19-550

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTA McAULIFFE INTERMEDIATE SCHOOL PTO, INC., CHINESE AMERICAN CITIZENS ALLIANCE OF GREATER NEW YORK, ASIAN AMERICAN COALITION FOR EDUCATION, PHILLIP YAN HING WONG, YI FANG CHEN and CHI WANG,

Plaintiffs- Appellants,

- against -

BILL DE BLASIO, in his official capacity as Mayor of New York, and RICHARD A. CARRANZA, in his official capacity as Chancellor of the New York City Department of Education,

Defendants- Appellees.

On Appeal From the United States District Court for the Southern District of New York

BRIEF FOR *AMICI CURIAE* NYC LAB MIDDLE SCHOOL PARENTS' ASSOCIATION; THE PTA OF PS/IS 119, THE GLENDALE; EAST SIDE MIDDLE SCHOOL PARENTS TEACHERS ASSOCIATION; PS 130M PARENTS ASSOCIATION and MNS/PTA, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Amici Curiae NYC Lab Middle School Parents' Association, East Side Middle School Parents Teachers Association, PS 130M Parents Association and MNS/PTA, Inc. are nongovernmental entities incorporated under Section 402 of the New York State Not-for-Profit Corporation Law. As such they are prohibited from issuing stock and thus no parent corporation or publicly held corporation owns 10% or more of such stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Parents Organizations of New York City middle schools and elementary schools which have had many students who have gone on to attend the specialized high schools. However, under the new rules at issue in this case disadvantaged students at these middle schools (and at the middle schools that the elementary schools feed into) are no longer eligible for admission to the specialized schools via the Discovery Program for disadvantaged students, no matter how poor they and their families are, because the schools have "Economic Need Indexes" of less than 60% under the City's newly devised measure. This is of course a concern to many of the parent members of the amici organizations. In addition several of the schools have large Asian populations and thus the discrimination alleged in the case is also of great concern to many of amici's members.

Amici are all authorized to file this brief by their governing bodies and rules.[1]

CONSENT TO FILING OF THIS BRIEF

Defendants-Appellees have consented to the filing of this amicus brief pursuant to Fed. R. App. P 29(a)(2).

[1] Amici and counsel state pursuant to Fed. R. App. P 29(a)(4)(E) and Local Rule 29.1(b) that no party's counsel authored this brief in whole or in part; and no party, party's counsel or other person contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF FACTS

Amici adopt the Statement of Facts contained in the Brief for Plaintiffs-Appellants. However, we add a brief discussion of an aspect of the implementation of the Discovery Program that is touched on but not highlighted by plaintiffs, and which is relevant to our argument below. Under the Hecht-Calandra Act,[2] , the specialized schools were "permitted to maintain[3] a discovery program" for "disadvantaged students" who "score[d] below the cut-off score" on the SHSAT exam. N.Y. Educ. Law § 2590-g(12)(d) [1996]. However, just as the law did not define "disadvantaged" or delineate the size the program, A. 262 (District Court Opinion at 8), it also did not specify just how far "below the cut-off score" a student admitted to the program could be.[4]

Therefore, defendants' assertion below, which was accepted by the District Court, that the Act limited participation in the program to those who scored "**just**

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[2] N.Y. Laws 1971 ch. 1212, *formerly codified at* N.Y. Educ. Law § 2590-g(12) [1996], *now incorporated by reference in* N.Y Educ. Law § 2590-h(l)(b). (Dist. Ct. Dkt. No. 48-1).

[3] There was apparently a version of the program in existence for several years before the enactment of the Act in 1971. *See* Declaration of Joshua Wallack (Dist. Ct. Dkt. No. 50) ["Wallack Decl."] ¶ 7; Bill Jacket, N.Y. Laws 1971 ch. 1212 (Dist. Ct. Dkt. No. 48-2) at 6.

[4] The Act did provide that the program must be operated "without in any manner interfering with the academic level" of the schools, *id.*, but did not contain specific criteria for this.

below" the cut-off (Defs' Mem. Law in Opp. to Pls' Mot. for Prelim. Inj. at 1; A. 262, 266 n. 11 [emphasis added]) was not accurate. For many years, though, this was apparently the way the program operated in practice, particularly when Stuyvesant, Bronx Science and Brooklyn Tech were the only SHSAT schools. Each of the three schools operated its own program, which was open to those scoring below its individual cut-off even if they had met the cut-off for a less competitive specialized school. As described by former Bronx Science principal Stanley Blumenstein:

> [T]he Discovery students typically fell just short of the school's cutoff score, and might have been admitted to another specialized school. They were essentially trading up to their top choice. "We…weren't lowering standards …because statistically if you are under the cutoff by three or four points, it's not much different than just being over it by three or four points."

A. 189.

Two developments over the last fifteen or so years have changed this, however. First, with the addition of five new specialized high schools beginning in 2002 (A. 264), the range of scores between the schools increased greatly. In 2018 the cut-off score was 559 for Stuyvesant but only 482 for the new Brooklyn Latin School, a 77-point difference. A. 23, 188. At the same time, the City limited eligibility for the programs at any of the schools to students who had missed the cut-off scores for **all** of the schools, including Brooklyn Latin. A. 189. Thus, in order to

continue participating in the program, which was then optional (A. 265), Stuyvesant and Bronx Science would have had to admit students whose scores were not just "three or four points" below those of some of their other students, but up to 75 points or more below the bottom of their classes. (The current minimum Discovery score is 469, 90 points lower than the Stuyvesant cut-off. A. 189.) They therefore stopped participating, *id.*, but the current City administration ordered them to resume doing so. A. 265.

As a result, even before the planned expansion of the Discovery Program from roughly 4% of the specialized school population to 20% that is at issue in the present case (A. 262, 265), Stuyvesant was accepting Discovery students with SHSAT scores between 78 and 90 points below its regular cut-off for admission. A. 188. The disparities were also large if not as glaring at Bronx Science and several other of the most selective schools. *See* A. 23, 188. The expansion will increase these disparities, perhaps markedly, by simultaneously raising the cut-off scores for regular admission to each of the schools due to the smaller number of slots available and lowering the threshold for eligibility for the greatly enlarged Discover Program.

ARGUMENT

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE DEFENDANTS' NEW RULES FOR DISCOVERY ELIGIBILITY ARE SO IRRATIONALLY RELATED TO THEIR PURPORTED GOALS THAT THEY ARE UNLIKELY TO SURVIVE STRICT SCRUTINY OR EVEN RATIONAL BASIS REVIEW

Amici join in the arguments made by plaintiffs in their brief regarding the standard for preliminary relief and the applicability of strict scrutiny, and that achieving racial diversity has not been held to be a compelling state interest at the secondary school level. We also agree with plaintiffs that defendants have failed to satisfy the narrow tailoring prong of strict scrutiny analysis. Indeed, we submit that, whether defendants' goals are compelling or not, the means they have chosen to achieve them – the redefinition of "disadvantaged" to exclude a student's own poverty, and the vast expansion of a program which, under the City's previous change, now leapfrogs Discovery students by several levels rather than nurturing them at the next highest level – are so arbitrary and capricious that they may well not even survive rational basis review.

A. The New Rules are Wholly Irrational

Defendants have asserted that their goal "is to extend enrollment opportunities to the **most disadvantaged** students in the city, thereby offering admission to the Specialized High Schools to a broader and more diverse swath of students."

Defs' Mem. Law in Opp. to Pls' Mot. for Prelim. Inj. at 14 (emphasis added); *see also id.* at 2, 17. The District Court similarly described the government's interests as "prioritizing Discovery eligibility for students it deems to be the **most in need**" and obtaining "the benefits that flow from having racially diverse schools." A. 287-88.

Amici agree that, as stated explicitly by defendants and implicitly by the court below, these goals are linked. (*See* chart *infra* p. 9 and surrounding discussion.) The problem, though, is that the City's revisions to the Discovery Program do **not** focus it on the students "most in need." Instead, as the District Court itself recognized, under the City's newly devised "Economic Need Index" ("ENI") applicable to schools rather than individual students or their families, "if a student is herself very low-income but attends an intermediate school with an ENI below 60%, the student is ineligible for Discovery, despite the fact that the student would have been eligible for the program under the prior criteria." A. 267. Under the new rules, to be deemed "disadvantaged" a student must meet one of the previous criteria related to individual and family circumstances, such as qualifying for free or reduced price lunch under federal guidelines, receiving welfare or food stamps, or being in foster care or a homeless shelter, **and** attend a school with an ENI of

60% or higher. A. 266; Wallack Decl., n. 3 *supra*, ¶¶ 16, 20.[5] Thus a student could be from a family on welfare or living in a homeless shelter and not qualify as "disadvantaged" for purposes of Discovery Program eligibility.

While a school's ENI is based on the average "Economic Need Value" ("ENV") of its students (A.266-67; Wallack Decl., n. 3 *supra*, ¶ 22), and thus might seem at first glance to be at least partially based on students' individual financial situations, a closer inspection shows that in the great majority of circumstances the ENV is itself based on the average poverty rate of the surrounding community rather than of students and families themselves.[6] A child from a household in particularly dire poverty – *e.g.*, on welfare or in a homeless shelter – will be assigned an ENV of 100% (*see* n. 6) which will nudge up the school's ENI average a bit, but if the average is still below 60% that student will still not be deemed "disadvantaged." Moreover, a child who is merely poor, even extremely poor, but does not fall into one of the special categories for a 100% ENV, will receive an

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[5] The new rules make some insignificant changes in the old individual criteria but "differ little [from the old rules] except in the new ENI requirement." A. 266.

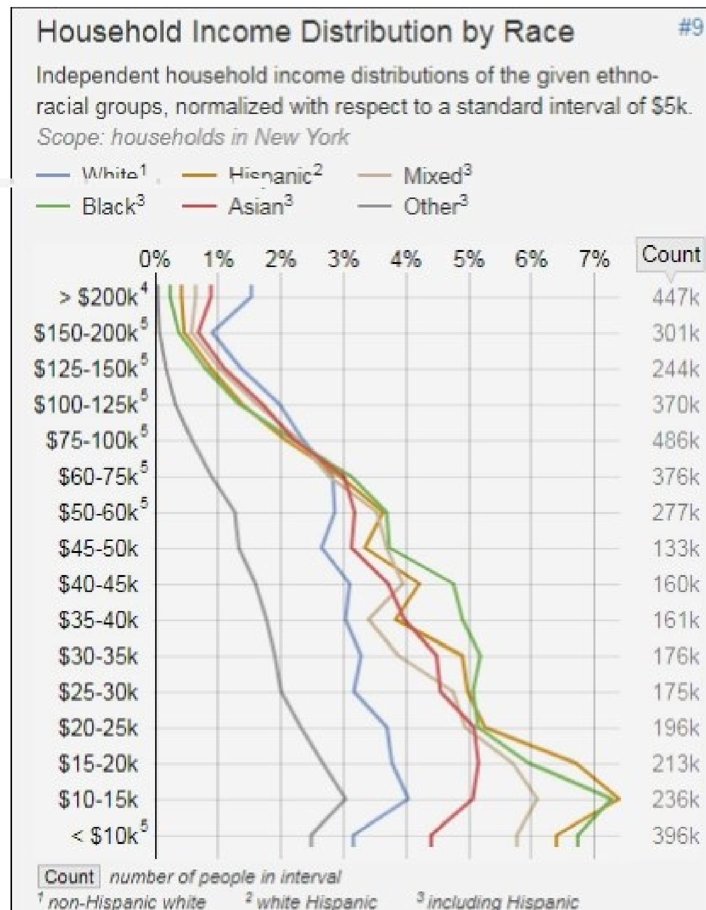
[6] A student's ENV is 1.0 (100%) if the student lives in a household that is eligible for public assistance, lived in temporary housing in the past four years, or speaks a language at home other than English and enrolled in a DOE school for the first time within the last four years. But otherwise, the student's ENV is based entirely on the percentage of families with school-age children in the student's census tract with incomes below the federal poverty level, and bears no relation at all to the student's own household income. A. 266; Wallack Decl., n. 3 *supra*, ¶ 23.

ENV equal to the poverty rate in his or her community rather than the actual poverty of his or her family (*see* n. 6). Thus that student's poverty won't be reflected at all in the school ENI.

The City argues that its old criteria were too liberal, noting that "in 2017, approximately 70% of DOE students were eligible to receive free lunch, which contributed to a large percentage of students potentially eligible for Discovery." Defs' Mem. Law in Opp. to Pls' Mot. for Prelim. Inj. at 17; *see* Wallack Decl., n. 3 *supra*, ¶ 16. But the Rube Goldberg-esque ENI measure concocted by the City just adds underinclusiveness to this overinclusiveness, while the City's own argument suggests an obviously simpler means of limiting the program to the most disadvantage students. The City could instead just lower the income ceiling for eligibility below that for the federal free lunch program, which is set at 130% of the federal poverty level and is currently $32,630 annually for a family of four. 83 Fed. Reg. 20788-89 (May 8, 2018), https://www.govinfo.gov/content/pkg/FR-2018-05-08/pdf/2018-09679.pdf. For example, the City could restrict eligibility to those below the poverty level itself, currently $25,100 annually for a family of four. *Id.* 20789. Rather than doing this, though, the City has inexplicably **raised** the family income limit to the cut-off for federal **reduced-price** lunch (A. 266) – 185% of the poverty level and currently $46,435 for a family of four, 83 Fed. Reg. 20789 *supra* – while at the same time imposing the arbitrarily Draconian ENI

requirement which excludes some of the very poorest students.

The more straightforward method of limiting the program to the most disadvantaged students by simply lowering the income cut-off would also further defendants' related and ostensibly compelling interest in enhancing racial diversity. As can be seen in the following chart based on U.S. Census Bureau data for New York City households, African-Americans and Latinos tend to be clustered disproportionately in the very lowest income groups:



Statistical Atlas, *Household Income in New York, New York (City)* (Chart #9),

https://statisticalatlas.com/place/New-York/New-York/Household-Income#figure /household-income-distribution-by-race.

This chart also shows that, contrary to some stereotypes, Asian-Americans are relatively poor compared to whites. In fact, Asians actually have the second highest poverty rate of any racial group in New York City, just slightly lower than Hispanics and higher than blacks. Mayor's Office of Operations, *New York City Government Poverty Measure 2005–2015* (May 2017) 33, Table 3.1, https:// www1.nyc.gov/assets/opportunity/pdf/NYCgovPovMeas2017-WEB.pdf; *see also* A. 136, 215 (61% of Asian students at the specialized schools are low-income). However, they are not as disproportionately concentrated in the very lowest income groups as are African-Americans and Latinos. Therefore, a straightforward lowering of the income cut-off for the Discovery Program would also likely have a negative impact on Asian enrollment. Unlike the ENI device, though, it would do so in a manner that was transparent and clearly neutral and incidental – rather than a seeming pretext for excluding all students from Asian neighborhoods. *See* Appellants' Opening Br. at 40-41; A. 89-107 (based on ENI figures at the time the City's plan was announced, it would have excluded students from 18 of 23 Asian-majority schools).

The utter irrationality of the ENI measure of "disadvantage" for Discovery admission is exacerbated by vastly expanding the program just when, under the

City's earlier change, it is now limited to students who scored below the cut-off for all of the specialized schools. *See supra* pp. 2-4. The combined result is that a child on welfare living in the poorest neighborhood in New York but enrolled in a Gifted and Talented Program at a middle school in a middle-class area, who scores 481 on the SHSAT (one point below the Brooklyn Latin cut-off) will have no path to the specialized schools, while a student from a family making $46,000 (*see supra* p. 8) who scores the current Discovery minimum of 469 (or even lower when the program is expanded) could wind up at Stuyvesant. And leapfrogging that 469-student by several levels to attempt to compete with students with scores 100 points or more higher, while denying the 481-student the potential chance to compete with peers at Brooklyn Latin who scored only a few points higher, does no more favors for the former than for the latter.

As with the change in the selection criteria, however, there is a far more rational alternative available to the City to achieve its goals of increasing diversity and providing opportunity to the most disadvantaged students – but to do so in a way that does not leapfrog them over other equally disadvantaged minority students and set them up for failure. That is to expand the program but reinstitute the successful model where disadvantaged students at each level were given the opportunity to move up to, and thrive at, the next level.

B. Strict Scrutiny Analysis

In two of its leading cases concerning racial preferences, the Supreme Court has linked the compelling interest and narrow tailoring strands of strict scrutiny analysis, suggesting that an attenuated or irrational "fit" between means and ends calls into question whether an ostensibly compelling goal is in fact a pretext for discrimination. In order to guard against this, the Court held that in applying the narrow tailoring test a reviewing court must be assured that "**the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype**." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *City of Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion of O'Connor, J.)) (emphasis added).[7]

The *Grutter* Court added that while "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does "require serious,

[7] *Grutter* and *J. A. Croson* of course involved challenges by **white** plaintiffs to racial preferences and set-asides, thus establishing that even in such cases strict scrutiny requires that there be no significant chance that the racial preference was motivated by prejudice towards or stereotyping about the white majority. This rule should be applied even more stringently where, as here, and as is becoming increasingly common in our increasingly multi-racial society, the brunt of ostensibly benign racial favoritism is alleged to fall on a group that is itself a racial minority which has historically faced discrimination. *Cf. Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting) ("Orientals" an example of a "discrete and insular minority" subject to heightened protection under Court's equal protection jurisprudence).

good faith consideration of workable race-neutral alternatives," 539 U.S. at 340, and that the means chosen "must not 'unduly burden individuals who are not members of the favored racial and ethnic groups,'" *id.* at 341 (quoting *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547, 630 (1990) (O'Connor, J., dissenting)). The Court went further in *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013), holding that "[t] he reviewing court must ultimately be satisfied that **no** workable race-neutral alternatives would produce the educational benefits of diversity." *Id.* at 312 (emphasis added).

It clearly follows that where as here the government chooses as convoluted and imprecise a means as the ENI mechanism to achieve its claimed interest in diversity, even though there is a simpler, more straightforward and racially neutral way to effectively do so, it not only runs afoul of the narrow tailoring requirement of strict scrutiny but raises doubt that the actual "motive … was illegitimate racial prejudice." At the very least it makes it impossible to exclude that possibility, as required by *Grutter*.

This is especially true where, as here, the context of the challenged action strongly suggests the possibility that racial prejudice against Asian-Americans was at least intertwined with a desire to enhance diversity as a motive for the action. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("a plaintiff [need not] prove that the challenged action rested solely on

racially discriminatory purposes [since r]arely can it be said that a … decision [is] motivated solely by a single concern"). Such an impermissible motive can be gleaned from, *inter alia*, the disparate racial impact of the action and "contemporary statements by members of the decisionmaking body." *Id.* at 266, 268.

Both of these factors strongly support the inference that racial prejudice was at least a possible motive for the use of the convoluted ENI test here rather than a more direct and effective method of identifying the most disadvantaged students. As seen, the impact of the test, at the time it was originally devised and imposed, was to exclude **all** students, no matter how poor, at over three-quarters of the City's Asian-majority middle schools. *See supra* p. 10.)[8] Even more striking is the contemporaneous statement of defendant Carranza that "I just don't buy into the narrative that any one ethnic group owns admission to these schools." A. 191. While defendants and the District Court attempt to explain away the "context" of this statement, amici submit that the most relevant "context" is the standard of racial discourse now expected of public officials, particularly in a city like New

[8] As plaintiffs note, under current ENI figures the impact will not be as drastic, but that is not because of any change to the ENI measure. *See* Appellants' Opening Br. at 41. Rather, it reflects an unexplained citywide 10% ENI increase that brought more schools above the 60% threshold for Discovery eligibility. *Id.*; A. 108. This increase appears to be a statistical anomaly as it is way out of line with consistent figures for the previous three years, A. 108, and even if not an anomaly can be expected to decline again with the recent economic uptick. The bottom line in terms of assessing motive is that at the time the measure was devised and imposed it would have had glaringly disparate impact on heavily Asian schools.

York, and that in that context it was such a blatant outlier from accepted norms that it alone establishes at least the possibility that impermissible prejudice was one motive for the new policy. Put simply, it is inconceivable that a New York City Schools Chancellor could have made such an insensitive remark about any other racial minority in discussing a new policy and kept his job, much less avoided a preliminary injunction in a racial discrimination case about the policy.

C. Rational Basis Analysis

For all the reasons set forth above, the ENI test is so irrationally related to its ostensible goal that it is unlikely to survive strict scrutiny. Indeed, it might well not even survive rational basis review. The Supreme Court has held that – at least in the case of actions differentially impacting social groups rather than economic regulation – even when heightened scrutiny is not invoked the government still "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 446-447 (1985) (action disparately impacting the mentally retarded) (citing *Zobel* v. *Williams*, 457 U.S. 55, 61-63 (1982) and *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 535 (1973)). That is because "even distinctions that are not suspect implicate 'the core concern of the Equal Protection Clause as a shield against arbitrary classifications.'" *Singh v. Joshi*, 152 F. Supp. 3d 112, 125 (E.D.N.Y. 2016) (quoting *Engquist v. Or. Dep't of*

Agric., 553 U.S. 591, 598 (2008)).

Even cases that have distinguished *City of Cleburne* and its predecessors have noted that those cases involved distinctions among demographic groups rather than economic regulation, and that therefore the Supreme Court had "been willing to infer irrationality from the availability of an alternative policy that more directly and effectively furthers the government's asserted interest." *Monarch Bev. Co. v. Cook*, 861 F.3d 678, 685 (7th Cir. 2017). However, "[t]he … Court has never invalidated an **economic** regulation on rational-basis review because a more direct or effective policy alternative was available." *Id.* (emphasis added).

Here, defendants have devised and imposed a test for Discover eligibility that appears to differentially impact racial groups even though its "relationship to an asserted goal is so attenuated as to render [it] arbitrary or irrational" and despite "the availability of an alternative policy that more directly and effectively furthers the government's asserted interest." Therefore plaintiffs have a high likelihood of succeeding on the merits even if strict scrutiny is not invoked.

CONCLUSION

The Order and Judgment Below Should be Reversed
and the Requested Preliminary Injunction Granted

Dated: May 7, 2019
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Respectfully submitted,

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