-board officials "may indicate awareness or consciousness of race," but "[i]nstead of being adopted for the purpose of discrimination, the statements indicate, if anything, that Board members and Administrators adopted [the] Plan [at issue] in an attempt not to discriminate on the basis of race") (emphasis in original); Christa McAuliffe Intermed. Sch. PTO v. de Blasio, 364 F. Supp. 3d 253, 279 (S.D.N.Y. 2019) (holding statements lauding how admission program changes would increase Black and Latinx enrollment at specialized high schools and regarding the "monumental injustice" of these groups' historical underrepresentation did not reflect discriminatory intent against Asians).

Even more clearly, the Coalition disingenuously ignores the breadth and range of all the considerations the Working Group and BPS took into account in devising and selecting the Plan. App. 167-74, ¶¶ 13-44. The Working Group, moreover, thoroughly considered current and historic Exam School admissions plans and rates, as well as several simulations based on available data from prior years to evaluate the possible socioeconomic, geographic and racial impacts of the various proposals it was considering.

Moreover, the use of BPS's "Racial Equity Planning Tool," designed to ensure that BPS takes "deliberate action to identify and dismantle cultural,

structural, racial and social barriers that create opportunity gaps for students," to "produce decisions that move the needle on closing opportunity gaps and other racial disparities for historically marginalized populations in BPS, including students, families, and employees" does not discriminate against any particular racial group. Instead, it focuses BPS's "finite resources [on] strategies that produce the best results for the most vulnerable," and "pivots" consideration of the impact of BPS policies on "Black, Latinx, English Language ('EL'), Special Education, and economically disadvantaged students and other historically marginalized communities. App. 176, ¶¶ 47-48.

The Plan's ultimate goal was to provide BPS with an equitable, citywide means for selecting students for Exam Schools for the 2021-2022 school year in the COVID-caused absence of the examination it historically used. See, e.g., App. 1134; 1480. It sought to mitigate the effects of grade inflation, including the variability among grading systems by applicants' schools, which would be exacerbated by the lack of an exam. App. 175, ¶¶ 42-43; 665-66. It underscored BPS's interests in promoting socioeconomic, geographic and racial diversity in its Exam Schools (e.g. App. 1473), by adding a "zip code" for the homeless and students in DCF custody, and ranking zip codes inversely by family median income. App. 176-77, ¶ 48.

Given all this, to claim that the Plan was all and only about race – indeed, that it was specifically designed to invidiously target Whites and Asians – is simply not credible. Indeed, that BPS had before it, but did not select, one of the many options that would have likely resulted in many more Black and Latinx admissions (and therefore necessarily fewer White and Asian admissions) is evidence enough of its lack of discriminatory purpose. Were BPS truly bent on discriminating against Whites and Asians, it chose one of the worst options available to accomplish this goal.

Similarly, that the Coalition plucks from the record a few School Committee members' statements about the projected racial impact of the Plan ignores the vast majority of *all* member commentary on *all* of the reasons behind the Plan. Indeed, a fulsome review of School Committee member comments reveals an overarching concern for all students on all dimensions, including socioeconomic status, family situation, class, geography, and race and ethnicity. See e.g. App. 466-67; 482.

Finally, the Coalition's focus on Locanto's statement at the October 21, 2020 meeting (App. 181, ¶ 66) and Oliver-Davila's and Rivera's text messages about it (App. 181, ¶¶ 67-68), does not change this result. Although the district court deemed Locanto's statement "racist" (see Add. 45), it did not find that it was

evidence of an invidious discriminatory purpose.[20] Id. That factual determination should be upheld as there was no connection whatsoever between it and the Plan. Locanto's random remark – that had no bearing on the Plan's terms or BPS's decision-making about it – cannot reasonably provide the basis for concluding that the Plan was motivated by a purpose to discriminate against Asians, never mind Whites. See, e.g., Allstate Ins. Co. v. Abbott, 495 F.3d 151, 161 (5th Cir. 2007) (stray remarks by legislators reflecting protectionist views did not support finding that statute had discriminatory purpose against out-of-state businesses when there was ample evidence that other legitimate purposes were considered).

Similarly, the text exchange between Oliver-Davila and Rivera about Locanto's comments does not on its face relate to the Plan. Rather, the texts are focused on the fact that Locanto had been overheard making a remark and its potential consequences, an exchange simply not relevant to the Plan or its purpose.[21] In sum, the Coalition has not shown BPS acted with invidious discriminatory purpose.

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[20] On its face, there is nothing in Locanto's cryptic comment ("That was like Shania (phonetic), Shanene (phonetic) and Boo (phonetic)" (App. 893)), that overtly reflects race-based animus against Asians.

[21] Oliver-Davila's and Rivera's newly-uncovered text messages are addressed, as they must be, in the section regarding the Coalition's Rule 60(b) motion. See Argument § III below.

III. The District Court's Rule 60(b) Indicative Ruling Should Be Affirmed.

The Coalition alternatively argues that were this Court to determine that it is not entitled to judgment based on the stipulated record, it should reverse the district court's denial of its Rule 60(b) motion and either add the newly uncovered text messages between Oliver-Davila and Rivera to the record – which the Coalition urges should change the underlying judgment – or vacate the judgment and remand to the district court for discovery and trial. The Court should affirm in all respects the district court's Rule 60(b) Indicative Ruling (Coalition III, Add. 50-104).

A. Standard of Review.

Rule 60(b) lists the reasons upon which a "court may relieve a party or its legal representative from a final judgment, order, or proceeding...." Fed. R. Civ. P. 60(b). "[R]elief under Rule 60(b) is extraordinary in nature," and "motions invoking that rule should be granted sparingly." Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002). To prevail, the movant must establish "that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted." Id.

On appeal, the Coalition argues for reversal only under Rule 60(b)(2), that is, in response to "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."[22/] A party who moves under Rule 60(b)(2) must demonstrate that:

> (1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted.

González-Piña v. Rodríguez, 407 F.3d 425, 433 (1st Cir. 2005); see Karak, 288 F.3d at 19-20 ("[A] party who seeks relief from a judgment based on newly discovered evidence must, at the very least, offer a convincing explanation as to why he could not have proffered the crucial evidence at an earlier stage of the proceedings.").

This Court reviews a trial court's denial of a Rule 60(b) motion for abuse of discretion. Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009) (citing Cintrón-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 527 (1st Cir. 2002)). "In practice this means *de novo* review on issues of abstract law

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[22/] The Coalition abandons on appeal its previous claim for relief from judgment under Rule 60(b)(3), that is, based on "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." See Coalition III, Add. 100-02.

and clear error as to fact findings, deferential review associated with the phrase 'abuse of discretion' otherwise being reserved for what might be termed judgment calls (e.g., law application, procedural rulings)." Roger Edwards, LLC v. Fiddes & Son Ltd., 427 F.3d 129, 132 (1st Cir. 2005).

B. The Newly Discovered Text Messages Would Not Change The Underlying Judgment.

Under these standards, Coalition III should be affirmed. Most clearly, starting with Rule 60(b)(2)'s fourth element, the district court correctly concluded that consideration of the text messages would probably not change the result were a new trial granted. See González-Piña, 407 F.3d at 433; Karak, 288 F.3d at 19-20. The court properly emphasized what was and continues to be the most basic flaw with the Coalition's entire case – its abject failure to prove that the Initial Plan resulted in any legally-cognizable disparate impact to its White and Asian member-students.

As fully argued (see Argument § II.C. above), the Coalition's claimed showing of disparate impact is hopelessly deficient. It altogether fails to justify its total reliance on citywide GPA and the 2020-2021 admissions numbers as proper comparators, offers no analysis – expert or otherwise – that could possibly lead to a finding of legally-required statistical significance, and fails to account for the many obvious variables other than race that could explain the Plan's admissions

demographics. Ultimately, the Coalition clings to the plainly untenable position that the status quo – the gross overrepresentation of Whites and Asian at the Exam Schools – is a condition that is constitutionally protected from change.

For its part, the district court explained these deficiencies very simply, reemphasizing that the Coalition's disparate impact analysis shows only (arguably) that White students would make up thirty-two instead of thirty-nine percent, and that Asian students would make up sixteen instead of twenty-one percent, of seats at the Exam Schools. Add. 98. Because White and Asian students together make up twenty-three percent of school-age children in Boston, but fifty percent of incoming students at the Exam Schools, "the Coalition's evidence of disparate impact was a projection of a prior plan that showed White students going from representing 243 percent of their share of the school-age population in Boston to 200 percent, and Asian students going from representing 300 percent of their share of the school-age population in Boston to 228 percent." Add. 98.[23/]

[23/] As discussed, the Coalition before the district court (and as it does here) attempted to supplement the admissions projections with "evidence" of the final numbers admitted. See App. 2884-86; see also Appellant's Brief at 29-32. The district court does not adopt or even mention these figures in Coalition III, arguably rejecting them as a matter of fact, but at least deeming them unnecessary for purposes of the Rule 60(b) decision. Regardless, as the Coalition itself recognizes, the projected and purported actual numbers are so close as to require the same result. See Id. at 29 ("These projections ultimately came true.").

Quite simply, this fact – without anything more – does not show legally cognizable adverse impact. See Coalition II, 996 F.3d at 46 ("[P]laintiff offers no evidence establishing that the numerical decrease in the overrepresentation of Whites and Asians under the Plan is statistically significant."); see also Anderson, 375 F.3d at 87-90 (holding that the results were not "stark" and did not qualify as a disparate impact under Arlington Heights).

As the district court so plainly held – and as this Court resoundingly concurred – the Coalition failed to establish any disparate impact against its White and Asian member-students as the result of the Plan. Coalition II, 996 F.3d at 46 (noting that Coalition "for[went] any serious engagement" with statistically analyzing the Plan's alleged disparate impact); 45-46; Coalition I, Add. 41-43 (concluding Coalition failed to prove disparate impact). The district court was therefore undoubtedly correct in concluding that the new text messages proffered would not change its ruling that the Plan survived an Equal Protection challenge.

C. The Coalition Could Have Discovered The Text Messages By Due Diligence.

The district court also correctly determined that the Coalition fails the second Rule 60(b) prong, that is, that the new "evidence could not by due diligence have been discovered earlier by the movant." As the court ruled, although the text messages were new evidence, "they are evidence that could have been discovered

earlier by the Coalition had it not chosen to forgo discovery and followed to fruition its suspicions that Oliver-Davila and Rivera harbored racial animus." Coalition III, Add. 95.

More specifically, the court concluded that "the Coalition here elected to forgo pressing for discovery NOT because it felt as though it had turned over every evidentiary rock but because, given its erroneous view of the law, it saw no need to overturn any more rocks than it already had examined." Add. 94. Indeed, although the Coalition already claimed evidence Chairperson Locanto made discriminatory remarks and effectively claimed that Oliver-Davila and Rivera had similar animus toward Whites and Asians, the Coalition "nevertheless discouraged further development of the record, insisting that it need not prove animus to prevail." Add. 95. As if to prove the point, the Coalition continues to make this exact argument on this appeal. See Appellant's Brief at 54-59.

Thus, the district court was correct in concluding that it "would have to blind itself to many of the Coalition's tactical decisions and representations on the record" to order Rule 60(b) relief. Add. 101. Despite the Coalition's blanket attempts to lay blame elsewhere, the court quite rightly concluded that "it is not appropriate to give the Coalition a second bite at the apple to recast its theory of

liability as one that the Coalition knew existed but elected not to argue, and as to which there was some evidence that the Coalition elected not to utilize." Add. 102.

Significantly, the district court also found that although BPS mishandled the public records requests from Murphy and the Boston Globe: 1) BPS did not engage in any misconduct during judicially-imposed discovery; 2) in answering records requests BPS had no way of knowing Murphy was a Coalition member or that the Coalition intended to rely on the requests of Murphy, a third party; and 3) to the extent that a more fulsome review of BPS records would have uncovered the text messages at the time the stipulated record was made, it was "inadvertence stemming from the burden of operating at flank speed to prepare for what [BPS and its counsel] very much wanted to be a timely, dispositive hearing – as events so proved." Add. 93. Although more directly related to Coalition's now-abandoned Rule 60(b)(3) claim, these findings all support the conclusion that the Coalition, with due diligence, could have uncovered the text messages earlier.[24/]

Indeed, these conclusions are essentially factual findings, based directly on the Coalition's actions, statements and arguments before the district court.

[24/] To be clear, with respect to the discovery of the text messages, BPS and its undersigned counsel are acutely aware of the district court's criticisms of their handling of the public records requests and the stipulated record and fully acknowledge they are not blameless in this regard.

Applying the appropriate standard or review, there simply is no argument that these findings should be overturned as clear error. See Roger Edwards, LLC, 427 F.3d at 132. Coalition III should be affirmed.

IV. Were The Court To Rule That Strict Scrutiny Should Be Applied To The Plan, It Should Remand The Case For Trial On That Issue Only.

Before the district court, BPS (as did Intervenors) explicitly and repeatedly reserved the right to present evidence on strict scrutiny, that is, evidence that the Plan served a compelling government interest and was narrowly tailored to that end. Indeed, in Coalition I, the district court was clear: BPS "maintained the Joint Statement supported judgment in its favor under the rational basis test but, cautiously, reserved its right to proffer evidence should that be necessary." Add. 4.

Ultimately, of course, in neither Coalition I nor Coalition III did the district court reach the question of whether the Plan survived strict scrutiny, concluding that evidence on the issue was not necessary. Therefore, BPS never proffered any such evidence.[25/]

[25/] Notably, the parties agreed in the Joint Statement that "students can benefit educationally when the student body of their school is diverse in terms of race, socioeconomic status, national origin, views and other factors." App. 181, ¶ 69.

As such, were this Court to determine that strict scrutiny is the proper standard for reviewing the Plan, it should not reverse the district court but rather remand the case for a trial limited to that issue.

CONCLUSION

For all of the foregoing reasons, BPS respectfully requests that this Honorable Court affirm the district court's decisions in Coalition I and Coalition III in all respects on any or all of the bases identified. Alternatively, the Court should remand the case to the district court for trial solely on the issue of whether the Plan survives strict scrutiny review.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(g), I certify that this filing complies with the type-volume limitation of Rule 27(d)(2) because it contains 12,337 words. This filing, moreover, complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/*Kay H. Hodge*
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I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent by first class mail, postage prepaid, to those indicated as non-registered participants on September 2, 2022.

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