TANG MOOT COURT COMPETITION

FALL 2024

(ORDER LIST: 598 U.S.)

WEDNESDAY, May 1, 2024

CERTIORARI GRANTED

24-0777 TANG COUNTY SCHOOL DISTRICT, Petitioner, v. COALITION FOR EQUITABLE EDUCATION, Respondent, and ASIAN AMERICAN PARENTS FOR OUR FUTURE, Respondent

The petition for writ of certiorari is granted.

IT IS ORDERED that the above-captioned matter be set for argument in this Court, said argument to be limited to the following issues:

1) Whether the district court properly denied Respondent ASIAN AMERICAN PARENTS FOR OUR FUTURE's motion to intervene as of right because of overlap in interests between the intervenor and a party.

2) Whether the facially neutral admissions policy of Petitioner school district that has diversity as one of its objectives violates the Equal Protection Clause when changes in the policy impact a racial group.

NOTE TO STUDENT COMPETITORS:

Respondent Asian American Parents for Our Future will be represented at oral argument by Respondent Coalition for Equitable Education. Thus, oral argument before the Supreme Court will have two parties: Petitioner Tang County School District and Respondent Coalition for Equitable Education.

Appendix A – Opinion of the 13th Circuit Court of Appeals

United States Court of Appeals
For the Thirteenth Circuit

COALITION FOR EQUITABLE EDUCATION
Plaintiff-Appellant

and

ASIAN AMERICAN PARENTS FOR OUR FUTURE
Intervenor-Appellant

v.

TANG COUNTY SCHOOL DISTRICT
Defendant-Appellee

Appeal from the United States District Court for the
District of Apalsa

Decided: May 1, 2024

Before TAMURA, LEE, and PATEL, *Circuit Judges.*

ANNA TAMURA, *Circuit Judge.*

Plaintiff-Appellant Coalition for Equitable Education ("Coalition") appeals from the District Court's entry of summary judgment in favor of Defendant-Appellee Tang County School District ("School District"). Intervenor-Appellant, Asian American Parents for Our Future ("AA Parents"), appeals the denial of its motion to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Both the Coalition and AA Parents (collectively, "Appellants") allege that changes to the admissions policy of Defendant-Appellee School District violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The District Court denied Intervenor-Appellant's motion to intervene because Intervenor-Appellant had the same ultimate objective as Plaintiff-Appellant and could not overcome the presumption of adequate representation. Shortly thereafter, the Court granted the School

District's motion for summary judgment, finding that the challenged admissions policy was facially neutral, that Plaintiff-Appellant had failed to show disparate impact, and that Plaintiff-Appellant could not show any evidence of intentional racial discrimination. At argument on the two appeals, both Appellants agreed that their substantive challenges to the Defendant-Appellee's policy arise from the same case and require consideration of the same body of facts. This Court thus stated that we would issue one decision to address the issues raised in both appeals. For the reasons set forth below, we reverse the District Court's decisions granting Defendant-Appellee's motion for summary judgment and denying the AA Parents' motion for intervention.

FACTS

For decades, Tang High, a magnet school, considered only two criteria in admissions decisions: test scores and grades. The testing requirements included not one but two standardized tests. Each applicant was ranked based primarily on his or her test scores, with less weight given to an applicant's middle school grade point average ("GPA"). Applications were anonymized without any indication of an applicant's race or ethnic background. Tang High prided itself on using these objective metrics to pick the most academically talented student body from its geographic boundaries. As a result, it had the reputation as the premier high school in the State of Apalsa and in the country.

In 1970, Tang County's school-age population was ninety-five percent White, two percent Black, one percent Latino, one percent Asian American, and one percent other/unknown. Tang High's first class was ninety-eight percent White and one percent Asian American, with only a few Black and Latino students.

In the next 50 years, the county's population and school-age population became more racially diverse, though the overall population of the county remained majority White. According to the 2020 Census, the population of Tang County was fifty-five percent White, fourteen percent African American, seventeen percent Latino, eight percent Asian American, and the remaining six percent falling into other categories or groups.

As the demographic make-up of the population changed, White families began sending their children to private schools in increasing numbers. Despite the continuing decline in the percentage of White students in the county's public schools, the Tang County School District Board ("Board"), which has five members elected in at-large county elections, did not have a non-White person serving as a Board member until 2021.

In 2021, after nation-wide protests over race and policing, some Tang County parents also began to seek changes to Tang High's admissions policies. Outraged and frustrated by the school's use of only two criteria, particularly its reliance on standardized tests, parents of students rejected by Tang High protested. These parents succeeded in ousting all the then-sitting

Board members in the 2021 Tang County election. The new Board members promised parents publicly and privately in emails to accomplish one goal: to make Tang High reflect the makeup of its community. Most of the new Board members campaigned on a promise of changing the admissions policy. One member even had the campaign slogan, "Make Tang High Look Like the Community." All new members emphasized in their statements while campaigning that they believed racism was a serious problem and wanted to work toward achieving racial justice.

Following the school board election, the Board set about creating a new admissions policy for Tang High. The Board promptly passed a resolution to issue an annual report on the demographics of the student body, including data on the applicants for admission, and the admitted students. The Board emphasized its belief that Tang High was "failing Black and Latino students." The Board also commissioned a report from an educational consulting group that proposed options for new admissions policies.

In November 2021, the educational consulting group delivered the report to the Board. The consulting group proposed four policies for admitting students:

> Option 1: maintain the previously-used plan;
>
> Option 2: offer admission to students with the top 10% GPAs residing within the jurisdiction of the county's 10 middle schools;
>
> Option 3: offer admission to students with the top 20% GPAs residing within any of the county's five zip codes;
>
> Option 4: offer admission to students with the top 4% GPAs residing within any of the 25 census tracts in the county.

The consulting group predicted the impact of each option as follows:

Option 1	40% White; 54% Asian American; 2% Black; 2% Latino; 2% Other/unknown/mixed race
Option 2	22% White; 44% Asian American; 16% Black; 16% Latino; 2% Other/unknown/mixed race
Option 3	38% White; 50% Asian American; 4% Black; 6% Latino; 2% Other/unknown/mixed race
Option 4	30% White; 36% Asian American; 16% Black; 16% Latino; 2% Other/unknown/mixed race

The Board invited public comment. Several parents, alumni of Tang High, and current schools expressed their support for Option 1, saying that any move away from choosing the most qualified students based on GPA/test scores would dilute the educational experience of all students and diminish the value of attending the magnet school in college admissions.

Others advocated for Option 3 as a big step forward without harming White and Asian American students too much. Others criticized Option 3 as not doing enough to increase the number of Black and Latino students.

A consensus began to develop among the parents against Options 1 and 3 and in support of Options 2 and 4.

The Board then held a vote on Options 1 and 3. It voted unanimously against Option 1, saying that maintaining the status quo conflicted with the magnet school's mission and the Board's view that racism is a pressing concern for the county, state, nation, and world. The Board also voted unanimously against Option 3, with a few members expressing that it did not go far enough in bringing more Black and Latino students into the magnet school. The Board voted unanimously that either Option 2 or 4 would be implemented, but decided that a final selection would occur following the 2022 school year. Having rejected the existing admissions policy, Option 1, the Board voted to implement temporary changes to the admissions policy for 2022 applicants based on Option 4 ("2022 Policy").

At the next meeting, parents attending were sharply divided on the 2 remaining options. Some parents of White children said that they supported the effort to increase the number of Black and Latino students, but that any change should not negatively impact White children as greatly as Option 2. They noted that Option 4 distributed the negative burden more evenly between White and Asian American children.

In November 2022, the Board released data showing the racial make-up of the class admitted that year. The numbers differed slightly from the predictions in the report. Members of the community and the Board heralded the policy as a step in the right direction. In January 2023, the Board voted to adopt Option 4 ("2023 Policy").

Over the course of the admissions policy changes, the demographics of students admitted to Tang High changed substantially:

Demographic	2021	2022	2023
Asian	55%	40%	32%
White	30%	22%	24%
Black	8%	18%	20%
Latino	4%	18%	20%
Other	3%	2%	4%

Meanwhile, the applicant population for each year was as follows:

Demographic	2021	2022	2023
Asian	25%	26%	24%
White	20%	21%	28%
Black	21%	19%	20%
Latino	26%	25%	20%
Other	8%	9%	8%

PROCEDURAL HISTORY

In 2022, following the announcement of the 2022 Policy, the Coalition for Equitable Education[1] filed an action under 42 U.S.C. § 1983 alleging that Tang High's admissions policy violated the Equal Protection Clause. The Coalition stated that its mission is to "[r]epresent all students in the Tang County School District and prevent race-based discrimination in education." Tang High moved to dismiss, but its motion was denied.

The parties proceeded to engage in discovery, including deposing current and former Tang County school board members. Before the close of discovery, Tang High announced the 2023 Policy. Following the announcement, the Coalition for Equitable Education moved for leave to amend its Complaint to include the 2023 Policy, which the District Court granted. In its Amended Complaint, Plaintiff realleged the same allegations in the original Complaint, but also alleged that the 2023 Policy "changed the admissions criteria with the purpose of disadvantaging Asian and White children."

In June 2023, Tang High released a report documenting the demographics of each applicant class from 2021 to 2023 and the acceptance rate by race of each class. At the end of June, the School District filed a motion for summary judgment. In compliance with the District Court of Apalsa's Local Rule 56,[2] the Plaintiff-Appellant Coalition and Defendant-Appellee School District filed their Joint Statement of Undisputed Facts, which included a statement that the current admissions policy was facially neutral.

Following the filing of the Joint Statement of Undisputed Facts, AA Parents moved to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). AA Parents alleged that it is a nationwide, nonprofit organization of Asian American parents concerned about

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[1] The Coalition for Equitable Education was founded in 2022. Its members consist of the 250 White and Asian parents whose children were denied admission to Tang High under the new policy.

[2] Local Rule 56 sets forth the procedure for motions for summary judgment in the District Court of Apalsa. The Rule provides in relevant part:

> Parties are required to file a joint statement of undisputed material facts that the parties agree are not in dispute. The joint statement of undisputed material facts shall be filed separately from the memoranda of law. It shall include citations to admissible evidence supporting each undisputed fact (i.e. the line, paragraph, or page number where the supporting material may be found in the record).

anti-Asian racism in education. AA Parents argued that based on the data released, its interests were not adequately represented by the Coalition for Equitable Education. In support of the motion, AA Parents submitted an affidavit from a representative stating that Asian Americans are uniquely affected by the policy. The representative also alleged that her group's interests are different from the Coalition for Equitable Education, which was made up of Asian and White parents of students, while her group consisted of only parents of Asian students. Accordingly, the two groups were not identical in membership or interests, and had potentially conflicting views as to the remaining policies at issue.

After the trial court denied AA Parents' motion to intervene, the parties completed briefing of the Defendant Tang County School District's motion for summary judgment.[3] After hearing argument, the Court issued a decision granting Defendant's motion for summary judgment and dismissing the action.

Appellants timely filed the instant appeal.

DISCUSSION

I. INTERVENTION UNDER RULE 24(a)(2)

A. STANDARD OF REVIEW

This Circuit has not determined the standard of review for reviewing a district court's denial of a party's motion to intervene as a matter of right. The U.S. Supreme Court also has declined to determine the proper standard of review. *See Berger v. North Carolina State Conf. of the NAACP*, 597 U.S. 179, 200 n.* (2022). We hold that the proper standard of review here is *de novo*. *See Cnty. of Orange v. Air Cal.,* 799 F.2d 535, 537 (9th Cir. 1986); *Comm'r., Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1170 (11th Cir. 2019) ("We review the grant . . . of a motion to intervene as of right *de novo*."). We disagree with the Circuits that have adopted of an abuse of discretion standard for reviewing denial of intervention as a matter of right. *See Ewers v. Heron*, 419 F.3d 1, 2 (1st Cir. 2005) ("Our review of denial of intervention is only for abuse of discretion, with closer review when the intervention is of right."); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987) (adopting an abuse of discretion standard of review because of the fact-specific nature of applications for intervention); *United States v. Virgin Islands*, 748 F.3d 514, 519 (3d Cir. 2014); *Stuart v. Huff,* 706 F.3d 345, 349–50 (4th Cir. 2013).

Our determination of the proper standard is based on the following considerations. First, as other courts have noted, intervention as a matter of right presents a question of law. *See Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992); *United States v. Metro. St. Louis Sewer Dist. (MSD)*, 883 F.2d 54, 55–56 (8th Cir. 1989) ("Intervention as a matter of right is a question

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[3] As Intervenor points out, the Coalition did not cite in its brief the recent decision *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), despite the issuance of the Supreme Court's opinion two months prior to the filing of the brief.

of law.") Second, using an abuse of discretion standard would make it virtually impossible to ensure that parties could have their rights represented for the purpose of Rule 24(a)(2). *See, e.g., Stack v. Gamill*, 796 F.2d 65, 67 (5th Cir. 1986) (determining in the context of permissive intervention that the abuse of discretion standard is "so restrictive that a federal appellate court will virtually never reverse a district court solely because of an abuse of discretion in denying permissive intervention."). Third, under language in Rule 24(a), a district court has no discretion in determining whether to grant a motion to intervene once the movant has met the statutory requirements. *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996). For these reasons, we apply the *de novo* standard when reviewing the denial of the motion to intervene as of right.

B. DISCUSSION

Rule 24(a) of the Federal Rule of Procedure governs intervention as of right and provides that:

> [T]he court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless [the] existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

A movant seeking to intervene as a matter of right must establish that: 1) his application to intervene is timely, 2) he has an interest in the property or transaction that is the subject of the action, 3) he is so situated that a disposition of the action as a practical matter may impede or impair his ability to protect that interest, and 4) his interest is represented inadequately by the existing parties to the suit. *Davis v. Butts*, 290 F.3d 1297, 1300 (11th Cir. 2019).

There is no dispute as to the first three elements. The District Court denied AA Parents' motion to intervene because "Plaintiff adequately represents the Intervenor's interests." Following the rulings of the U.S. Courts of Appeals for the First, Second, Third, and Ninth Circuits, the District Court presumed adequate representation because AA Parents and Plaintiff ostensibly had the same ultimate objectives.

1. Presumption of Adequate Representation

We first determine whether to apply a presumption of adequate representation to this action, as Defendant urges. Intervenor argues that this Court should not adopt the presumption of adequate representation in light of the Supreme Court's decision in *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022).

In *Berger*, the Supreme Court declined to determine whether there is a presumption of adequate representation. *Berger*, 597 U.S. at 197. However, some Circuits have highlighted the apparent skepticism expressed by the Court in *Berger* regarding the presumption of adequacy. *See Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 688 n.3 (7th Cir. 2023) (noting that the Supreme Court "called into question whether any presumption of adequate representation is appropriate"); *Callahan v. Brookdale Senior Living Cmtys., Inc.*, 42 F.4th 1013, 1021 n.5 (9th Cir. 2022) (noting the Court's skepticism of a presumption of adequate representation, but applying a different test for representation).

This Circuit has never addressed what a putative intervenor must show to establish adequate representation or when a presumption of adequate representation applies.

Some Circuits presume adequate representation when an intervenor shares the same ultimate objective as another party. The First Circuit held that "[w]hen a proposed intervenor's objective aligns seamlessly with that of an existing party . . . a rebuttable presumption of adequate representation attaches." *SEC v. LBRY, Inc.*, 26 F.4th 96, 99 (1st Cir. 2022) (internal quotation omitted). The Fifth Circuit[4] has ruled that adequate representation is presumed when the intervenor has the same ultimate objective as another non-governmental party. *Edwards v. City of Houston,* 78 F.3d 983, 1005 (5th Cir. 1996); *see also Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula,* 41 F.4th 767, 774 (6th Cir. 2022) (presumption of adequate representation applied when the intervenor and a party share the same ultimate objective). The same ultimate objective is generally less exacting a criterion than identity of interests. *See Callahan*, 42 F.4th at 1021 n.5 (distinguishing parties with the same ultimate objective from those with an identity of interests).

Other Circuits take a tiered approach and apply different presumptions depending on the circumstances. For example, the Seventh Circuit uses a three-tiered approach: one for when the goals of the intervenor and a party are the same, one if the party in the case with the same interest as the intervenor is a governmental entity, and, the strongest presumption, if the party and intervenor have identical interests. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). Under the Ninth Circuit's two-tiered approach, when an intervenor has the same ultimate objective as a party, adequate representation is presumed. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). But when an intervenor has an identical interest as another party, the intervenor must make a compelling showing of inadequate representation. *Id.*

Yet other Circuits apply a presumption only when there is an identity of interests. For example, the Tenth Circuit applies a presumption of adequate representation when the interests of a party and intervenor overlap fully. *Kane Cnty. v. United States,* 94 F.4th 1017, 1030 (10th

[4] The Fifth Circuit also recognizes a second presumption (not applicable here) in cases where a non-governmental entity attempts to intervene alongside the government. *See, e.g., Texas v. United States*, 805 F.3d 653, 661–62 (5th Cir. 2015).

Cir. 2024); *see also Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179–80 (2d Cir. 2001).[5]

Once adequate representation is presumed, appellate courts have also differed in determining the proof required to show whether representation is in fact adequate. Some Circuits require a showing of adversity of interest, collusion, or nonfeasance by the existing party. *See, e.g., Edwards,* 78 F.3d at 1005; *Liddell v. Caldwell,* 546 F.2d 768, 771 (8th Cir. 1976); *Virginia v. Westinghouse Elec. Corp.,* 542 F.2d 214, 216 (4th Cir. 1976). Other courts do not adopt a single hard and fast rule, but evaluate the facts of each case independently. *See, e.g., Butler, Fitzgerald & Potter*, 250 F.3d at 180; *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)* ("*Students for Fair Admissions 2015*"), 807 F.3d 472, 476 (1st Cir. 2015) (focusing on whether a party in the case would make the intervenors' argument). The District Court applied the former approach, requiring the intervenor to show collusion, adversity of interest, or nonfeasance by the Plaintiff.

We disagree with the District Court on the showing that an intervenor must make to demonstrate that his or her interests are inadequately represented by an existing party. We hold that the burden on a putative intervenor to satisfy Rule 24(a)(1) requirements is low and that there is no presumption of adequate representation.

In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), a case involving a motion under Rule 24(a)(2), the Supreme Court noted that the burden for showing inadequate representation should be treated as minimal. *Id.* at 538 n.10. Although the Court's statement regarding the presumption of adequate representation is *dicta, see Berger*, 597 U.S. at 196–97, we nonetheless look to the Supreme Court's reasoning for guidance in reaching our holding. In particular, the *Berger* Court pointed to *Trbovich* and observed, "[r]ather than endorse a presumption of adequacy, the Court held that a movant's burden in circumstances like these 'should be treated as minimal.'" *Id.* at 196. In our view, this reference to the comment in *Trbovich* supports this Court's view that the requirement of a minimal burden cannot co-exist with the presumption of adequate representation.

That said, other Circuits read *Trbovich* differently and have found its command consistent with the presumption of adequate representation. *Students for Fair Admissions 2015*, 807 F.3d at 475 (citing *Trbovich* but applying the presumption of adequate representation); *Harris-Clemons v. Charly Trademarks Ltd.*, 751 F. App'x 83, 85–86 (2d Cir. 2018) (citing *Trbovich* but discussing what is necessary to overcome the presumption of adequate representation); *Westinghouse Elec. Corp.*, 542 F.2d at 216 (noting *Trbovich*'s command that the burden be minimal, but explaining that when an intervenor shares the same objective as a party, it must overcome the presumption of adequacy). These courts acknowledge *Trbovich*'s holding that the burden for intervention is minimal, but then add hurdles for an intervenor to surmount. This Court rejects the presumption

[5] Notably, the Second Circuit requires a more rigorous showing when an intervenor has the same ultimate objective as a party, but does not presume adequate representation. *Butler, Fitzgerald & Potter*, 250 F.3d at 179–80.

of adequate representation because, in our view, such an approach cannot be squared with *Trbovich*'s interpretation of Rule 24(a)(2).

Other decisions of the Supreme Court addressing motions under Rule 24(a)(2) further support application of a minimal burden on intervenors. For example, in *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433 (2017), the Court held that an intervenor only needs to satisfy Article III standing if it seeks relief beyond what the plaintiff requests. *Id.* at 440. In fact, the Supreme Court has declined to require intervenors to show Article III standing as a general rule. *McConnell v. FEC*, 540 U.S. 93, 233 (2003). These cases reinforce the Court's view that the burden on an intervenor is minimal.

Our holding here is also consistent with the history and purpose of Rule 24(a)(2), which was amended in 1966 to broaden the right to intervene. *See* Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 331–32 (2020) (observing that the 1966 amendment to Rule 24(a)(2) broadened the right to intervene). Indeed, the Advisory Committee commented that one motivating factor in amending Rule 24(a)(2) was to make intervention easier. FED. R. CIV. P. 24 advisory committee's note to 1966 amendment. The 1966 amendment removed language requiring that a would-be intervenor "is or may be bound by a judgment in the action." *Id.* The Advisory Committee also suggested in its comments to the 1966 amendment that inadequate representation could be established by a reasonable probability. *Id.* Such a burden is a low one. Thus, for the reasons discussed, we decline to adopt a presumption of adequate representation.

We recognize the public policy considerations that have led our sister Circuits to invoke the presumption. Some commentators have posited that the presumption of adequate representation is "an important safety valve that prevents lower courts from construing the right to intervene too broadly[.]" *The Supreme Court 2021 Term: Federal Jurisdiction and Procedure: Civil Procedure—Intervention—Federal Rule of Civil Procedure 24(a)—Berger v. North Carolina State Conference of the NAACP*, 136 HARV. L. REV. 390, 397 (2022). While we acknowledge the concerns raised regarding the potential proliferation of parties and possible burden this may place on courts, such concerns are not enough to justify writing non-existent requirements into the text of a Federal Rule. We thus hold that the sole inquiry for determining the motion for intervention is whether the intervenor's interest is adequately represented by another party. If the proliferation of intervenors unduly burdens courts, this is an issue that the Advisory Committee, Supreme Court, and Congress will be able to consider in further amendment of the rule.

2. Determining Adequacy of Representation

Next, we address what an intervenor must show to establish inadequate representation. We are guided by *Trbovich*'s reference to a minimal standard. *Trbovich*, 404 U.S. at 538 n.10. We adopt the Ninth Circuit's three prong standard for analyzing adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki, 324 F.3d at 1086.

These criteria follow the concerns expressed in *Trbovich*, while also providing clear guidance to the district courts on whether to allow intervention. We believe that these requirements focus on the core issue for adequate representation: whether an existing party may fail to represent the interest of the intervenor. Many other Circuits follow this approach. For example, in a non-presumption case, the Seventh Circuit found that representation may be inadequate when a party fails to make an argument before the trial court that would further the intervenor's interest. *Bost*, 75 F.4th at 690; *see also Driftless Area Land Conservancy v. Huebsch,* 969 F.3d 742, 749 (7th Cir. 2020) (determining intervenor had shown inadequate representation when the party failed to make certain arguments in a motion to dismiss). In addition, an intervenor can satisfy its burden by showing it would bring a unique expertise or perspective different than other parties in the case. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528–29 (9th Cir. 1983); *see also Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001). Taken together, these cases stand for the proposition that an intervenor's unique arguments that may not be otherwise advanced is sufficient to show that representation by existing parties may be inadequate. In our view, such a standard strikes the correct balance between preventing redundant views from multiple parties, while also ensuring that courts hear all the important arguments and views from the litigants before them.

Applying this standard here, we find that AA Parents has sufficiently shown that the Coalition may not provide adequate representation. The Coalition may not make all of intervenor's arguments. As AA Parents points out, the Coalition failed to cite *Students for Fair Admissions 2015*. It also failed to contend that every admissions policy proposed by Defendant-Appellee is improper. AA Parents also points to the failure of the Coalition to raise an argument that strict scrutiny should apply based solely on the significant impact on Asian American students. All these serious omissions lead us to find a reasonable probability of inadequate representation.

Additionally, the interests of AA Parents are narrower than the interests of the Coalition. Courts have recognized that a group with a broader interest may not necessarily represent the more narrow interest of another group. *See, e.g., Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) (finding that state with broad interest in many remedies may not adequately represent parents who had narrow interest in a single remedy). Similarly, the interests of the Asian American students are different from those of other students. As the changes in enrollment from 2022 to 2023 show, only Asian American students saw a substantial decrease in their numbers

under both policies. In contrast, White students and underrepresented groups saw an increase in 2023, further demonstrating that the interests of AA Parents are unique.

Thus, we reverse the District Court's decision to deny Asian American Parents for Our Future's motion to intervene.

II. THE SCHOOL ADMISSIONS POLICY VIOLATES THE PLAINTIFFS' RIGHTS UNDER THE FOURTEENTH AMENDMENT

A. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Our review of the District Court's decision to grant summary judgment is *de novo*, applying the same standard as the District Court. *King v. Ill. Cent. R.R.*, 337 F.3d 550, 553 (5th Cir. 2003). Summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A genuine issue of material fact exists when the evidence would allow a reasonable jury to return a verdict for the non-movant. *Id.* at 248.

B. DISCUSSION

The purpose of the Fourteenth Amendment's Equal Protection Clause is to eliminate state-based discrimination based on race. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). To that end, the Supreme Court has struck down discriminatory actions by the government in many areas of American life. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state laws banning interracial marriage); *Georgia v. McCollum*, 505 U.S. 42 (1992) (prohibiting the use of peremptory challenges based on race). Courts seek in these and other decisions to emphasize the colorblind nature of the Constitution. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* ("*Students for Fair Admissions 2023*")*,* 600 U.S. 181, 230 (2023). In reaction, schools opposed to implementation of the rulings of the Supreme Court have developed methods to circumvent the elimination of discrimination. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (holding that the laws are unconstitutional whether attempted "ingeniously or ingenuously"). This makes vigilance ever more important because racial distinctions by their very nature are "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

One recurrent area of controversy occurs in the realm of school admissions policies, which is once again raised in this case. Defendant moved for summary judgment after completion of discovery. Determining that the School District's admissions policy was facially neutral and the Board did not have discriminatory intent, the District Court granted Defendant's motion for summary judgment. For the reasons discussed below, we reverse.

1. Review of Claims of Violation of Equal Protection Rights

There is no dispute that intentional and purposeful discrimination violates the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). When the government uses racial classifications, it must survive strict scrutiny. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). To do so, the school must show that its use of racial classifications is narrowly tailored to a compelling governmental purpose. *Id.* Defendant-Appellee School District contends that the admissions policy of Tang High is facially neutral and therefore not subject to strict scrutiny. Intervenor AA Parents argues that the admissions policy, in light of *Students for Fair Admissions 2023*, must still be subject to strict scrutiny regardless of whether it is facially neutral.

The Parties do not dispute that the 2023 Policy is facially neutral and they have so stated in their Joint Statement of Material Facts. Even so, the fact that a policy is facially neutral does not mean that it cannot be subject to strict scrutiny. Although courts have most commonly applied strict scrutiny to laws that classify citizens based on race, courts have sometimes applied strict scrutiny to facially neutral laws that could serve as a pretext for discrimination. *Pers. Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). If a facially neutral law is motivated by a racial purpose or is unexplainable on grounds other than race, it is subject to strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *see also Shaw,* 509 U.S. at 643 (holding that strict scrutiny applies to not only racial classifications but also to "those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'"). Indeed, to hold otherwise would render the Fourteenth Amendment an empty promise. *See Students for Fair Admissions 2023,* 600 U.S. at 230–31 ("'[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'") (quoting *Cummings v. Missouri*, 71 U.S. 277, 325 (1866))). Thus, we must first determine whether the Tang High admissions policies were motivated by race or can only be explained by the consideration of race.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* ("*Arlington Heights*"), 429 U.S. 252 (1977), the Supreme Court set forth factors that a court can consider in determining whether a facially neutral policy was motivated by a discriminatory purpose. The School District argues that we should apply these factors—as the District Court did—in determining whether the policy was motivated by race. AA Parents disagrees and argues that the School District showed such an obvious pattern of discrimination in promulgating changes to its admissions policy that the impact on Asian American students alone can subject the policy to strict scrutiny. *See Arlington Heights,* 429 U.S. at 266 ("Absent a pattern as stark as that in *Gomillion* [*v. Lightfoot*, 364 U.S. 339 (1960),] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence."). We conclude based on the facts presented that impact alone was sufficient to subject Tang High's policy to strict scrutiny.

In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court held that disproportionate impact alone does not trigger strict scrutiny. *Id.* at 242. Building on *Washington,* the Court then determined in *Arlington Heights* that generally, a facially neutral law that has a racially disparate impact will be found to be unconstitutional if there is a discriminatory intent or purpose. *Arlington Heights,* 429 U.S. at 265. A court determining whether a facially neutral law has a discriminatory intent or purpose must conduct an inquiry into both direct and circumstantial evidence. *Id.* at 265–66. Despite the requirement in *Washington* that both impact and intent be shown, the *Arlington Heights* Court acknowledged that there may be a class of cases where evidence of disparate impact alone could evidence a discriminatory intent, without any other evidence. *Id.* But the Court emphasized that such cases are "rare" and must have a "stark" pattern. *Id.*

One case evidencing a stark pattern is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). There, the Court considered a facially neutral laundry licensing ordinance. *Id.* As the Court observed:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74.

In determining that the law was unconstitutional, the Court relied on evidence of the permitting rates. *Id.* at 374. The city defendant in *Yick Wo* did not issue permits to the petitioner and 200 other Chinese laundromat owners, but gave permits to eighty White laundromat owners to allow them to operate. *Id.* The Court found this to be evidence of a stark pattern of discrimination. *Id.* Because the city could provide no racially neutral explanation or defense, the Court found that the defendant violated the Fourteenth Amendment. *Id.*

Here, the facts before us are akin to *Yick Wo.* Only one racial group saw a decline under both the 2022 and 2023 policies: Asian Americans. It is telling that after adopting the 2022 Policy, the School District chose to make further changes to the admissions policy, articulating its view that things were "headed in the right direction." The further changes in 2023 evidenced the direction toward which the School District wanted to move.

The School District argues that it needed to alter the test requirement because of the disparate impact that the original admissions policy was having on Black and Latino students, which could expose it to liability. This argument is similar to the one rejected in *Ricci v. Destefano,* 557 U.S. 557 (2009). In *Ricci*, the Supreme Court addressed a fire department's decision to throw out test results after no Black fire fighters passed. *Id.* at 562. As a result, White and Hispanic firefighters filed suit against the department. *Id.* at 562–63. The Court reasoned that just as it would be unconstitutional to consider race in scoring the examination,

determining whether to use the exam results based on race had to be similarly unconstitutional. *Id.* at 584. In essence, the School District, just like the fire department in *Ricci*, waited for the results of the exams, then considered the racial breakdown in determining whether to use testing. This is impermissible racial discrimination that does not justify the School District's policy.

The Sch'ol District urges this Court to follow the Circuits that have declined to find a disparate impact in cases involving statistical changes. In particular, the School District points to the analysis of the court in *Lewis v. Ascension Parish School Board*, 806 F.3d 344 (5th Cir. 2015), in which the Fifth Circuit held that the plaintiff's statistical evidence could not establish disparate impact. *Id.* at 362. Defendant also relies on *Coalition for TJ v. Fairfax County School Board,* 68 F.4th 864 (4th Cir. 2023), for the proposition that a year-to-year comparison of admission rates does not establish disparate impact. *Id.* at 880. We disagree with those decisions and find that a year-to-year comparison provides the best metric for judging the effect of a particular policy.

Finally, the Supreme Court has confronted the issue of racial discrimination in admissions policies and has repeatedly held that attempts to achieve certain racial quotas are unconstitutional. For example, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Court struck down a race conscious admissions policy that used racial classifications. *Id.* at 319–20. As the Court explained, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 290–91 (quoting *Hirabayashi*, 320 U.S. at 100). Similarly, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court determined that an admission system that awarded a fixed number of additional points to racial minorities was not narrowly tailored to a compelling governmental purpose. *Id.* at 270. Two decades later, the Supreme Court clearly commanded in *Students for Fair Admissions 2023,* that "race-based admissions programs must end[.]" *Id.* at 229. The Court reminded lower courts that "[e]liminating racial discrimination means eliminating all of it." *Id.* at 206. And the Court again reiterated that under the Fourteenth Amendment, "[w]hat cannot be done directly cannot be done indirectly." *Id.* at 230 (quoting *Cummings*, 71 U.S. at 325). For a court to permit a school to use facially neutral levers to change racial balance would give schools a license to circumvent Court precedent prohibiting racially discriminatory admissions policies through indirect means. Regardless of the motives or goals of the Board, benign racial motives are constitutionally impermissible. *Lewis v. Ascension Par. Sch. Bd.*, 662 F.3d 343, 349 (5th Cir. 2011). We thus hold that when admissions policies are amended to implement facially neutral changes that so clearly impact a particular group, as they do here, they are subject to strict scrutiny. To hold otherwise would create an end-run around Supreme Court precedent.

Even if we had determined that disparate impact alone does not satisfy the intent requirement, we would still find that the Tang High admissions policy is subject to strict scrutiny. To determine whether invidious discrimination was a motivating factor, we must consider all direct and circumstantial evidence of intent that is available to us. *Arlington Heights*, 429 U.S. at 266. Considerations include the sequence of events, whether the defendant departed from usual

procedures, and legislative history, although these factors do not constitute an exhaustive list of all considerations. *Id.* at 267–68.

Here, the evidence on the record shows that the School District was motivated by improper race balancing. The history of the Board's policies supports this determination. The Board implemented its first admissions policy change in 2022. After it received data on the racial demographics in November 2022, it once again changed the policy. Emails from the Board described the 2022 Policy as a "step in the right direction." While the emails do not specifically state the direction that the Board was headed, taken in context with earlier comments about the goal of making the school look like the community, the emails are indicative of the Board's desire to achieve a particular racial balance.

The School District argues that it never specified racial quotas or targets. However, the Board's course of conduct in implementing the policies supports the contrary conclusion that it intended to balance the racial makeup of its student body.

Mr. Mike Johnson, former school board chairman, testified at his deposition that before the admissions policy change, Tang High was the most diverse high school in the state due to the high numbers of Asian American students. As he put it, "Tang High was the only majority minority school in the state." Nonetheless, the School District insists that the changes to the Tang High admissions policy were necessary because the student body did not adequately represent the surrounding community.

The School District's policy arises from an invidious view of "community" presupposing that certain students who live in the community, who have families in the community, who go to the same coffee shops and parks in the community somehow do not represent the community simply because of their race or ethnicity. The policy is the epitome of a state policy based on race. Before and after the policy, Tang High remains a student body made up of students from the community. The only difference is that the racial makeup of the student body has been changed to achieve racial proportions that the School District determined to be desirable.

We hold that Defendant's effort at racial balancing is unconstitutional. As the Supreme Court warned in a plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), efforts to achieve racial balance are patently unconstitutional. *Id.* at 723. This is true when a university attempts to admit specific percentages of students to achieve racial balance explicitly. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311 (2013). It is also true here, when a school district attempts to do the same. Therefore, even if the disparate impact of the policy could not alone establish discriminatory intent, the admissions policy should also be subject to strict scrutiny.

2. Application of Strict Scrutiny to this Case

Having determined that strict scrutiny applies, we next examine whether the admissions policy of Tang High was narrowly tailored to further a compelling governmental interest. Strict scrutiny "must not be 'strict in theory, but fatal in fact.'" *Id.* at 314 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). It also "must not be strict in theory but feeble in fact." *Id.* Indeed, strict scrutiny requires that courts rigorously examine the laws, policies and/or practices based on race. *Adarand Constructors*, 515 U.S. at 236. To survive strict scrutiny, Tang High must show that its use of race is narrowly tailored to further a compelling governmental interest. *Students for Fair Admissions 2023,* 600 U.S. at 207. The Supreme Court has identified only two interests that justify the use of race: 1) remedying a specific, identified past instance of discrimination that violated the Constitution or a statute; or 2) avoiding imminent and serious risk to human safety. *Id.* In the context of admissions policies, any race-based admissions policy must have a definitive end point. *Id.* at 212.

First, the interest identified by Tang High is not compelling. The Board argues that the purpose of changing its admissions policy was to prepare students for life in a pluralistic society. It also sought to implement educational best practices surrounding tests and admissions policies. The School District also highlights the benefits of diversity for students. All of these interests, "though plainly worthy," are similar to the interests raised in *Students for Fair Admissions 2023*, which did not provide a compelling state interest. *Students for Fair Admissions 2023*, 600 U.S. at 215.

Second, the means used by the School District are not narrowly tailored. The praise voiced in support of the 2022 and 2023 Policies belies a discriminatory assumption: that changes in the racial make-up in a school necessarily results in that school becoming more diverse, even when the school was already the most racially diverse in the state. This approach conflating diversity, pluralism, and other democratic ideals with simplistic racial counts are rooted in racial stereotypes that associate certain characteristics with different races. *See Shaw*, 509 U.S. at 647. This is particularly true here, when the Board combines all Asian Americans together into a single category. The policy proceeds from a false premise that diversity in thought and pluralism is best served through racial balancing. Such an approach is not consistent with the goals of our free society.

Finally, there are many other more narrowly tailored approaches available to address any inequalities. Dr. Lee testified that tests are unfair and reproduce inequalities in education, but the Board could have addressed these educational issues by offering remedial measures, such as increased tutoring at the schools with low test scores. Changing the terms of admission because the Board was dissatisfied with current outcomes has a detrimental impact on certain students based on their race. We determine, therefore, that the 2022 and 2023 admissions policies are unconstitutional.

CONCLUSION

For these reasons, the District Court's decisions denying Intervenor's motion to intervene and granting Defendant's motion for summary judgment are REVERSED. This case is REMANDED to the District Court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Hon. Anna Tamura
JUDGE ANNA TAMURA
13th Circuit Court of Appeals Judge

Judge LEE, Concurring in the Judgment

While I agree with the Majority that the District Court wrongly denied Intervenor's motion to intervene, I disagree with the determination that there is no presumption of adequate representation in a case involving parties with the same objective.

The presumption that a putative intervenor is adequately represented by another party with the same objective serves important interests, including the court's concern in managing its own docket. *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 35 (1st Cir. 2000). Likewise, as the Advisory Committee noted in its comments on the 1966 amendment, "[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." FED. R. CIV. P. 24 advisory committee's note to 1966 amendment. Moreover, when intervention is sought in an action brought under the original jurisdiction of the Supreme Court and not governed by Rule 24, the Court has recognized that intervention must be subject to a high bar because of the limited resources of the Court. *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010). Thus, the important concerns of docket management and the need to place some limit on intervention have given rise to a presumption of adequate representation. Without any such safeguard, courts could face a surge in parties with similar interests.

This stricter approach is compatible with Supreme Court precedent. In *South Carolina v. North Carolina*, 558 U.S. 256 (2010), the Court considered whether intervention was appropriate in an original jurisdiction action. *Id.* at 259. The case involved claims arising from apportionment of water brought by South Carolina against North Carolina. *Id.* The city of Charlotte sought to intervene. *Id.* at 262. Charlotte asserted that it had unique interests, including that it held the permit for the water transfer at issue in the suit and also was a potential source of water transfer depending on the outcome. *Id.* The Supreme Court concluded that Charlotte's interest was not sufficiently unique and intervention was improper. *Id.* at 274–76. The Court reasoned that, ultimately, the sovereign interests of North Carolina adequately represented Charlotte's claimed interests. *Id.* at 274–75.

Although intervention in an original jurisdiction action is not governed by Rule 24 and is subject to a different standard, the Court in *South Carolina* emphasized that even under Rule 24(a)(2), Charlotte would not have been able to intervene because "an existing party. . . adequately represents [its] interest." *Id.* at 276 n.8. In other words, when a putative party's interests are the same as those of an existing party, it follows that the representation is adequate absent other external circumstances. To overcome the presumption of adequate representation, an intervenor simply must explain why an overlap of interests does not necessarily lead to adequate representation. *See Maine v. Dir., U.S. Fish and Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) ("'Presumption' means no more in this context than calling for an adequate explanation as to why what is assumed—here, adequate representation—is not so.").

For cases subject to Rule 24, the presumption of adequate representation follows the same logical process, making explicit what is implied by the Court's reasoning in *South Carolina.* The reasoning in *South Carolina* provides a good reason for applying the presumption of adequate representation. Accordingly, I would adopt the presumption of adequate representation in this Circuit.

A presumption In a case such as this requires a higher showing of interest to overcome the presumption. It does not alter the burden on the Intervenor. Therefore, I would adopt a rule presuming adequate representation when a party and Intervenor share the same ultimate objective. The rest of the analysis would proceed in the same manner, except that the showing is subjected to a higher level of scrutiny. As the Majority opinion shows, Intervenor has established facts that rebut the presumption.

/s/ Hon. Mark Lee
JUDGE MARK LEE
1^{3t}h Circuit Court of Appeals Judge

Judge PATEL, Dissenting.

The Majority, in invoking a colorblind constitution, turns a blind eye to the continued disparities in this country. For this reason, I dissent. As Justice Sotomayor wrote in her dissent in *Students for Fair Admissions 2023*, "[e]qual educational opportunity is a prerequisite to achieving racial equality in our Nation." *Students for Fair Admissions 2023*, 600 U.S. at 319 (Sotomayor, J., dissenting). Even though progress has been made in racial equality since *Brown v. Board of Education*, 347 U.S. 483 (1954), today's decision seeks to thwart progress. If other courts were to follow the path set forth by the Majority, it is unclear what changes, if any, schools could make to their admissions policies without violating the Fourteenth Amendment.

The Majority proceeds on the assumption that the United States is colorblind when it is not. Racial inequalities persist in major areas of life, including education. The Court's holding today will tie the hands of educators and lawmakers seeking to use facially neutral tools to address systemic discrimination and inequality. Such an outcome goes against the precedent of the Supreme Court. The Supreme Court has suggested that, at least in the employment context, that statistical comparisons of the racial composition of a workplace to the racial composition of the relevant population may be probative of a pattern of discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Similarly, in the election context, the Court has determined that a redistricting legislature's mere awareness of racial demographics does not trigger strict scrutiny. *Miller v. Johnson,* 515 U.S. 900, 916 (1995).

The Majority's determination that the impact of the admissions policies on Asian Americans is so stark that it necessarily leads to an inference of discriminatory intent, is out of line with precedent and other Circuits. My colleagues accept AA Parents' argument that the proper comparison is between the original policy and the 2022 and 2023 Policies. But, as other courts have determined, no precedent establishes that the proper standard for determining disparate impact is by comparing a group's performance under a prior policy to performance under the current policy. *See Coal. for TJ*, 68 F.4th at 880. Indeed, the focus must be on disparate impact when compared to other groups. *See Arlington Heights*, 429 U.S. at 266. This can be seen in decisions finding discrimination when a group has substantially less representation than it should have. *See Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (case finding purposeful discrimination based on evidence that Blacks constituted 27.1% of the taxpayers in a county, but only 9.1% of the grand jury venire and 7.8% of the petit jury venire). Taken together, the proper metric for determining statistical disparity is not the pre-policy percentages, but the comparison between Asian American students as a percentage of the school population and society at large. Another potentially meaningful comparison could be if a group has a much lower admission rate compared to other groups.

Neither of these comparisons suffice to support a finding of discrimination here. Asian Americans make up 15% of the population of Tang County, but even under the 2023 Policy, make up 32% of the admitted students. There is also no evidence of disparate impact when one

looks at the percentage of applicants to Tang High that are Asian, twenty-four percent (24%), compared to the admitted population, which was thirty-two percent (32%) Asian. These figures show that while the percentage of Asian American students admitted declined following the policy change from fifty-five percent (55%) to thirty-two (32%), Asians were still admitted as a disproportionately larger percentage of the class. This indicates that it was not harder for Asians to be admitted to the class.

Further, the majority's determination that racially discriminatory intent can be inferred solely from the impact defies precedent. For example, in *United States v. Singleterry*, 29 F.3d 733 (1st Cir. 1994), the First Circuit rejected an attempt to challenge mandatory minimum sentencing guidelines that treated cocaine base and cocaine powder differently. *Id.* at 734–35. Defendant-appellant presented evidence that the majority of cocaine base users were Black, while powder cocaine users were White. *Id.* at 741. Defendant-appellant also adduced evidence that the defendants receiving the more stringent cocaine base sentences were predominantly Black, while the defendants receiving the more lenient cocaine powder sentences were predominantly White. *Id.* The court acknowledged that in some cases "where evidence of disparate impact leads most naturally to an inference of discriminatory purpose, the governmental classification may be subject to strict scrutiny under equal protection principles." *Id.* But it concluded that in the case of sentencing guidelines, there are racially neutral grounds that more plausibly explain the impact rather than discriminatory intent. *Id.* Therefore, the First Circuit affirmed the district court's determination that the policy was not racially motivated. *Id.* Similarly, a statistical study of differences in prosecution rates for murder and the death penalty could not establish the stark pattern required by *Yick Wo. Shaw,* 733 F.2d 304, 311–13.

Moreover, reliance solely on statistical evidence in this context conflicts with Supreme Court precedent. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court rejected the use of statistical evidence to prove that the death penalty had a disparate impact. *Id.* at 293–97. While acknowledging that it has approved the use of statistical disparities to show Equal Protection violations in the jury selection and employment, the Court nonetheless rejected the use of such evidence in the death penalty context. *Id.* at 293–94. The Court reasoned that the number of variables relevant to the imposition of the death penalty was far too great to draw meaningful inferences. *Id.* at 294–95.

In the context of education generally and this case in particular, several other variables can explain the disparity other than racial animus or intent to discriminate. For example, the report issued by the educational consulting firm indicates that Tang High has a disproportionate percentage of students from the top 20th percentile of households by household income and most students come from one of the five zip codes in the county. I submit that one could conclude that disparities in educational funding at the school level are a recognized educational issue. *See San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 54–55 (1973). Such disparities result in differences in educational outcomes, including test scores. Thus, to say that the disparity of the admissions results between 2021 and 2022/2023 can be explained only by race ignores the reality

of the situation in Tang County. Had the Board truly wanted to achieve racial balancing as the Majority suggests, it could have chosen a different option from the report. The report contained specific racial demographic estimates based on modeling and demographic data. Had the intent of the Board been racial balancing, it could have chosen an option that most closely approximated the demographics of the county. It did not do that.

Moreover, even if review of this case had been under the *Arlington Heights* factors, the Majority's decision would still be in error. While it is true that there are references to race in the record, none of those references rise to the level required to show an invidious purpose. *Arlington Heights,* 429 U.S. at 266. Mere references to race by policymakers that do not denigrate particular groups, do not necessarily support a determination of invidious discrimination under *Arlington Heights*. *United States v. Carrillo-Lopez,* 68 F.4th 1133, 1147–51 (9th Cir. 2023) (rejecting a disparate impact challenge to Section 1326 of the Immigration and Nationality Act). At most, references to race are either incidental descriptions of the population or require speculation and innuendo. In reality, the record is clear that the policies that the Board adopted were not motivated by an invidious discriminatory purpose.

Of course, as a practical matter, today's decision will burden the courts and require judges to second guess educational experts. The Supreme Court in many contexts has recognized that judges are not educators and must defer to their expertise within that area. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (determining that in the context of censorship of school newspapers, deference is due to educators' judgment); *Bd. of Curators of Univ. of Miss. v. Horowitz,* 435 U.S. 78, 90 (1978) (deferring to the expert judgment of educators in the context of school disciplinary matters). Similarly, the autonomy of local schools is a vital national tradition that must be respected. *See, e.g., Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *Missouri v. Jenkins,* 515 U.S. 70, 131–33 (1995) (O'Connor, J., concurring). Today's decision requires courts to second guess the expert choices of educators. It also requires courts to micromanage democratically-elected school boards. All of this will inundate the courts in a flood of litigation over policy and pedagogical disagreements more properly discussed in forums for public debate, rather than the courtroom.

/s/ Hon. Arjun Patel
JUDGE ARJUN PATEL
13th Circuit Court of Appeals Judge