UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP., Plaintiff, v. THE SCHOOL COMMITTEE OF THE CITY OF BOSTON, ALEXANDRA OLIVER-DAVILA, MICHAEL O'NEILL, HARDIN COLEMAN, LORNA RIVERA, JERI ROBINSON, QUOC TRAN, ERNANI DeARAUJO, and BRENDA CASSELLIUS, Defendants THE BOSTON BRANCH OF THE NAACP, THE GREATER BOSTON LATINO NETWORK, ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK, ASIAN AMERICAN RESOURCE WORKSHOP, MAIRENY PIMENTAL, and H.D., Defendants-Intervenors.	Civil Action No. 1:21-cv-10330-WGY

Brief *Amicus Curiae* of Center for Law and Education in Support of Defendants and Defendants-Intervenors.

Kathleen B. Boundy (BBO# 050960)
kboundy@cleweb.org
Sky Kochenour (BBO# 693852)
skochenour@cleweb.org
*Admission Forthcoming (04/14/2021)

On the brief
Paul L. Weckstein (BBO# 519000)
pweckstein@cleweb.org

Center for Law and Education
105 Chauncy Street, 6th Floor, Suite 3
Boston, MA 02111

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INTEREST OF *AMICUS CURIAE*

CLE is a national non-profit resource and support organization that collaborates with public interest attorneys, their clients, and community organizations to implement key education programs (e.g., Title I, career and technical education, special education, and English learner (EL) education), the civil rights statutes, and state education reform initiatives to ensure all students a high-quality education. One of few national organizations rooted in school reform and civil rights, CLE focuses on bringing the two together to challenge systemic barriers that deny students, particularly those from low-income families, equal educational opportunities and have an adverse disparate impact on the basis of race, color, national origin, language status, disability, sex, gender identification, sexual preference.[1]

CLE advances its mission by drawing upon its extensive experience and expertise to connect the rights of students and responsibilities of school personnel to actual school practice. Established in 1969 as a joint project between Harvard Law School and the Harvard Graduate School of Education, CLE served for 25 years as the education support center for the Legal Services Corporation (LSC). CLE worked in that capacity until 1995, when the U.S. Congress defunded the 15 LSC funded national centers. In that capacity, CLE provided federal legislative and administrative advocacy, co-counseling, litigation support, and technical educational assistance to legal services attorneys throughout the country who represented students discriminated against on the basis of race, ethnicity, language status, and disability, arbitrarily suspended or expelled from school, and denied an adequate education.

For more than twenty years (1972-1995), CLE served as counsel for the class of BPS students and their parents in the landmark Boston desegregation case *Morgan v. Hennigan*, 379

[1] 42 U.S.C. § 2000d; 20 U.S.C. § 1681; 29 U.S.C. § 794; G.L. c. 76, § 5.

F. Supp. 410 (D. Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974). In 1974, the federal district court ruled that Boston Public School officials had engaged in discrimination in assigning students and hiring teachers and administrators and ordered extensive remedies on behalf of the class of African American students and their families seeking equal educational opportunities.

In Massachusetts, as a grantee of the Massachusetts Legal Assistance Corporation, CLE continues to provide legal and technical assistance, including co-counseling, to legal services organizations, other public interest attorneys, and pro bono counsel with whom it represents students from low-income families in education law related matters. Currently, CLE is representing BPS students in challenging policies and practices that impede students of color, English learners, and students with disabilities from accessing equal educational opportunities consistent with their civil rights in court, before federal administrative agencies, and in exhausting remedies through the administrative process.

INTRODUCTION

Demographic data demonstrate that some of the groups most marginalized in our society – students of color, students living in poverty, students with disabilities, and students who are English learners – have historically been underrepresented in these institutions of academic excellence. Recognizing the need to improve access to the entirety of the Boston Public school student body and brought on by the necessity of responding to the COVID-19 pandemic, the Boston School Committee adopted the admissions plan at issue in this case for the 2021-22 school year ("Admissions Plan"). In doing so, the Boston School Committee put into place a facially neutral, race-conscious measure designed to provide more equitable access to the exam schools for students across a broad range of racial, socioeconomic, and geographic spheres.

While a law or policy does not escape strict scrutiny merely because it is facially neutral and has less racial impact than a policy that uses race on its face, what makes strict scrutiny inapplicable here is that, while race-conscious, the Admissions Plan is not based on discriminatory intent or racial animus but on an intent to create more inclusive schools and improve equitable access to the Exam Schools for historically underrepresented student populations. *Amicus* firmly believes that the Admissions Plan survives any level of constitutional scrutiny and that Defendant/Intervenors and Defendants should prevail in this case for the reasons articulated in Defendant/Intervenors brief.

The focus of this amicus brief, however, will not be on repeating or elaborating arguments already made to support that judgment. Instead it will focus on the need to ensure that the way the Court articulates the basis for its judgment does not leave room for interpretations of law that would incorrectly and unnecessarily limit the ability of our clients and others to successfully seek redress for violations of their civil rights and pursue full equal educational opportunity free of discrimination. That danger is often present in cases challenging educational institutions' voluntary efforts to address inequality because the defending institution may have broader institutional interests in setting the bar as low as possible for justifying other actions that may subject them to civil rights challenges (while the plaintiff may have similar long-term interests despite their posture in the case at hand). This is not a hypothetical danger, as our brief will show with instances in which statements made in the filings in this case, including in those of the defendant Boston School Committee, directly pose that danger.

ARGUMENT

I. *AMICUS* URGES THE COURT TO ADDRESS INCORRECT, MISLEADING, AND AMBIGUOUS STATEMENTS IN THE PARTIES' FILINGS AND CLEARLY AND CAREFULLY ARTICULATE .

The following sections address areas of the Parties' filings, particularly those of the Defendants, that contain incorrect, misleading, and ambiguous statements. These statements, if left unaddressed by the Court in light of the considerations *amicus* raises below, pose particular dangers to our clients and civil rights law more broadly. As *amicus* stated in the Introduction, it is critically important that in doing so the way the Court articulates the basis for its judgment does not leave room for interpretations of law that would incorrectly and unnecessarily limit the ability of our clients and others to successfully seek redress for violations of their civil rights and pursue full equal educational opportunity free of discrimination.

A. A law or policy does not escape strict scrutiny merely because it is facially neutral and has less racial impact than a policy that uses race on its face. What does make strict scrutiny inapplicable to a facially neutral statute is the absence of discriminatory intent or racial animus.

It is clear that facial neutrality, without more, is insufficient to exempt a law or policy from strict scrutiny. *See*, *e.g.*, *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 352 (5th Cir. 2011) (determining school assignment plan based on geography was facially neutral but finding that "[b]ecause factual questions exist as to whether Option 2f had both a racially discriminatory motive and a disparate impact, and the court misapprehended the significance of the evidence before it, the court erred in awarding summary judgment under a rational basis test."). While that should be obvious, statements in Defendant's filings directly to the contrary exemplify the need to make it clear:

> "BSC's Interim Plan for Exam School admissions is race neutral and therefore not subject to strict scrutiny." Defendant's Proposed Findings of Fact and Conclusions of Law, Document #77 (filed Apr. 2, 2021) (hereinafter "Conclusions of Law, Doc. #77") at 29.
>
> "Race-neutral school selection policies – even undertaken with race-conscious considerations and goals – are constitutionally permissible and not subject to strict scrutiny. Conclusions of Law, Doc. #77 at 28. Repeated in Defendant's Brief for

Judgment, Doc. #76 (filed Apr. 2, 2021) (hereinafter "Brief for Judgment, Doc. #76") at 3.[2]

Most importantly, facial neutrality cannot lead to a conclusion that strict scrutiny is inapplicable in the presence of disparate impact unless there has been careful determination that there is no discriminatory intent, the key missing ingredient in Defendants' statements. Similarly, the fact that a facially-neutral policy has less racial impact than a policy that makes explicit use of race does not free it from strict scrutiny. To state otherwise would indirectly remove virtually any facially neutral policy from strict scrutiny. (*See also infra* Section (I)(C).

Unless the court explicitly quashes these misleading and ambiguous statements in the record it risks encouraging state actors to cloak discriminatory action under the veil of facial neutrality without fear of judicial redress. A law or policy does not escape strict scrutiny merely because it is facially neutral and has less racial impact than a policy that uses race on its face. What does make strict scrutiny inapplicable to a facially neutral statute is the absence of discriminatory intent or racial animus.

B. Discriminatory intent does not have to rise to the level of a "predominant motivating factor" in a state actor's decision to trigger strict scrutiny.

Discriminatory intent need not be the "sole," "dominant," or "primary" purpose to establish a violation of the Equal Protection Clause. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Doe ex rel. Dow v. Lower Merion Sch. Dist.*, 665 F.3d 524, 538 (3d Cir. 2011) ("Racially discriminatory purpose means that the decisionmaker adopted

[2] Defendants rely on Justice Kennedy's concurring opinion in *Parents Involved in Community Schs.*, 551 U.S. 701 (2007) (hereinafter "*Parents Involved*"). However, what Justice Kennedy actually said in *Parents Involved* does not support Defendants above-quoted statements. Justice Kennedy was explicitly referring to specific race-neutral mechanisms that a district might employ for the "objective of offering an equal educational opportunity to all of their students" and further opined that "it is unlikely that any of [those mechanisms] would demand strict scrutiny to be found permissible." *Parents Involved*, 551 U.S. at 789. The language in Justice Kennedy's concurrence cannot be turned into a broad statement of law that race-neutral policies are not subject to strict scrutiny. Such a proposition is contrary to the mandates of Equal Protection and certainly not a position Justice Kennedy ever embraced.

the challenged action at least partially because the action would benefit or burden an identifiable group."). Rather, the key inquiry to showing discriminatory intent is whether a discriminatory purpose "has been a motivating factor in [a] decision…." *Arlington Heights*, 429 U.S. at 266.

On the topic of discriminatory intent, Defendants state,

> "The decision-maker'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*, 515 U.S. at 916. Brief for Judgment, Doc. #76 at 12 (emphasis added); Conclusions of Law, Doc. #77 at 31 (same).
>
> "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." Brief for Judgment, Doc. #76 at 12 (emphasis added); Conclusions of Law, Doc. #77 at 31 (same).

Defendants' citation to *Miller* is completely inapposite here as *Miller* was a legislative redistricting case and the requirement for race to be the "predominant factor" is specific to that jurisprudence, where the Court has refrained from considering redistricting cases in which the primary motivation is political.[3] At the same time, Defendants also cite the correct standard here – in the very next sentence – without noting the contradiction, thereby sowing confusion at best.

Amicus respectfully requests, consistent with *Arlington Heights*, that the Court clarify a plaintiff in an equal protection case must show discriminatory intent has been a "motivating factor" and not a "predominant factor" in a decision.

C. Neither the availability of options that would have had more racial impact than the one selected nor the range of considerations taken into account are sufficient to establish the lack of discriminatory purpose.

[3] *Miller*, 515 U.S. at 917 ("The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.") (internal citations omitted).

"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 (providing a non-exhaustive summary of sources of evidence that could be instructive in this inquiry, including the historical background of the decision, the specific sequence of events leading up to the challenged decision, and the legislative or administrative history). *Amicus* believe that the stipulated record demonstrates that Defendants did not with discriminatory intent, in adopting the Admissions Plan. However, Defendants also make two inaccurate statements that are very dangerous to all Equal Protection claims. Defendants first argue:

> "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." Brief for Judgment, Doc. #76 at 15.

Under the above excerpt from Defendant's Brief for Judgment, Doc. #76, all that is necessary to protect discriminatorily motivated actions from strict scrutiny is to limit the degree of racial impact below what it could be under other approaches. Among other things, Defendant's analytical approach here is also a way of making their earlier specious argument [*infra* Section (I)(A)] that facially neutral laws and policies always escape strict scrutiny a reality, since almost *any* facially-neutral criteria, unless an equivalent proxy, will have less impact than facial ones. Whether a state actor's behavior was motivated by a discriminatory purpose is not a function of how effective the intended discrimination was.

Defendants also state:

> "The breadth and range of all the considerations the Working Group and BPS took into account in devising and selecting the Interim Plan establish that it did not act with an invidious discriminatory purpose." Conclusions of Law, Doc. #77 at 32.

The breadth and range of considerations Defendants encountered in devising and selecting the Interim Plan certainly *help* Defendants show that they did not act with discriminatory intent consistent with *Arlington's* "sensitive inquiry." However, that fact, standing alone, is not a sufficient condition to establish that a state actor acted without discriminatory intent.

Certainly, as a separate matter, a showing of some racial impact is relevant for proof of a cognizable harm, and the extent of racial impact in relation to other available options and the range of options considered would factor into a narrow tailoring analysis, but Defendant's framing of the issue in the aforementioned quotes is a gross misrepresentation of the kind of evidence a court should consider in regard to its inquiry into discriminatory intent. There is also a, different, important reason not to treat narrow tailoring as synonymous with limited impact, as is suggested by the language in Defendants first excerpt. That a policy is fully effective in achieving its legitimate or compelling goals and interests, including race-conscious but non-discriminatory ones, should not mean that it is not narrowly tailored. It is, in that regard, indeed well-tailored. This is not to deny that narrow tailoring to minimize negative impact on students is important but to acknowledge that ambitious goals can lead to appropriately narrowly tailored solutions that still have a significant, justifiable impact.

Accordingly, while *amicus* believes the record supports the Defendant's claim that it did not act with discriminatory intent in adopting the Admissions Plan, *amicus* also urges the Court to explicitly reject the notion that a defendant can establish lack of discriminatory intent based solely on either the availability of options that would have had more racial impact than the one selected or the range of considerations taken into account.

D. Seeking to increase access to educational opportunity for historically disadvantaged student populations does not constitute a goal of "racial balancing."

The Supreme Court has been clear in the context of higher education that a university cannot undertake action in the name of diversity "simply to 'assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). Such action "would amount to outright racial balancing, which is patently unconstitutional." *Id*. Plaintiffs label the Admissions plan as racial balancing and state that Defendant's explicit goal was to engage in racial balancing:

> "In this latest iteration, the Zip Code Quota Plan, the BSC does not try to disguise its attempt at racial balancing." Plaintiff's Memorandum in Support of Preliminary and Permanent Injunctions, Document #62 (Filed Mar. 23, 2021) (hereinafter "Memorandum in Support, Doc. #62) at 1.
>
> "As is clear from the agreed upon facts and documents in this case, in enacting this Zip Code Quota Plan the Defendants acted with overt intent to change the racial balance of the Exam School to increase the number of Black and Latino students and decrease the number of Asian and White students." Memorandum in Support, Doc. #62 at 3.

Plaintiffs here misunderstand or misrepresent what constitutes "racial balancing." Simply put, the Admissions Plan does not fit the definition of racial balancing as described in *Grutter* and *Bakke*[4], and that clear definition cannot be transformed into a broader one that would bar, or even disfavor, efforts to increase access and participation (i.e., increase the numbers) of students in educational opportunities where they are underrepresented. These legitimate and indeed compelling interests of increasing access and participation are independent of, and extend

[4] As a separate but related point, the City of Boston is too racially and ethnically diverse for Zip codes to serve as a proxy for race and enter the "racial balancing" equation in that manner. *Davis v. Guam*, 932 F.3d 822, 837-38 (9th Cir. 2019) ("Proxy discrimination is a form of facial discrimination. It arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group. For example, discriminating against individuals with gray hair is a proxy for age discrimination because 'the 'fit' between age and gray hair is sufficiently close.'") (quoting *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)).

beyond, the institutional goal of creating a diverse environment *within* the schools for the benefit of students who attend them.[5]

The legitimacy and importance of these goals are even greater in the elementary/ secondary education context because, unlike institutions of higher education who have had no role or responsibility for the prior education of their applicants and only bear responsibility for treating applicants fairly in the admissions process, elementary/secondary systems such as Boston Public Schools have been responsible and continue to be responsible for the education up to and beyond the admission decision made here in this case. Far from being merely an aspirational goal, a school district's failure to take affirmative steps to identify disparities and provide students with equal educational opportunity would violate state and federal law. *See e.g.*, 20 U.S.C. § 6301 ("The purpose of this subchapter is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."); 42 U.S.C. § 2000d; 29 U.S.C. § 794; 20 U.S.C. § 1681. This quoted language from 20 U.S.C. § 6301 is the "Statement of Purpose" for Title I of the Elementary and Secondary Education Act of 1965 (as amended December 10, 2015 by the Every Student Succeeds Act), the largest federal elementary and secondary education program. Title I imposes wide responsibilities in pursuit of that purpose for all recipients of those funds, including BPS. The "achievement gaps" a local educational agency must identify and address specifically include racial and socioeconomic gaps. To that end, the Admissions Plan – both in purpose and

[5] While it is clear that the institutional goal of creating a diverse environment within the schools for the benefit of students who attend them is what the Supreme Court is referring to when it speaks of a goal of "diversity," *see Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198, 2210 (2016), diversity as a term is sometimes interchangeably used to describe the goal of increasing access and participation for the benefit of previously underserved populations. Diversity in this sense is a misnomer compared to how the Supreme Court has interpreted the term but would appropriately capture Defendant's goal of working to establish a system that better ensures overall equitable access to the Exam Schools.

implementation – seeks not to assure within the Exam Schools some specified percentage of particular groups but to increase overall access to educational opportunity for historically disadvantaged student populations.

It is also worth noting[6] that the Supreme Court has not closed the door on a school district's ability to, under limited circumstances, use methods that would constitute racial balancing as contemplated by *Grutter* and incorrectly used by the Plaintiffs in this case. *See Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in judgment) ("What the government is not permitted to do, *absent a showing of necessity not made here*, is to classify every student on the basis of race and to assign each of them to schools based on that classification.") (emphasis added).[7] Justice Kennedy noted in his concurring opinion in *Parents Involved* that the school districts in that case "failed to provide the support necessary for [the] proposition that [its] [assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts]." *Id.* at 789. Justice Kennedy continued that "individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest." *Id.* at 790.

In sum, *amicus* respectfully requests this Court rebuke Plaintiff's attempt to conflate a goal to increase overall access and participation to educational opportunity for disadvantaged student populations with "racial balancing."

E. "Stark systemwide disparity" is not required for showing disproportionate racial impact.

[6] *Amicus* offer the analysis in this paragraph for completeness of review regarding the legal standard and not because it has any relevance to the Admissions Plan, which it does not.

[7] Justice Kennedy did not join the portion of the plurality opinion that stated, relevant to this point, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' Parents Involved, 551 U.S. at 732 (plurality).

Disproportionate impact necessary to show harm exists when a law or policy produces a "significant statistical disparity" between similarly situated classes of individuals. *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009). The First Circuit has described that "[a]n explanatory variable has a "statistically significant" effect if, assuming the effect of the explanatory variable on the response variable were actually zero, the effect observed in the model is different enough from zero that it is unlikely to be due to chance." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157, 198, n.37 (1st Cir. 2020).[8]

Defendant's Brief for Judgment, Doc. #76 at 7-8 conflates two distinct aspects of Equal Protection analysis in the following statement:

> "Even were this [claim by Plaintiff concerning the reduction in seats for White and Asian applicants] true (which, as discussed below, Plaintiff has not and cannot prove as an evidentiary matter),[4/] it simply does not establish that the Interim 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)." Brief for Judgment, Doc. #76 at 7-8 (footnote omitted).

The 1st Circuit in *Anderson* was not using the "stark systemwide racial disparities" language for the purpose of assessing whether the plaintiff met the Equal Protection requirement of showing disparate *impact* as proof of cognizable harm [which requires a showing of some statistically significant disparity]. Rather, the court was addressing a wholly different question: the extent to which discriminatory *intent* can be inferred from a systemic pattern of racial disparities. *Anderson*, 375 F.3d at 89 ("If plaintiffs had been able to show that the New Plan resulted in stark systemwide racial disparities regarding assignments to first choice schools, we

[8] The First Circuit further explained that "different enough" is quantified using a significance level" and that "[t]he experts in this case used a significance level of 5%." *Id.* The court did not undertake an independent inquiry into whether a significance level of 5% was appropriate.

might—depending on the circumstances—have reached the conclusion that intentional discrimination occurred....").; *Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

Accordingly, *amicus* respectfully requests the Court reject Defendant's incorrect statement and make clear that disparate impact exists when a law or policy produces a "significant statistical disparity" between similarly situated classes of individuals.

F. A policy can have disparate impact on students even if they are being represented in proportion to their population.

Of all the misstatements identified this brief, this may well be the single most widespread source of misunderstanding, and the one with the greatest potential for damaging valid civil rights claims by our clients and others. As such, it is particularly important that the Court not merely ignore the misstatements here but explicitly identify and reject them.

Defendants argue:

> "That the Plan may result in fewer seats for Whites and Asians than Plaintiff's preferred city-wide ranking only by GPA simply does not show any constitutionally-proscribed discriminatory impact, particularly in light of Plaintiff's projections that would result in significant Exam School admissions overrepresentation of Whites and Asians as compared to Boston's student population." Brief for Judgment, Doc. #76 at 1.
>
> "Plaintiff's projections – even if believed – show only that under the Interim Plan Whites and Asians would make up 32% and 16% of the entering Exam School classes, despite BPS student populations of 14% and 9%, respectively" and that "Plaintiff makes no attempt to explain how such admission rates could possibly be seen as resulting in 'disproportionate racial results.' Brief for Judgment, Doc. #76 at 8; Conclusions of Law, Doc. #77 at 30.

Defendant's formulation of disparate impact is logically unsound. A group's maintaining its status as "overrepresented" compared to its population share after a policy is implemented has no bearing on whether the specific policy at hand has disproportionately impacted that group. *See supra* Section (I)(E) (discussing the standard for showing disparate impact as "significant

statistical disparity"). Critically, a policy *can* have factors that are disproportionately impacting or excluding students of one group even though they may not be "underrepresented" relative to their population. In contrast to the Admissions Plan, which contains no racial quota system whatsoever, failure to recognize this reality would in essence create a quota system in which institutions are free to discriminate against a group, no matter how qualified members of that group may be, once the group reaches its proportional share of representation.

Defendant's Brief for Judgment, Doc. #76 at 18 comes closer to articulating the meaning of disparate impact when it refers to an absence of evidence that there are "otherwise-qualified students who are, because of race, likely to be excluded from Exam School admission because of the Interim Plan." That proposition, however, is entirely different from whether any groups of students are over-, under-, or well-represented relative to their population and, as such, it is contrary to the implication of Defendant's previous quote that there cannot disproportionate impact on a group if its members are being represented in equal or greater proportion than their share of the population.

G. A school district that does not violate the Equal Protection Clause can still violate G.L. c. 76, § 5 under the same facts.

G.L. c. 76, § 5 provides in relevant part "[n]o person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation." In their filings, all three parties make statements about G.L. c. 76, § 5 that range from incomplete to incorrect. As *amicus* will discuss below, the lack of careful language employed by the Parties in this case opens this G.L. c. 76, § 5 up to incorrect interpretation and misapplication, particularly regarding an issue that is not before the Court in this case: whether the Admissions Plan violates G.L. c. 76, § 5 because it

has the effect of subjecting students to discrimination because of their race.[9] The lack of clarity in the Parties' filings lend credence to the need for the Court to articulate a basis for addressing Plaintiff's claim under G.L. c. 76, § 5 *in the context of this case* that does not unintentionally limit its future applicability to pursue valid and actionable violations of our clients' civil rights. In doing so, *amici* urge the Court to find that the scope of G.L. c. 76, § 5 has not been properly raised and argued here in this case.

In a footnote, Defendants state:

> [2/]Plaintiff asserts two claims: one for an equal protection violation under 42 U.S.C. § 1983, and another for violation of M.G.L. c. 76, § 5...Both prohibiting race discrimination in public education, the analysis of these claims is essentially the same. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 195-96 (1st Cir. 2020) (holding analysis of claim under Title VI, analogous federal law prohibiting race discrimination in education, is same as one for violation of equal protection). Brief for Judgment, Doc. #76 at 2, n.2.

Intervenors state:

> "Plaintiff's state law claim fails for the same reasons Count I [Equal Protection claim] fails." Intervenors' Brief in Opposition to Plaintiff's Motion for Judgment and Injunctive Relief, Document #72 (filed Apr. 2, 2021) at 20.

Plaintiffs state:

> "Any School Committee action that violates the Fourteenth Amendment necessarily violates this statute as well. Moreover, this statute contains no exception for claims of compelling interests. For this reason, too, the Zip Code Quota Plan is unlawful." Memorandum in Support, Doc. #62 at 20.

The Parties' statements implicate three propositions, two broad and one case-specific, about how G.L. c. 76, § 5 should be interpreted: (1) if a school district violates the Equal

[9] Plaintiffs have not adequately addressed the question of M.G.L. c. 76, § 5's independent scope, other than its statement, which we believe to be thoroughly incorrect: "this statute contains no exception for claims of compelling interests." Memorandum in Support, Doc. #62 at 20. The question of the statute's independent scope is of great import to our clients and other students in Massachusetts and is not properly before the Court in a suitable manner to determine their rights. That is also why we are so concerned about the words used to address the statute, even in dismissing it.

Protection Clause then it necessarily violates G.L. c. 76, § 5 **[legally correct]**; (2) if a school district does not violate the Equal Protection Clause then it by definition does not violate G.L. c. 76, § 5 **[legally incorrect]**; and (3) if, in the context of a specific case, a school district does not violate the Equal Protection Clause then it does not violate G.L. c. 76, § 5 **[*legally correct OR incorrect depending on why the action did not violate the Equal Protection Clause*]**.

Plaintiffs' statement – "Any School Committee action that violates the Fourteenth Amendment necessarily violates this statute as well" – exemplifies proposition (1). *Amicus* believe that much to be an accurate statement about G.L. c. 76, § 5, though we strongly agree with Defendants and Intervenors that the Admissions Plan does not violate the Fourteenth Amendment. The danger here is that, without clear judicial language, proposition (1) can easily be incorrectly assumed to also embrace the converse: that any action that does not violate the Fourteenth Amendment necessarily does not violate the G.L. c. 76, § 5 [proposition (2)].

Proposition (2) is Defendant's erroneous position as spelled out in the footnote *amicus* cited above. G.L. c. 76, § 5 prohibits conduct beyond what the Equal Protection Clause proscribes and there are circumstances where action on the part of a school district would not violate the Equal Protection Clause but would violate the statute. *Compare* 603 C.M.R. § 26.02(5) ("Public schools shall not use admission criteria *that have the effect* of subjecting students to discrimination because of their race, color, sex, gender identity, religion, national origin, or sexual orientation.") (emphasis added) *with Arlington Heights*, 429 U.S. at 264–65 (1977) ("[O]fficial action will not be held unconstitutional [under the 14th Amendment] solely because it results in a racially disproportionate impact). Defendant's citation to Title VI, a *federal* law, is inapposite – and further evidence that the issue of the scope of G.L. c. 76, § 5 has not been properly raised and argued here – as it presumes, without allowing for the possibility,

and indeed the reality, that the Commonwealth has enacted a statute that goes beyond Equal Protection. *See* 603 C.M.R. § 26.02(5).

What complicates the analysis of G.L. c. 76, § 5, and underscores the need for careful treatment of this statute from this Court, is that in the context of a specific case a claim that fails under the Equal Protection Clause *can fail* for those same reasons under G.L. c. 76, § 5 depending on what those reasons are. This narrow statement is distinct from the broad, legally incorrect assertion made by Defendants and addressed above that a school district that does not violate the Equal Protection Clause *necessarily* does not violate G.L. c. 76, § 5. If a court finds that a compelling interest exists and a school district's action is narrowly tailored to meet that interest then a plaintiff's claim would fail under both the Equal Protection Clause and G.L. c. 76, § 5.[10] Similarly, if a Plaintiff is unable to establish harm then an Equal Protection Clause claim and a G.L. c. 76, § 5 claim will fail for that reason. *See*, *e.g.*, *Doe v. Acton-Boxborough Regional Sch. Dist.*, 468 Mass. 64, 83 (2014) (holding that voluntary recitation of the pledge of allegiance violated neither art. 106 of the Massachusetts Declaration of Rights nor G.L. c. 76, § 5 for failure to show cognizable harm).[11,12] Where the two claims differ, as discussed in the previous paragraph, is in regard to discriminatory intent. An Equal Protection claim premised on disparate impact will fail for lack of a showing discriminatory intent; a claim under G.L. c. 76, § 5 will not. *See* 603 C.M.R. § 26.02(5).

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[10] We do not at all accept Plaintiffs' different, additional proposition that there are no exceptions for compelling interesting claims – a statement that is not argued beyond saying that it does not appear in the very short text of the Act and, if accepted, would be entirely unworkable, particularly in light of the Act's scope of addressing policies and practices that have the effect of discriminating.

[11] The Supreme Judicial Court of Massachusetts has held that the art. 106 of the Massachusetts Declaration of Rights and the Equal Protection Clause are coextensive. *See Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 723 (1999) ("The standard under the Federal and State Constitutions is the same.").

[12] *Acton-Boxborough* is a good example as to why clarity from this court is necessary, where the court in that case stated that "[f]or the same reasons we hold that the pledge does not violate art. 106, however, we also hold that it does not violate [G.L. c. 76, § 5]" without further clarifying the distinction between the two claims.

The Parties' filings in light of the analytical framework for G.L. c. 76, § 5 *amicus* have just discussed highlight the critical need for the Court to be precise in its handling of this statutory claim. *Amicus* believes that the evidence supports the Court ruling that Defendants did not violate the Equal Protection Clause. If the Court chooses to address the relationship between the Equal Protection Clause and G.L. c. 76, § 5, *amicus* urges caution for the Court to focus on what is at issue in this case (allegations concerning alleged racial classifications and discriminatory intent) and not address what is not at issue in this case (the scope of G.L. c. 76, § 5 which has been neither pled nor briefed). An unintentionally overbroad statement that implicates the cognizable disparate impact claim under G.L. c. 76, § 5 when it is not at issue in this case could have far-reaching, damaging consequences for civil rights.

CONCLUSION

Amicus firmly believes that the Admissions Plan survives any level of constitutional scrutiny and that Defendant/Intervenors and Defendants should prevail in this case for the reasons articulated in Defendant/Intervenors brief. As *amicus* stated in the Introduction, it is critically important that in doing so the way the Court articulates the basis for its judgment does not leave room for interpretations of law that would incorrectly and unnecessarily limit the ability of our clients and others to successfully seek redress for violations of their civil rights and pursue full equal educational opportunity free of discrimination.

Respectfully submitted,

/s/ Kathleen B. Boundy
Kathleen B. Boundy (BBO# 050960)
kboundy@cleweb.org

On the brief
Paul L. Weckstein (BBO# 519000)
pweckstein@cleweb.org

Sky Kochenour (BBO#693852)
skochenour@cleweb.org
*Admission forthcoming 04/14/2021

Center for Law and Education
105 Chauncy Street, 6th Floor, Suite 3
Boston, MA 02111

Dated: 04/09/2021

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants on April 9, 2021.

/s/ Kathleen B. Boundy
Kathleen B. Boundy
BBO# 050960
kboundy@cleweb.org