No. 22-2649

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK,
Plaintiff – Appellant,
CHRISTA MCAULIFFE INTERMEDIATE SCHOOL PTO, INC., ASIAN AMERICAN COALITION FOR EDUCATION, PHILLIP YAN HING WONG, YI FANG CHEN, CHI WANG,
Plaintiffs,
v.
ERIC ADAMS, in his official capacity as Mayor of New York, RICHARD A. CARRANZA, in his official capacity as Chancellor of the New York City Department of Education,
Defendants – Appellees,
TEENS TAKE CHARGE, DESIS RISING UP AND MOVING, HISPANIC FEDERATION, ELIZABETH PIERRET, on behalf of her minor son O.R., ODUNLAMI SHOWA, on behalf of his minor child A.S., TIFFANY BOND, on behalf of her minor child K.B., LAUREN MAHONEY, on behalf of her minor children N.D.F. and N.E.F., ROSA VELASQUEZ, on behalf of her minor child C.M., COALITION FOR ASIAN AMERICAN CHILDREN AND FAMILIES,
lntervenors – Appellees.

On Appeal from the United States District Court
for the Southern District of New York
Honorable Edgardo Ramos, District Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' revised admissions policy was designed to change the specialized high schools' racial makeup. To that end, Defendants greatly expanded the Discovery program and selected an Economic Need Index (ENI) cutoff that prevented students attending half of the City's majority Asian-American middle schools from competing for 20% of seats at each specialized school. The middle schools that remained eligible were less than 8 percent Asian American, even though the proportion of Asian-American students citywide was twice that. This unequal treatment of Asian-American students, which Plaintiffs have alleged and intend to prove was motivated by a racially discriminatory purpose, violates the Equal Protection Clause.

The district court concluded that it doesn't matter whether the admissions changes were motivated by racial discrimination because of an odd coincidence: around the same time that Defendants implemented their revised admissions policy, there was an unrelated and extraordinary ten-percentage-point jump in the City's calculation of ENI. Defendants did not adjust their ENI cutoff to account for this jump. Had it not been for that unexpected increase, according to Defendants' own

estimate, Asian-American representation at the specialized high schools would have dropped by more than two percentage points. As it turned out, Defendants' failure to account for the ENI increase meant that the predicted drop did not occur.

But Defendants should not be given a pass on intentional discrimination simply because their attempt to racially balance the specialized schools was unsuccessful. Even though overall Asian-American admissions did not decrease, Defendants' discriminatory policy was not without victims. First, as noted above, Asian-American students were disproportionately excluded from the Discovery program, and thus from one-fifth of available seats. Second, Defendants' revised policy excluded identifiable Asian-American students from the two most competitive and prestigious of the specialized high schools, Stuyvesant and Bronx Science, when they otherwise would have received invitations to those schools. These exclusions are an undeniable consequence of Defendants' racially motivated policy; more importantly, they represent a clear discriminatory harm to the affected students.

The district court's bifurcated process meant that Plaintiffs have been unable to obtain discovery regarding Defendants' discriminatory

intent. Thus, in evaluating Defendants' request for summary judgment, the Court should presume that Plaintiffs will be able to establish that intent. This appeal therefore asks whether a challenge to a racially motivated policy that treats Asian-American students unequally and excluded some Asian-American students from their preferred schools may not proceed unless the policy also resulted in an aggregate disparate racial impact across the specialized schools.

The answer is clearly no. First, the unequal treatment of Asian-American students supports an equal protection claim, regardless of whether it reduced the overall number of Asian-American students at the specialized schools. Second, denying invitations to Stuyvesant and Bronx Science to students who otherwise would have received them is precisely the kind of race-based harm that the Equal Protection Clause was meant to prohibit.

Yet the district court improperly disregarded both harms. As to the first, it erroneously concluded that a challenge to a facially neutral policy requires an aggregate disparate impact. To the contrary, under *Arlington Heights*, aggregate disparate impact is only one factor and is not a necessary component of an intentional discrimination claim. Neither the

district court nor Defendants or Intervenors cite a single *Arlington Heights* case where a court found discriminatory intent but ruled against the plaintiff because there was no aggregate disparate impact.

As to the second harm, the district court disregarded identified students' exclusion from Stuyvesant and Bronx Science as not "significant" because the same pattern did not appear at all of the specialized schools. But equal protection is an individual right, and what the district court downplayed as only "minor differences" were significant harms to the affected Asian-American students.

Defendants' and Intervenors' attempts to bolster the district court's flawed decision have no merit. First, they incorrectly claim that this Court's cases requiring a "discriminatory effect" mean that Plaintiffs must prove an aggregate disparate impact. To the contrary, the unequal treatment of Asian-American students is a clear "discriminatory effect" of Defendants' policies. Second, they argue that the reduction in Asian-American admissions to Stuyvesant and Bronx Science must be disregarded because that was not part of Plaintiffs' "theory of the case" and because Defendants' expert disagreed with the analysis. Not so. The exclusion of these Asian-American students from the top two schools is

consistent with Plaintiffs' claims, and an unresolved dispute between experts is not a proper basis for granting summary judgment.

At bottom, Defendants argue that their policies do not violate anyone's rights because (due to the anomalous Citywide jump in ENI) it only affected a relatively small number of Asian-American students, rather than causing the dramatic across-the-board drop Defendants had expected. In other words, just a *little bit* of discrimination is okay. And in their view, it's just too bad for the disadvantaged Asian-American students excluded from the Discovery program because they attended the wrong middle school. But the Equal Protection Clause is not so easily avoided. Although Defendants' overall plan was thwarted by the ENI increase, their discriminatory purpose succeeded as to the Asian-American students who were excluded from Discovery or denied invitations to Stuyvesant and Bronx Science. Plaintiffs' claims should be allowed to proceed.

ARGUMENT

I. Intentional Discrimination Claims Do Not Invariably Require Proof of Aggregate Disparate Impact

A. Under *Arlington Heights*, disparate impact is just one possible factor, not an essential element of an intentional discrimination claim

Because it is not always obvious whether a race-neutral policy was motivated by a discriminatory racial purpose, the Supreme Court developed the *Arlington Heights* framework, which requires courts to examine the "totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), and conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). The ultimate purpose of this holistic inquiry is to identify whether a race-neutral policy can be "traced to a discriminatory purpose." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

In an *Arlington Heights* analysis, no one factor is dispositive or essential—including whether the policy results in a disparate impact once implemented. *See* 429 U.S. at 266 (except in extreme cases, "impact alone is not determinative"); *see also Cooper v. Harris*, 581 U.S. 285, 319

(2017) ("[I]n no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail."). Instead, impact is just one factor that the Supreme Court has identified as potentially relevant, part of a list that includes: the "impact of the official action—whether it bears more heavily on one race than another"; the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; and "contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 266–67. The Court emphasized that this list is not "exhaustive" and also noted the "limited probative value of disproportionate impact" in proving intent. *Id.* at 267 & n.15. Although disparate impact "*may* provide an important starting point," *id.* at 266 (emphasis added), "purposeful discrimination is the condition that offends the Constitution." *Feeney*, 422 U.S. at 274 (quotation omitted). Aggregate disparate impact is not essential.[1]

[1] The Supreme Court consistently speaks of disparate impact in a way that makes clear it is not a necessary element. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (listing "disparate impact on a particular group" as "*[p]ossible* evidence" in an *Arlington Heights* inquiry) (emphasis added); *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is *often* probative of why the action was taken in the first place since people

In holding otherwise, the district court turned the Supreme Court's "may" into a "must." That not only contradicts *Davis* and *Arlington Heights*, but also distorts Plaintiffs' equal protection claim into a disparate impact claim, which is a creation of statutes like Title VII, not part of equal protection jurisprudence.[2] *See Briscoe v. City of New Haven*, 654 F.3d 200, 208 (2d Cir. 2011) ("The Equal Protection Clause ... prohibits only intentional discrimination; it does not have a disparate-impact component.") (quoting *Ricci v. DeStefano*, 557 U.S. 557, 627 (2009) (Ginsburg, J., dissenting)). Because the district court erroneously required a showing of aggregate disparate impact before Plaintiffs could obtain discovery into intent, summary judgment must be reversed.

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usually intend the natural consequences of their actions.") (emphasis added); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 329 n.28 (1993) (Stevens, J., dissenting) (noting that "in constitutional cases disproportionate impact *may* provide powerful evidence of discrimination") (emphasis added); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent *may* include proof of disproportionate impact.") (emphasis added).

[2] That conflation is also apparent in the district court's telling reference to "Plaintiffs' disparate impact claim." App. 517; *see also* Op. Br. at 63–64.

B. "Discriminatory effect" includes unequal treatment and does not require aggregate disparate impact

This Court has sometimes referred to a need to show a "discriminatory effect" or "adverse effect" in challenges to race-neutral laws. *E.g.*, *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); *Brown v. Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). That is fully consistent with Plaintiffs' claims. Contrary to Defendants' and Intervenors' straw-man characterization of their argument, *see* Appellee Br. at 42; Intervenors' Br. at 23, Plaintiffs readily accept that if a policy does not actually discriminate against or affect anyone, it will not violate equal protection even if those who enacted it were motivated by an intent to discriminate. Here, however, there *is* a clear discriminatory effect of Defendants' policies; specifically, the exclusion of Asian-American students. That unequal treatment leads to diminished opportunities and violates the individual right enshrined by the Equal Protection Clause. No further showing of discriminatory effect—including an aggregate disparate impact across all the specialized schools—is required.

The district court improperly disregarded the evidence of unequal treatment, misconstrued this Court's decisions, and equated

"discriminatory effect" with "aggregate disparate impact." SA-013. Defendants and Intervenors continue that same error on appeal. This Court should reject those arguments.

1. Unequal treatment is the touchstone of an equal protection claim and a superior measure of discriminatory effect

At its core, the Equal Protection Clause demands that "all persons similarly circumstanced shall be treated alike." *Hayden v. Paterson*, 594 F.3d 150, 169 (2d Cir. 2010). Accordingly, the Supreme Court has held that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–30 (1995). Indeed, this Court has called the prohibition on "unequal treatment" the "touchstone" of the equal protection guarantee. *Hayden*, 180 F.3d at 49; *see also Stevens v. Hous. Auth. of S. Bend*, 720 F. Supp. 2d 1013, 1028 (N.D. Ind. 2010) ("The essence of an equal protection violation … is unequal treatment …."), *aff'd* 663 F.3d 300 (7th Cir. 2011).[3]

[3] In contrast, "[d]isproportionate impact … is not the sole touchstone" of an intentional discrimination claim. *Davis*, 426 U.S. at 242.

Diminished opportunity due to racial discrimination is one form of unequal treatment that constitutes an equal protection injury. *See, e.g.*, *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1016 (D.C. Cir. 1997) ("Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to [minority-owned] firms."); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (contractor's injury in challenge to a minority set-aside program was "the inability to compete on an equal footing"). As the Supreme Court explained in *Bakke*, there is an equal protection violation when, due to race, some applicants "are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats," while "the preferred applicants have the opportunity to compete for every seat in the class." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978). Although *Bakke* and its progeny generally addressed laws that were racially discriminatory on their face, the courts' analysis of the relevant *injury* turns on the unequal treatment of individuals, rather than effects on an overall racial group.

Given its preeminence in the equal protection inquiry, unequal treatment is a better measure of "discriminatory effect" than the district

court's and Defendants' myopic insistence on aggregate disparate impact, for at least three reasons. ***First***, a focus on equal treatment more closely aligns with the text of the Equal Protection Clause—which says nothing about disparate impact—and with decisions of the Supreme Court and this Court. *See* U.S. Const. amend. XIV, § 1 (requiring "equal protection of the laws"); *Arlington Heights*, 429 U.S. at 266; *Hayden*, 180 F.3d at 49. ***Second***, a focus on equal treatment is more faithful to the well-established "rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273. Aggregate disparate impact looks only at the *results* of a policy, after it is implemented. Equal treatment considers distinctions made in the law itself.[4] ***Third***, requiring a showing of disparate impact would mean that many discriminatory policies cannot be challenged until after they are implemented and their racial impact analyzed. That would eliminate the

[4] For example, until Defendants' revised admissions policy was implemented, it was uncertain whether Asian-American students would receive fewer offers to attend the specialized high schools. *See* App. 36 ¶ 64 (Defendants' Answer) (admitting that "the impact of the changes is unknowable before they are applied"). In contrast, it was apparent in advance just from looking at school demographics that the 0.6 ENI restriction would disproportionately exclude students at heavily Asian-American middle schools. *See* App. 399; *id.* at 306–07 & n.6.

ability to bring pre-enforcement challenges, a key tool in protecting civil rights.

2. Defendants' revised admissions policy treats Asian-American students unequally

Defendants do not dispute that under the revised admissions policy, Asian-American students were disproportionately excluded from the Discovery program. Through use of a 0.6 ENI cutoff that restricted eligibility only to students who attend certain schools, Defendants excluded disadvantaged students at nearly half of the majority Asian-American schools in the City, even while nearly five out of every six middle schools were eligible. App. 306–07 & n.6. Students at the eligible schools were only about 8 percent Asian American, less than half the percentage of Asian-American students in the City as a whole. *Id.* at 307, 336–37. Thus, the many Asian-American students who attend disfavored middle schools were excluded from one-fifth of the seats at the specialized schools, a clear discriminatory effect of Defendants' policies.[5]

[5] In responding to the hypothetical in Plaintiffs' Opening Brief, Defendants all but concede that this is a sufficient discriminatory effect. *See* Appellee Br. at 48 n.10 (citing Opening Br. at 52). They agree that "the disproportionate burden of the [facially neutral] application process" in Plaintiffs' hypothetical "could perhaps itself be challenged as a

The undisputed evidence also shows that DOE selected 0.6 as an ENI cutoff because that gave them the best chance of altering the racial makeup of the specialized schools without unduly reducing the proficiency of admitted students. An internal DOE email first proposing the idea of an ENI restriction noted that "drastically altering/narrowing the disadvantages definition" for the Discovery program would "presumably" lead to "more black/Hispanic students"—and thus fewer Asian Americans—at the specialized schools. App. 393. DOE employees also prepared a table evaluating the racial effect of "varying 'floors' for Economic Need," including cutoffs of 0.4, 0.6, and 0.8, and no ENI floor. App. 398. That projection showed that there needed to be a cutoff of at least 0.6 before offers to Asian students began to drop and offers to black and Hispanic students would appreciably increase. *Id.* And although imposing an even stricter cutoff of 0.8 would reduce Asian representation by six percentage points and "increase the percentage of black and Hispanic children offered seats to 22%," the "[i]ncoming proficiency of

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discriminatory effect." *Id.* Precisely. And here, the disproportionate exclusion of Asian Americans from Discovery program eligibility is a discriminatory effect.

those students … would decrease significantly." *Id.* It is thus no surprise that the City settled on a 0.6 cutoff in pursuit of racial balance while not unacceptably reducing student proficiency.

Defendants miss the point in objecting that ENI is a proxy for "individual disadvantage" or "community disadvantage" rather than for race. Appellee Br. at 50. The problem is not simply the use of ENI, but the selection of a cutoff that disproportionately excluded Asian-American students in an attempt to lower their representation in the specialized schools. That was not accidental: internal DOE modeling predicted that excluding students at schools with ENIs below 0.6 would reduce Asian participation in the Discovery program from 64 percent to 38 percent. App. 399. In other words, the 0.6 ENI cutoff was a proxy for schools with heavy Asian-American populations.

The slight overall increase in Asian-American admission to the specialized schools as a whole is of no comfort to the individual Asian-American students who were disproportionately excluded from Discovery program eligibility by the 0.6 ENI cutoff. All the slight overall increase means is that (due to Defendants' mistake in failing to account for the general jump in ENI) enough *other* Asian-American students gained

admission to offset their exclusion. But that does not "cure" the unequal treatment faced by these students who, contrary to Defendants' repeated claim, clearly did not "benefit" from Defendants' policies. *See* Appellee Br. at 2, 3, 16, 18, 24, 27, 36, 39, 50 (claiming "benefit" to Asian-American students).[6] Nor should it immunize Defendants from liability for their intentional discrimination. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016) (holding that state voting law changes that disproportionately affected African Americans violated equal protection even though "aggregate African American turnout increased by 1.8%" under the new law).

C. Defendants' cited cases do not require proof of aggregate disparate impact

Defendants think the only question worth asking is whether the policy change led to an aggregate drop in Asian representation across all the specialized high schools. They incorrectly claim that unequal treatment is not enough and cite cases purporting to establish that Plaintiffs can only show discriminatory effect through aggregate

[6] It is this perverse thinking—one that treats every individual of a racial group as the same—that the Equal Protection Clause was designed to prohibit.

disparate impact across the specialized schools. *See* Appellee Br. at 30, 39–40 (citing cases). But Defendants' cited cases carry no such requirement.

The first, *Palmer v. Thompson*, 403 U.S. 217 (1971), was a challenge to a city council's closure of previously segregated public swimming pools, allegedly to avoid an integration order. In that context, the Supreme Court noted that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. That is perfectly consistent with Plaintiffs' argument, which is that Defendants' discriminatory intent *plus* the unequal treatment inflicted on Asian-American students at excluded middle schools violates the Equal Protection Clause. *Palmer* says nothing about needing to show an after-the-fact disparate impact to succeed on an equal protection claim. And even if it could be read that way, *Palmer* preceded the decisions in *Davis* and *Arlington Heights*; to the extent it

requires something more or different than those decisions, it has been superseded.[7]

Likewise, this Court's decision in *Orange Lake Associates, Inc. v. Kirkpatrick* does not impose a disparate impact requirement. In *Orange Lake*, the question was whether a facially neutral zoning decision that allegedly had a disparate impact on racial minorities violated the Equal Protection Clause. 21 F.3d 1214, 1225–26 (2d Cir. 1994). The "[m]ost important" reason why this Court rejected the challenge had nothing to do with impact, but was because the plaintiff "fail[ed] to point to any evidence of [a racial] motivation" in the zoning law. *Id.* at 1227.[8] And although Defendants claim that *Orange Lake* held that an equal protection claim can "only" trigger strict scrutiny if "the law has … a disproportionate impact" on one race, Appellee Br. at 39–40, that ignores

[7] According to *Davis*, the "holding" in *Palmer* was that "the legitimate purposes of the ordinance [that closed the swimming pools] to preserve peace and avoid deficits were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations." 426 U.S. at 242. *Davis* dismissed *Palmer*'s discussion of "disproportionate racial consequences" as "dicta." *Id.*

[8] Although the plaintiff claimed a discriminatory impact, it "provide[d] no evidentiary support" and "put[] forward no proof" for its allegations, which were contrary to the available evidence. 21 F.3d at 1226.

the Court's important qualifier: a plaintiff "*normally* must show … a disproportionate impact." 21 F.3d at 1226 (emphasis added). Even if equal protection cases *normally* involve disproportionate impact, that means they sometimes do not, and *Orange Lake* does not require such a showing.[9]

Similarly, Defendants' other cited cases focused on discriminatory intent and unequal treatment; none of them insist on a showing of aggregate disparate impact. *See Hayden*, 180 F.3d at 50 (plaintiffs "d[id] not sufficiently allege that Nassau County harbored an intent to discriminate against them" and "have not been excluded from full consideration [i.e., treated unequally] because of their race");[10] *Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 212 (2d Cir. 2006) (focusing on discriminatory intent and not mentioning disparate impact); *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 199 (2d Cir. 2014) (in evaluating an

[9] The Ninth Circuit has accurately described the question of discriminatory effect as whether "the defendant's actions adversely affected the plaintiff in some way." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013). That is satisfied here as to the Asian-American students who were treated unequally.

[10] *See also* Plaintiffs' prior discussion of *Hayden*. Opening Br. at 47–49.

RLUIPA claim, discussing "unequal treatment" and referring only to "discriminatory effect," not disparate impact); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83, 122 (2d Cir. 2019) (affirming a finding of discriminatory intent and finding "discriminatory effect" from a restriction on a religious school's planned housing, without any discussion of disparate impact).[11] To the extent the topic of disparate impact arises in these cases, it is because the plaintiffs argued that there was such an impact. *See, e.g.*, *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009) ("Assuming without deciding" that the plaintiffs could establish their allegation of discriminatory impact, "they have

[11] Defendants' out-of-circuit cases are likewise consistent with Plaintiffs' view. *See Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 550 (3d Cir. 2011) ("To establish discriminatory impact in a racial discrimination case, Appellants must show that similarly situated individuals of a different race were *treated differently*.") (emphasis added); *Lewis v. Ascension Par. Sch. Bd.*, 806 F.3d 344, 354 (5th Cir. 2015) (school redistricting case where the plaintiff failed to prove his allegation of discriminatory effect); *Alston v. City of Madison*, 853 F.3d 901, 907 (7th Cir. 2017) ("Statistics are relevant only if they address the pertinent question, that is, whether [the plaintiff] was *treated differently* ...."); *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021) (looking to factors other than impact because "there is no clear pattern [of disparate impact] that would be determinative").

nonetheless failed to proffer enough evidence of discriminatory intent to survive summary judgment.").

Neither logic nor precedent requires that aggregate disparate impact be shown in every case, or even every challenge to a facially race-neutral policy. Rather, the ultimate inquiry must always focus on whether there has been intentional discrimination. Requiring proof of disparate impact is particularly inapt in a case like this, where Defendants predicted and intended a disparate impact but failed to account for the general Citywide ENI increase that changed who was eligible for the Discovery program. Indeed, *Orange Lake* emphasized that where there is not a pattern of disparate impact evidence, the court must "look to other evidence … for some clues about legislative motivation." 21 F.3d at 1226. Here, the district court erroneously required a showing of aggregate disparate impact *before* Plaintiffs could even obtain discovery into other evidence of Defendants' intent. Its decision must be reversed.

II. Plaintiffs' Expert Evidence Creates a Material Issue of Fact That Precludes Summary Judgment

Even if the district court were correct that Plaintiffs must show a reduction in Asian-American representation at the specialized high

schools, it erred in disregarding evidence of aggregate impact at Stuyvesant and Bronx Science—the most competitive and prestigious of the specialized schools. Although Defendants downplay Stuyvesant and Bronx Science as just "two of the eight" specialized schools, Appellee Br. at 26, the Court should not ignore the special status these schools hold. Stuyvesant and Bronx Science are the oldest, most prestigious, and most difficult to get into of the specialized schools. *See* Opening Br. at 17–20 (discussing the schools' history). They consistently have two of the highest cutoff scores, and they are most applicants' first and second choices (in one order or the other).[12] App. 340–42.

Analysis by Plaintiffs' expert Dr. Jacob Vigdor demonstrated that Defendants' revised policies resulted in a group of identifiable Asian-American students being excluded from Stuyvesant and Bronx Science, reducing overall Asian-American invitations to those schools. Opening Br. at 34–35, 58–59. Dr. Vigdor's analysis was not an estimate or a projection; rather, because admission to the specialized schools is

[12] Defendants do not deny that Stuyvesant and Bronx Science are the most prestigious and competitive of the specialized schools, and Intervenors concede that they are "the two most competitive." Intervenors' Br. at 33.

through a predictable process based on SHSAT scores and students' school preferences, Dr. Vigdor was able to "pinpoint specific students" who were excluded. App. 358.[13]

The district court gave almost no explanation for its disregard of this evidence—which is reason enough to reverse its grant of summary judgment. *See, e.g.*, *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 547 F. App'x 484, 487 (5th Cir. 2013) (reversing "[b]ecause the district court provided no explanation for its grant of summary judgment on this claim"). Moreover, the scant explanation the district court provided revealed that it (1) misconstrued Plaintiffs' intentional discrimination claim as one for disparate impact; (2) parroted but did not explain Defendants' assertion that the exclusion of these students is not "significant"; and (3) did not cite any relevant precedent that justified rejecting evidence of impact at the top two schools. *See* Opening Br.

[13] Because Dr. Vigdor focused on specific students, rather than just analyzing group statistics, Defendants' arguments about how courts should use statistical analyses to "analyze discriminatory effect" in the context of "government hiring and admissions policies" is beside the point. Appellee Br. at 57–58.

at 61–66. None of these are a sufficient basis for disregarding very real evidence of very real harm to individual Asian-American applicants.[14]

Defendants' two-fold attempt to bolster the district court's meager analysis fares no better. First, they argue that because it only included two schools, Dr. Vigdor's evidence is inconsistent with Plaintiffs' "theory" that there would be a reduction in Asian-American representation across all eight schools. To the contrary, Dr. Vigdor's analysis supports Plaintiffs' allegation that Defendants' plan would cause harm at individual specialized schools, and there is nothing improper about Plaintiffs honing their arguments to account for what was revealed in discovery. Second, Defendants argue that Dr. Vigdor's analysis is meaningless because he used the "wrong" data, but this is simply a dispute between experts that cannot be resolved at summary judgment. The harm to Asian Americans applying to Stuyvesant and Bronx Science creates a genuine issue of material fact that precludes summary judgment.

[14] Contrary to Defendants' claim, the district court did not conclude that Dr. Vigdor's analysis was "inadmissible." Appellee Br. at 52. It just chose to disregard his analysis. *See* SA-022.

A. Dr. Vigdor's evidence is presumptively admissible and creates a material issue of fact

Generally, there is a "presumption of admissibility of evidence." *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995). This presumption extends to evidence submitted by expert testimony. *See In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007) ("[T]he assumption the court starts with is that a well qualified expert's testimony is admissible."); Fed. R. Evid. 702 advisory comm. note ("[T]he rejection of expert testimony is the exception rather than the rule."). And where expert testimony raises material issues of fact, it is sufficient to defeat a motion for summary judgement. *See, e.g.*, Opening Br. at 60 (citing *Klein v. Tabatchnick*, 610 F.2d 1043, 1048 (2d Cir. 1979), and *Knight v. N.Y. State Dep't of Corr.*, No. 18-CV-7172, 2022 WL 1004186, at *12 (S.D.N.Y. Mar. 30, 2022)); *see also Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (summary judgment is often "inappropriate where the evidence bearing on crucial issues of fact is in the form of expert opinion testimony"); *Castleberry v. Collierville Med. Assocs. Inc.*, 92 F.R.D. 492, 493–94 (W.D. Tenn. 1981) ("Expert evidence normally will not constitute sufficient support for a motion for summary

judgment and will be more useful as a means of raising an issue of fact, since the weight to be given expert evidence is normally an issue for the trier of fact.").

Here, Dr. Vigdor is qualified and his testimony relevant because it shows that invitations to Asian Americans for Stuyvesant and Bronx Science were lower than they otherwise would have been due to the challenged admissions policy changes. Because this is a fact of consequence in an equal protection challenge to a facially race-neutral statute, his analysis raises a material issue of fact that precludes the grant of summary judgment.[15]

B. Plaintiffs' claims are consistent with a discriminatory effect at the top two specialized schools

Defendants incorrectly argue that Dr. Vigdor's analysis should be ignored because focusing on Stuyvesant and Bronx Science "is inconsistent with plaintiffs' theory of discrimination across all the [specialized schools]." Appellee Brief at 52. They further claim that Plaintiffs are trying to improperly "materially revise their theory of the

[15] Plaintiffs' Opening Brief details the errors in the district court's disregard of this evidence. Opening Br. at 61–66.

case at this late stage." *Id.* at 53–54. But this is no revision of Plaintiffs' theory—they have argued from the beginning that Defendants "intended to racially balance the [specialized high] schools by limiting the number of Asian Americans who are admitted." App. 20 (Complaint). That this "limiting" effect was concentrated at the two most competitive schools (due to the unexpected ENI jump) does not undermine their claims, as Plaintiffs have always recognized that "the precise impact of the changes is unknowable before they go into effect." *Id.*[16] Nor is it improper that Plaintiffs (like Defendants) have honed their arguments based on the evidence that arose in discovery. Defendants cite no case law requiring a plaintiff to be forever bound to the defendants' view of the "theory of the case."[17]

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[16] Defendants agreed. App. 36 ¶ 64 (admitting that "the impact of the changes is unknowable before they are applied"). Defendants had projected, however, that the changes would reduce Asian-American representation across all the specialized high schools. *See* Opening Br. 26–27.

[17] Defendants cite *Wright v. Ernest & Young, LLP*, 152 F.3d 169 (2d Cir. 1998), to say that "a party may not use opposition to a dispositive motion as a means to amend the complaint," Appellee Br. at 53–54, but no amendment is necessary here. Plaintiffs adequately pleaded their equal protection claim, and Dr. Vigdor's analysis supports that claim, not some new claim. In contrast, the plaintiff in *Wright* sought to allege a new duty for the first time in her opposition to a motion to dismiss. 152 F.3d at 178.

C. A factual disagreement among experts cannot be resolved at the summary judgment stage

Defendants did not seek to preclude Dr. Vigdor's testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and rightly so—Dr. Vigdor is eminently qualified and his testimony is relevant and helpful. Defendants chose instead to proffer a competing expert who tried to poke holes in his analysis. Dr. Vigdor submitted a supplemental report rebutting those criticisms. *See* Opening Br. at 36 n.32; App. 356–60. But now, citing nothing but their expert's one-sided view of the evidence, Defendants argue that Dr. Vigdor's analysis must be jettisoned entirely because he used what Defendants call the "wrong" data.

In so arguing, Defendants badly and repeatedly misrepresent what the district court held below. The court did not "observe[]" (or "note[]" or "explain[]" or "recognize[]") that Dr. Vigdor used faulty data. Appellee Br. at 23; *see also id.* at 26, 37, 52, 54. Rather, the district court merely stated that "Defendants *argue*" that Dr. Vigdor's analysis was irrelevant because he analyzed invitations instead of offers. SA-022 (emphasis

added).[18] The court did not *accept* Defendants' argument—and rightly so, since resolving an evidentiary dispute between experts is not proper at summary judgment. *See, e.g.*, Opening Br. at 60 (citing *Klein*, 610 F.2d at 1048, and *Knight*, 2022 WL 1004186, at *12). Now, Defendants ask this Court to rule in their favor, on a disputed issue of fact, with competing expert analyses, that the district court did not resolve. It should decline to do so.

In any event, Defendants' argument is spurious. They claim that Dr. Vigdor's analysis is "irrelevant and inadmissible" because he considered data corresponding to invitations that DOE sent to potential Discovery program applicants, some of whom (Defendants speculate) might not be "actually eligible for the Discovery Program" or "individually disadvantaged." Appellee Br. at 56. They claim that the "right" approach is to analyze offers given to Discovery program participants, after all the paperwork is filled out and turned in. Appellee Br. at 55–56. In Defendants' view, using the latter data set is the *only* valid approach because students who receive offers have been

[18] The district court did not mention Defendants' expert or give any credence to his opinions.

determined to be eligible for the Discovery program, whereas those receiving invitations have not yet been.

This is nothing more than a disagreement between experts, not susceptible to resolution at summary judgment. *Klein*, 610 F.2d at 1048; *Knight*, 2022 WL 1004186, at *12. Moreover, Defendants are mistaken in arguing that their expert's analysis is "right" and Dr. Vigdor's "wrong."[19] Dr. Vigdor's analysis properly focused on invitations because that is the element that DOE has control over. That is, DOE decides who it sends invitations to based on its admissions policies, and when Defendants revised those policies, the immediate concrete effect was to change who received invitations. In contrast, as Dr. Vigdor pointed out, DOE has no control over "whether students submit the paperwork necessary to convert their 'invitation' into an 'offer.'" App. 356–57; *see also* Appellee Br. at 12 (conceding that students must provide "information … about whether they are interested and eligible" for the Discovery program).

[19] Although Defendants also claim that Dr. Vigdor did not "meet the statistical standards prescribed by law," Appellee Br. at 54 (citing *Chin v. Port Aut. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012)), they do not specify any "statistical standards" that are supposedly relevant to the analysis or that Dr. Vigdor failed to meet.

Thus, the data field preferred by Defendants' expert is the "wrong" field because it *only* includes students who successfully navigated the offer process and thus does not accurately reflect the effect of Defendants' policy changes.[20]

In any event, it bears repeating that this is nothing more than a disagreement among experts as to which approach better accounts for the effects of Defendants' policy changes. It is possible that the trier of fact could ultimately find Defendants' expert analysis more compelling, but it was reversible error to disregard Dr. Vigdor's analysis at the summary judgment stage.

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[20] It is possible that some Asian Americans who were denied invitations to Stuyvesant and Bronx Science were not individually disadvantaged, but most of them likely were, since more than half of the Asian Americans who attend the specialized schools are in poverty. *See* App. 35 ¶ 54 (Defendants' Answer). Defendants also do not know how many students who receive invitations but not offers are due to ineligibility versus failure to successfully complete paperwork or otherwise navigate the application process.

Regardless, at the summary judgment stage, when inferences are to be drawn in Plaintiffs' favor, it cannot validly be assumed that *none* of the students were individually disadvantaged. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

CONCLUSION

This Court should reverse the grant of summary judgment and order that Plaintiffs be allowed discovery into Defendants' intent.

DATED: May 5, 2023.

Respectfully submitted,

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