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; ALEXANDRA OLIVER-DAVILA; MICHAEL O'NEIL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS,

Defendants – Appellees,

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants – Intervenors – Appellees.

No. 22-1144

BOSTON PARENT COALITION
FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff – Appellant,

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA OLIVER-DAVILA; MICHAEL D. O'NEILL; HARDIN COLEMAN; LORNA RIVERA; JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS, Superintendent of the Boston Public Schools,

Defendants – Appellees,

THE BOSTON BRANCH OF THE NAACP; THE GREATER BOSTON LATINO NETWORK; ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK; ASIAN AMERICAN RESOURCE WORKSHOP; MAIRENY PIMENTEL; H.D.,

Defendants – Intervenors – Appellees,

KAY H. HODGE; JOHN MATTHEW SIMON,

Respondents.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In the fall of 2020, the Boston School Committee replaced the longstanding criteria for admission to its three prestigious Exam Schools with a ZIP Code quota "chosen precisely because of [its] effect on racial demographics." Add. 096. During the process, *three* of the seven School Committee members made overtly racist remarks denigrating Asian American and white parents. Add. 095–96. The quota accomplished the Committee's goal—it made it disproportionately more difficult for Asian American and white students to get into the Exam Schools and correspondingly fewer Asian American and white students were admitted to the class for the 2021-22 cycle. Yet the School Committee continues to defend the ZIP Code quota on the ground that the plan's successes were mere happenstance, and that it did not intend to discriminate against any racial group. The evidence here, however, is clear as day. The School Committee chose the ZIP Code quota "at least in part 'because of,' not merely 'in spite of,' its adverse effects" on Asian American and white students, *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). And because that much is plain, the district court should have

subjected the quota to strict scrutiny and ultimately declared it unconstitutional.

The School Committee's ZIP Code quota resulted in five students represented by the Boston Parent Coalition for Academic Excellence being denied admission to any Exam School. For the reasons set forth below, this Court should hold that the ZIP Code quota was unconstitutional and remand the case to allow the district court to order admission for these five students.

ARGUMENT

I. The Coalition Retains Article III Standing

The Coalition brought this lawsuit on behalf of parents of 14 students, then sixth graders, who sought admission into the Exam Schools for the fall of 2021. App. 2082. These students hailed from ZIP Codes—like West Roxbury, Chinatown, and Brighton—that all stood to lose Exam School seats due to the ZIP Code quota. Add. 029 ("[T]he Coalition has demonstrated that its members are eligible to apply to the Exam Schools, that they did in fact apply, and that they reside in zip codes 02111, 02114, 02135, and 02132, all of which sent more students to

the Exam Schools under the old plan than are presently likely under the Plan for school year 2021-2022.").

The district court held that the Coalition had standing to represent these students because "these zip codes will have either higher competition among their residents for their apportioned seats or pick later in the rounds." *Id.* After all, before the release of admissions decisions, all 14 students the Coalition represents had standing because "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chap. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

After final judgment below, BPS issued admissions decisions. The predicted effect came to pass. Not only did students in West Roxbury (02132) obtain fewer seats than they would have even under a random distribution, but they also had to obtain a substantially higher GPA to obtain admission than if they had lived anywhere else—and particularly if they lived in the ZIP Codes with the fewest white and Asian American applicants. App. 2892. As it turns out, five of the 14 students represented by the Coalition had a GPA that would have been high enough for

admission absent the ZIP Code quota. App. 2885–86. These students suffered a cognizable injury beyond unequal treatment—they were denied admission to an Exam School because they lived in the wrong part of town that had been targeted because of race. They continue to suffer that injury. Because these students would have standing in their own right, the Coalition has standing to continue representing them.

A. Release of admissions decisions did not moot the case

The School Committee's primary argument is that the issuance of admissions decisions—coupled with BPS's decision to discontinue the challenged plan after one year—moot this case. Although the School Committee now apparently recognizes that the Coalition had standing at the outset, it asserts the case is now moot because the district court can no longer enjoin it from using the ZIP Code quota. But the Coalition no longer seeks this remedy, which it recognizes would be impractical, if not impossible. It instead asks the Court to craft a limited remedy that provides equitable relief to five students who were indisputably harmed —and continue to be harmed—by the ZIP Code quota. The relief the Coalition now seeks is little different than the one this Court approved

after finding that BPS' race-based admissions policy violated the Constitution in *Wessmann v. Gittens*, 160 F.3d 790, 809 (1st Cir. 1998).

The Supreme Court has emphasized that "in the event of a constitutional violation . . . every effort should be made by a federal court to employ those methods 'to achieve the greatest possible degree of (relief), taking into account the practicalities of the situation.'" *Hills v. Gautreaux*, 425 U.S. 284, 297 (1976) (quoting *Davis v. Sch. Comm'rs*, 402 U.S. 33, 37 (1971)). Here, the "practicalities of the situation" are different now than at the outset. Now, there are specific students who would have been admitted absent the challenged quota.[1] It is well within the power of a federal court to fashion an equitable remedy that provides relief to those students. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is

[1] Both the School Committee and Intervenors argue that the Coalition's definition of injury is arbitrary because BPS has never used only GPA to determine admission to the Exam Schools. But admission during the challenged year was based on only two factors—a student's GPA and ZIP Code. App. 179–80. The Coalition's position—articulated from the beginning of this lawsuit—is that the latter factor was intended to act as a racial proxy. Without that factor, admissions would have come down to a Citywide competition based only on GPA—just as BPS allocated the initial 20% of seats under the challenged plan. App. 179.

broad, for breadth and flexibility are inherent in equitable remedies."); *United States v. Virginia*, 518 U.S. 515, 547 (1996) (a remedial decree "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977))); *Morgan v. Kerrigan*, 530 F.2d 431, 432 (1st Cir. 1976) ("[T]he court's equitable power to fashion a remedy is both broad and flexible."); *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231–32, 239 (4th Cir. 2016) ("once a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, . . . court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs." (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982))). The case is not moot simply because the remedy initially sought is no longer available.

Separately, the School Committee presses two supposed problems with the Coalition's evidence that the five students were rejected on account of the quota. First, because the evidence post-dates the district court's initial judgment, the School Committee says the Court cannot consider it except on review of the denial of the Coalition's Rule 60(b)

motion. Yet this gets the issue backwards. Under Rule 60, "newly discovered" evidence refers to evidence that *existed at the time of trial* but was unknown to the party seeking post-judgment relief. *See In re Abijoe Realty Corp.*, 943 F.2d 121, 124 n.3 (1st Cir. 1991) (citing *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir. 1988)). Accordingly, while the five students' admissions decisions are "new" evidence, they are not the type of evidence that could have formed the basis of a Rule 60(b) motion. The evidence did not exist at the time of trial. The School Committee's assertion that evidence of the students' decisions could *only* be reviewed on appeal from the Rule 60 denial is thus quite puzzling.

On the contrary, the evidence was properly before the district court—and is properly before this Court. When the Coalition filed its Rule 60 motion in light of the newly-revealed racist text messages, the district court questioned whether the Coalition still had standing after the admissions decisions had been made. App. 2639–40. In response, the Coalition proffered the evidence regarding the five students' decisions. App. 2843–47. The evidence satisfied the district court as it did not address standing in its indicative ruling, despite its prior query and continual "obligation to determine whether subject-matter jurisdiction

exists.'" *Industria Lechera de Puerto Rico, Inc. v. Beiro*, 989 F.3d 116, 120 (1st Cir. 2021) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)); *see also Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270–71 (2015) (explaining that where the district court had questions regarding the standing of an association, "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence"); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (noting that "it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing").[2]

[2] Indeed, had the Rule 60 motion never been filed, it is likely that the Coalition could have supplemented the record in this Court to demonstrate continued standing. *See Redfern v. Napolitano*, 727 F.3d 77, 83 (1st Cir. 2013) (permitting a party to introduce new facts via a Rule 28(j) letter and noting that the Court had previously "considered new facts presented in one such letter when those facts were verified and relevant to the question of mootness" (citing *United States v. Brown*, 631 F.3d 573, 580 (1st Cir. 2011)). After all, even the Supreme Court considered an affidavit lodged directly in that Court to establish that the members of a group challenging a race-based school assignment system "ha[d] children in the district's elementary, middle, and high schools." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007).

Second, the School Committee takes issue with the form of the evidence—Murphy's declaration and its attachments—and argues that it is insufficient to establish continued standing primarily because the students are not named. But the School Committee has no authority for the proposition that this Court may simply ignore uncontested verified evidence. Here, the evidence is in the form of a declaration of an individual with personal knowledge of the admissions decisions, and includes as an attachment the decision letter sent to one of the students. App. 2885–88. The School Committee complains that it was unable to dispute the claims made in Murphy's declaration, but it did not pursue any avenues to contest the evidence below. It cannot now complain, in the face of a sworn declaration, that it cannot verify the identity of the five students.[3]

In short, because a remedy may still be had for these five students, the case is not moot.

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[3] To be sure, if the Court is concerned about the identity issue, it may order a limited remand. But it does not deprive the Coalition of standing to represent these individuals. And once the fact of a constitutional violation has been established, the district court may then craft a remedy. Even if this Court does not order the Coalition's preferred remedy of admission for the students, the district court may still do that on remand, or order another remedy, such as nominal damages.

B. The Coalition has standing to seek injunctive relief for its members

Aside from mootness, the School Committee and Intervenors assert that the Coalition lacks standing to seek individual remedies for the five affected students. But this argument misreads *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), and its progeny. That an association seeks injunctive relief that would inure to particular members is not a jurisdictional bar that deprives the association of standing to represent those members. And given the development of the case, the limited remedy the Coalition now seeks should not dissuade the Court from reaching the merits on prudential grounds.

First, the jurisdictional issue. It is often said that an association must show three things to have standing to represent its members under *Hunt*: that

> (1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals.

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 183 (1st Cir. 2020) (quoting *United States v. AVX*

Corp., 962 F.2d 108, 116 (1st Cir. 1992)). But these three elements are not created equal. As the Supreme Court has explained, the purpose of the *Hunt* inquiry is to ensure that "the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996). Yet only the first two *Hunt* prongs are necessary to ensure the presence of "adversarial vigor in pursuing a claim for which member Article III standing exists." *Id.* at 556. The third prong, on the other hand, focuses on "matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id.* at 557. It is "prudential," not jurisdictional. *Id.* at 555.

It is undisputed that the Coalition satisfies the first two *Hunt* prongs—it has members who would have standing in their own right, and the Coalition itself was formed specifically to vindicate the rights of students to be free from racial discrimination when applying to the Exam Schools. The School Committee and Intervenors focus only on the third prong, but even if the Court were to find issue under that prong with the nature of the relief sought, it would not affect the Court's jurisdiction to

hear the appeal. *See id.* at 556 ("[O]nce an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more."). The Coalition therefore has Article III standing.

The third *Hunt* prong should not stop the Court from hearing the merits of a case that it has jurisdiction to hear. To begin with, both sets of Appellees present only the thinnest reed of authority for the proposition that a court should prudentially decline to decide a case where a plaintiff association seeks injunctive relief on behalf of individual members. The lion's share of the authority comes from the Second Circuit, which remains the only circuit to flatly prohibit an association from bringing *any* civil rights claim on behalf of its members. *See Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 122–23 (2d Cir. 2017) (Jacobs, J., dissenting); *see also Christa McAuliffe Intermediate Sch. PTO v. de Blasio*, 364 F. Supp. 3d 253, 271 n.17 (S.D.N.Y. 2019). Just as this Court has not followed the Second Circuit to foreclose associational Section 1983 claims, it should not follow that court's strained reading of *Hunt*'s third prong.

There is simply no comparable precedent in this Court. The only First Circuit authority in either brief is *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 35 (1st Cir. 2019), but the facts of that case help demonstrate why the Coalition's case does *not* require individual participation. *Parent/Professional* involved claims under the Americans with Disabilities Act and the Individuals with Disabilities Education Act that a public school system segregated students with mental disabilities in a separate and inferior school. *Id.* at 17–18. A plaintiff association sought "to sue on behalf of hundreds of children who [had] not chosen to sue or even to pursue related administrative remedies." *Id.* at 35. The complaint involved "multiple facets of each child's special education program." *Id.* As a result, this Court found that "adjudication of the claims here would turn on facts specific to each student, including unique features of each student's unique disability, needs, services, and placement." *Id.* In such a case, prudence suggests that complicated matters of individualized proof—not to mention potential issues with circumventing an individual requirement to exhaust administrative remedies—should not be resolved in a representative capacity.

This case is different in several important respects. The Coalition did not seek any individual remedy at the outset—its goal instead was to enjoin the ZIP Code quota for everyone. But circumstances changed once admissions decisions were released, and it became possible to discern which students would have received admission but for the quota. Far from promoting "administrative convenience and efficiency," *Brown Group*, 517 U.S. at 557, an order dismissing this appeal for lack of standing would needlessly complicate the case. It would invite the five students to bring their own cases,[4] restarting the entire process after the issues in this case have already been briefed twice in this Court. That makes little sense here, as the "individual proof" required is limited to five student's ZIP Code, and GPA—facts that are quite easily discernible. *See Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 314 (1st Cir. 2005) (Boudin & Dyk, JJ., concurring) (noting that "[w]here only injunctive relief is sought, an association may sometimes be allowed to sue even if some proof from individual non-party members is required" and endorsing the Third Circuit's rule allowing "for association standing

[4] The students would have substantial time to do so, as the statute of limitations for Section 1983 claims in Massachusetts is three years. *Fincher v. Town of Brookline*, 26 F.4th 479, 485–86 (1st Cir. 2022).

if proof as to member circumstances were 'limited,' but it noted that 'conferring associational standing would be improper for claims requiring a fact-intensive-individual inquiry.'" (quoting *Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 286–87 (3d Cir. 2002))). Because the factual development from each student would be "limited" rather than "fact-intensive," individual participation is not necessary here.[5]

* * *

This case is not moot because a controversy remains between members of the Coalition and the School Committee over the constitutionality of the ZIP Code quota. Five children of Coalition members were denied admission to the Exam Schools because they live in a ZIP Code the School Committee targeted because of its racial demographics. The Coalition has standing to continue to represent them. It seeks only a limited remedy of admission for these five students who

[5] Put differently, what the Coalition now seeks is still a generic remedy—it applies to all of the students the Coalition represents who were denied Exam School seats because of the School Committee's discrimination. The only difference is that we can now identify particular students.

were adversely affected, and it should be permitted to proceed on that basis.

II. Strict Scrutiny Applies to the ZIP Code Quota

Considering the whole record, the district court reached an inescapable conclusion—it was "clear" that "the race-neutral criteria were chosen precisely because of their effect on racial demographics." Add. 096. Under Supreme Court precedent, the next step was just as clear. Such a finding amounts to an acknowledgement that the ZIP Code quota was chosen "at least in part 'because of,' not merely 'in spite of,' its adverse effects" on Asian American and white students. *Feeney*, 442 U.S. at 279. The district court therefore erred by not subjecting the ZIP Code quota to strict scrutiny. The School Committee and Intervenors now urge this Court to continue the error. This Court should instead follow *Feeney* and faithfully apply *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977), to find that the School Committee's racial purpose triggers strict scrutiny.[6]

[6] For the reasons stated in the Coalition's opening brief, the Coalition does not believe a remand is necessary should the Court find that strict scrutiny applies because the School Committee lacks—as a matter of law—a compelling interest in achieving the educational benefits of diversity at the K-12 level. Opening Brief at 54–56. Additionally, it is not

A. The ZIP Code quota was projected to have—and in fact had—a substantial disparate impact on Asian American and white students

The School Committee accuses the Coalition of cherry-picking the data, but no matter how the Court looks at it, the ZIP Code quota accomplished its objective of limiting Asian American and white enrollment at the Exam Schools. As the Coalition demonstrated in its opening brief, whether one compares the results of the challenged plan (or, for that matter, the Working Group's simulations) to the previous year's data, to what would have happened in a Citywide competition without a quota, or even to a hypothetical random lottery, Asian American and white students come out worse under the ZIP Code quota. Opening Brief at 28–32. And that is the result the School Committee sought. This Court should reject the School Committee's and Intervenors' attempts to obfuscate the clear fact that this Plan accomplished what it set out to do.

In its attempt to minimize the racial impact, the School Committee asserts that the Coalition failed to present expert testimony

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clear why the School Committee should have an additional opportunity to introduce evidence to overcome its burden under strict scrutiny when it chose not to do so before the case went to judgment.

demonstrating the "statistical significance" of the disparate impact. As an initial matter, it is not clear why expert testimony regarding statistical significance should ever be required to prove a claim of intentional discrimination. It is no wonder that the cases cited—principally *Jones v. City of Boston*, 752 F.3d 38, 43–44 (1st Cir. 2014)—are Title VII *disparate impact* cases. In that context, proof of statistical significance is necessary because the statistics are the *entire claim*. *See Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (a "threshold showing of a statistically significant disparity . . . and nothing more" is required to make out "a prima facie case of disparate-impact liability" (citation omitted)). *Arlington Heights* claims like this one are more analogous to *disparate treatment* claims under Title VII, where the plaintiff must show a discriminatory purpose behind an adverse employment action. *See id.* at 577. That is why the Fourth Circuit recently cautioned against courts requiring "too much" proof of disparate impact in an equal protection case where proof of impact is merely "one of the circumstances evidencing discriminatory intent" rather than "'the sole touchstone' of the claim." *See*

McCrory, 831 F.3d at 230–31 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).[7]

Yet the bigger problem with the School Committee's theory is that statistical significance is irrelevant here. "Statistical significance evaluates the probability that an observed difference between two populations would have occurred randomly if the populations compared were the same." Harvard Law Review Association, *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1532, 1535 (1995). But the analysis here—either using the simulations or the actual data—is not a comparison of two populations, but rather the effect of two different sets of criteria on the same population. It is simply true that had GPA been the only factor, more Asian American and white students, including the five the Coalition represents, would have been admitted. In

[7] *Lewis v. Ascension Parish School Board*, 806 F.3d 344, 360–61 (5th Cir. 2015), does not hold otherwise. The plaintiff in *Lewis* established, without expert testimony, that the challenged assignment plan disproportionately funneled nonwhite students into a particular school. *Id.* at 361 (calling this evidence "undisputed"). The claim floundered because the plaintiff could not prove that attendance at this school was a detrimental outcome. *See id.* at 361–62. Here, there is no dispute that denial of admission to the Exam Schools is a detrimental outcome because admission confers a benefit over and above attendance at a typical BPS school.

this context, it makes no sense to say, as the School Committee does, that "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." School Committee Brief at 46 n.19. Because the population is held constant, variation of the criteria—here from a GPA-only plan to the ZIP Code quota—necessarily causes the discrepancy. Statistical significance is a red herring and has no place here.

Perhaps that is why the School Committee shifts to questioning the Coalition's proffered baseline for measuring disparate impact. The School Committee notes that admission has not been based on GPA alone for at least 20 years, but that misses the point. Previously, GPA and exam score were the only criteria, but the School Committee eliminated the exam and replaced it with the ZIP Code quota. No students took the exam during the 2021-22 cycle, and it is impossible to know how those students would have scored on a test that was never given. But GPA has been a constant criteria, and it is the *only* criteria used during the challenged cycle other than the ZIP Code quota. Because it is the ZIP Code quota that the Coalition argues was implemented to discriminate on the basis of race, it is the ZIP Code criterion that must be evaluated to determine

the racial effect of the quota.[8] Indeed, the School Committee relied on a simulation that *made this exact calculation* to show the projected effect of the quota. App. 1757, 1776–80, 1794.

Finally, both the School Committee and the Intervenors attack the Coalition's characterization of the actual admissions data.[9] For example,

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[8] The School Committee and Intervenors appear to favor using a comparator based on either the Citywide enrollment numbers or the applicant pool. But as the Coalition explained, either benchmark would permit the School Committee to employ racial balancing by proxy in order to limit enrollment of groups it considered "overrepresented." Opening Brief at 35–36. And this type of racial balancing is "no less pernicious." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *7 (4th Cir. Mar. 31, 2022) (Rushing, J., dissenting).

[9] Intervenors' claim that the Coalition waived its disparate impact argument based on the actual admissions data is meritless. Just like the evidence of the admissions decisions, the Coalition submitted the actual admissions data in response to the district court's concern that the Coalition might no longer have standing. *See* App. 2639–40. Because this evidence did not exist at the time of trial, it is not the appropriate subject of a Rule 60(b) motion.

The School Committee strangely appears unwilling to admit to the veracity of the 2021-22 admissions data. But the charts relied on are a matter of public record. For example, the chart showing the percentage of students admitted in each GPA range by ZIP Code is located at Page 10 of a slide deck presented on May 18, 2021, by the Exam School Task Force, available on BPS' website here: https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Domain/2931/Exam%20School%20Task%20Force%20%205%2018%2021.pdf (last visited Oct. 19, 2022). Various other data was presented at that meeting and at one on May 14, available here: https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Do

Intervenors point out that some ZIP Codes the Coalition labeled as predominantly white and Asian American also have substantial portions of Black and Hispanic people. This is true, of course, but also irrelevant. A racial proxy does not have to be perfectly effective to accomplish its goal of limiting Asian American and white enrollment. *Cf. McCrory*, 831 F.3d at 216–18, 230–31 (election regulations found to be enacted with discriminatory intent even though the vast majority of Black voters were unaffected and some white voters were affected). To be sure, some white and Asian American students who live in ZIP Codes that received favorable treatment may have benefitted from the ZIP Code quota. But its (intended) effects fell hardest on ZIP Codes like West Roxbury, where almost the entire population is white or Asian American and students had to score substantially higher than others to gain admission. In terms of the overall racial makeup of the admitted class, this tradeoff produced

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main/2931/AdditionalData%20Exam%20School%20Invitation%20Overview%20for%20Task%20Force%205%2014%2021.pdf (last visited Oct. 19, 2022). All meetings of the Exam School Task Force are available here: https://www.bostonpublicschools.org/domain/2931 (last visited Oct. 19, 2022). Regardless of the record, the Court should take judicial notice of this data. *See Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010).

what it was supposed to produce—fewer Asian American and white students at the Exam Schools.

The disparate impact inquiry in this case is strikingly simple. *Arlington Heights* tells courts to look at the "impact of the official action." 429 U.S. at 266. Here, the "official action" was the imposition of the ZIP Code quota. The data clearly demonstrate that the quota was projected to have—and did have—a disparate impact on Asian American and white applicants, making it disproportionately harder for them to get in than it would have been without the quota. *See Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, 560 F. Supp. 3d 929, 952–53 (D. Md. 2021) (*AFEF I*).[10] That is all that is required to demonstrate disparate impact in the context of an intentional discrimination claim. This Court

[10] Intervenors correctly point out that the *Association for Education Fairness* court has since granted the Board of Education's second motion to dismiss. *See Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-cv-02540-PX, 2022 WL 3019762 (D. Md. July 29, 2022) (*AFEF II*). But the Coalition cites the first opinion only as persuasive authority. The second opinion, which dealt with a different set of admissions criteria, did not repudiate the initial opinion's observation that "high-performing students, including Asian Americans, who score in the highest percentiles nationally will, in all likelihood, rank lower if only compared to their local peers." *AFEF I*, 560 F. Supp. 3d at 952–53. That is precisely the effect the ZIP Code quota disproportionately foists on Asian American and white students.

should reject the School Committee and Intervenors' attempt to complicate the matter.

B. The School Committee's discriminatory purpose is clear from either record

As the district court belatedly recognized, the observed disparate impact was precisely the point of the ZIP Code quota. Add. 096. That much was clear even before the additional racist text messages came to light. After all, the Coalition does not have to prove that the School Committee acted with *animus* towards Asian American and white students, nor does it have to show that race was the *only* reason the School Committee acted. The Coalition need only prove that the ZIP Code quota was chosen "at least in part 'because of,' not merely 'in spite of,'" that impact. *Feeney*, 442 U.S. at 279; *see also McCrory*, 831 F.3d at 233 (a finding of discriminatory intent "does not mean . . . that any member of the General Assembly harbored racial hatred or animosity toward any minority group").

Under this standard, the School Committee's protestations that the Coalition unduly focuses on parts of the record ring hollow. Leaving aside the School Committee members' racist comments, the record includes ample evidence that the School Committee was focused on the racial

outcome of the new criteria, to the detriment of Asian American and white applicants. The Working Group not only relied on various simulations that were focused on race, but relayed to the School Committee the "Projected Shift" chart that quantified the proposed action in racial terms. App. 1486. Although Boston Public Schools had not been shown to discriminate against Black or Hispanic students for decades, the Working Group explained that "rectifying historic racial inequities afflicting exam school admissions for generations" was one of its two main imperatives. App. 422. A Working Group member even noted that racial gaps in GPA "played a significant role in what we will ultimately recommend." App. 414–15.

Ultimately, the Working Group's recommendation—which the School Committee almost entirely adopted—was presented as something that would "allow our exam schools to more closely reflect the racial and economic makeup of Boston's kids." App. 653. The record suggests the School Committee agreed on this purpose. If anything, some School Committee members were disappointed that the proposal did not go further in limiting the seats that would be available to Asian American and white students. *See, e.g.*, App. 943 (Rivera: "[I]t doesn't go far enough

because white students would continue to benefit from 32 percent of the seats according to this plan."). In short, neither the School Committee nor intervenors point to anything in the record suggesting that the School Committee was not animated—at least in part, but likely primarily—by these considerations of racial balancing.

That leaves only the School Committee's and Intervenors' mischaracterizations of the Coalition's arguments. For example, the Coalition does not contend that any invocation of diversity as a purpose is enough to trigger strict scrutiny. Nor does it equate the School Committee's interest in racial balancing with the Supreme Court's use of the term in explicit discrimination cases like *Fisher*. Rather, the School Committee can pursue diversity in any number of ways without discriminating against individual students—whether by expanding school offerings, offering free test prep, and encouraging students from all over the City to apply. What it can't do, at least without satisfying strict scrutiny, is choose a set of admissions criteria "because it would assign benefits or burdens on the basis of race." *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 553 (3d Cir. 2011). A purpose of ensuring that the Exam Schools would "more closely reflect" the racial makeup of

Boston, App. 653, combined with means designed to effectuate that purpose through a proxy, must trigger strict scrutiny. *See Feeney*, 442 U.S. at 279; *AFEF I*, 560 F. Supp. 3d at 953 ("The Complaint also makes plausible that the County acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data."). Simply put, there is no diversity exception to *Arlington Heights*.

III. The District Court Abused Its Discretion in Denying the Rule 60(b) Motion

Neither the School Committee nor Intervenors offer a substantive response to the Coalition's main point on appeal from the denial of its Rule 60(b)(2) motion—that the Coalition was entitled to rely on the School Committee's *stipulation* that "[a] true and accurate transcription of text messages between Boston School Committee Members, Vice-Chairperson Alexandra Oliver Davila and Lorna Rivera during the October 21, 2020 Boston School Committee meeting is attached as Exhibit 72." App. 181. As the district court itself noted during the motion hearing, "I will tell you I thought I had the complete – um, the complete, um, messages. And telling me now that it wasn't stipulated that it was

complete falls on extremely deaf ears because I took it . . . as true and accurate messages." App. 2628–29. Indeed, "anyone" in the district judge's position, reading the stipulation, "would think that." App. 2629.

In this situation, it makes little sense to say that the Coalition should have sought discovery to expand upon the known racist text messages from three of the School Committee members. If the School Committee was willing to stipulate *to the court* that the record was complete, it would have been a waste of everyone's resources to seek discovery. Adopting a rule that parties do not exercise due diligence if they accept opposing counsel's stipulation—filed with the court—that no further evidence exists would encourage unnecessary discovery and discourage cooperation between litigants. This is not a situation where the Coalition simply decided to rest on what it had without assurances that it had seen all of the relevant messages. Instead, it received those assurances, they turned out not to be true, and the district court nevertheless held that the Coalition should have pressed on with discovery, ignoring the time constraints of the case and the students' interest in prompt resolution. Although courts retain wide discretion in

ruling on post-judgment motions, the district court's decision to hold the Coalition's attempt to avoid discovery against it abused that discretion.

The School Committee defends the district court's order by again criticizing the Coalition's legal theory on the merits. But even assuming the Coalition's confidence in its legal theory was one reason it chose not to seek further discovery, there was no reason to insist on discovery regarding the additional racist text messages because the School Committee was willing to stipulate that what was produced had been the complete exchange. And in any event, as the Coalition's merits argument makes clear, the district court was simply wrong when it held that admissions criteria adopted "precisely because of their effect on racial demographics" in an environment where "[t]hree of the seven School Committee members harbored some form of racial animus," Add. 096, nevertheless were not implemented with discriminatory intent. Such an error of law amounts to an abuse of discretion. *See Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir. 2003).

CONCLUSION

For the reasons stated, the Coalition respectfully asks this Court to reverse the judgment below.

DATED: October 21, 2022.

Respectfully submitted,

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/s/ Christopher M. Kieser
CHRISTOPHER M. KIESER
Attorney for Plaintiff – Appellant

Dated: October 21, 2022.

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I hereby certify that on October 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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