No. 22-2493

In the United States Court of Appeals for the Third Circuit

SHERICE SARGENT, individually, as next friend of her minor child, and on behalf of those similarly situated; MICHELE SHERIDAN, individually, as next friend of her minor child, and on behalf of those similarly situated; and JOSHUA MEYER, individually, as next friend of his minor child, and on behalf of those similarly situated, *Plaintiff-Appellants*,

v.

SCHOOL DISTRICT OF PHILADELPHIA; WILLIAM R. HITE, in his official capacity as Superintendent of the School District of Philadelphia; BOARD OF EDUCATION, THE SCHOOL DISTRICT OF PHILADELPHIA; JOYCE WILKERSON, LETICIA EGEA HINTON, JULIA DANZY, MALLORY FIX LOPEZ, MARIA MCCOLGAN, LISA SALLEY, REGINALD STREATER, and CECELIA THOMPSON, each in their official capacities as members of the Board of Education of the School District of Philadelphia; SABRIYA JUBILEE, in her official capacity as Director of Diversity, Equity, and Inclusion for the School District of Philadelphia; and KARYN LYNCH, in her official capacity as Chief of Student Support Services for the School District of Philadelphia, *Defendant-Appellees*.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF MASSACHUSETTS, PENNSYLVANIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTERESTS OF *AMICI*

Massachusetts, Pennsylvania, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington submit this brief as *amici curiae* under Fed. R. App. P. 29(a)(2) to urge this Court to reject Plaintiff-Appellants' appeal from the District Court's decision declining to preliminarily enjoin the School District of Philadelphia's plan for admitting students to four of the District's "criteria-based" schools. Contrary to decades of Supreme Court precedent, Plaintiff-Appellants argue that strict scrutiny should apply to a public school's race-neutral admissions plan simply because policymakers' goals in formulating a policy include increasing equity in access to education: an intent to break down barriers to access, they assert, necessarily implies an invidious intent to decrease access for and discriminate against others. Br. 35. Indeed, they go so far as to argue that such invidious intent necessarily arises from merely setting a goal of increasing the percentage of students from underrepresented groups who achieve sufficient academic success to *qualify* to apply for admission to selective high schools. Br. 4, 22. These unfounded notions would imperil the States' interests in ensuring our public schools equitably and effectively serve all our students, regardless of race, socioeconomic status, or

background, and, if adopted, would threaten the States' interests in a host of other policymaking areas as well.

All the States and the District of Columbia share an interest in ensuring that every student in our jurisdictions receives a quality education, fulfilling what the Supreme Court has long recognized as "perhaps the most important function of state and local governments." *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954). Commensurate with its importance, this commitment is indeed embodied in our state constitutions. *See, e.g.*, Pa. Const. Art. III, Pt. B, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."). As Massachusetts' Supreme Judicial Court has recognized in interpreting Massachusetts' Constitution, providing every student with an education is a "democratic imperative" and fundamental to the very existence of state government. *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 431, 822 N.E.2d 1134, 1137 (2005); *see* Mass. Const. Pt. 2, C. 5, § 2.

Plaintiff-Appellants' arguments threaten the ability of state and local lawmakers, school districts, and school officials to carry out this most important obligation. Under their theory, even a race-neutral admissions policy must be subject to strict scrutiny simply if policymakers' aims include removing barriers to access known to have a disproportionate impact on certain demographically

identifiable categories of students by race, because any such greater equity in access "can be achieved only by *reducing* the percentage of" students in other racial groups. Plaintiff-Appellants' Br. 35. Their theory, if adopted, could foreclose many efforts on the part of state and local governments aiming to break down barriers to access to public schools, seemingly subjecting policymakers to strict scrutiny whenever they are aware of the potential demographic consequences of race-neutral policy choices and work to reduce inequities in policies' impact.

Indeed, the implications of Plaintiff-Appellants' arguments sweep well beyond K-12 education, threatening our ability to engage in sound policymaking in other critical areas at the core of our police powers. As discussed further below, many aspects of government policymaking involve allocating finite resources analogous to a sought-after placement at a particular school. In allocating such resources, policymakers frequently must ensure that resources are deployed effectively across a host of dimensions, to people from every corner of our jurisdictions: people of varying socioeconomic status; people living in urban, suburban, and rural communities; people with and without disabilities; people of all ages; and people from diverse racial, ethnic, and language communities. And policymakers are often faced with the reality that preexisting policies may not provide adequate, equal, or equitable access to programs and benefits for particular communities, in some cases because the policies themselves impose unnecessary

or arbitrary barriers to access. Yet under Plaintiff-Appellants' suggested reasoning, a policy would be subject to strict scrutiny any time policymakers considered the impact potential race-neutral policy changes might have across various communities. The result would be perverse: governments would be severely constrained in their ability to serve *all* of their communities—and therefore would fall short for many.

Of course, the *Amici* States and District of Columbia also share a compelling interest in eradicating race discrimination in all its forms. *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). But this case does not involve any such discrimination. The School District's admissions plan does not even take an applicant's race into account in the admissions process in any way; no student will be admitted, or rejected, "on the basis of individual racial classifications" of the kinds that require strict scrutiny, *see Doe v. Lower Merion School District*, 665 F.3d 524, 545 (3d Cir. 2011) (quoting *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007)). Instead, the School District formulated the kind of race-neutral policy that courts, including this one, have long subjected only to rational basis review. *See, e.g.*, *Lower Merion*, 665 F.3d at 545-55.

In sum, the *Amici* States and District urge this Court to reject the unfounded, illogical, and destructive notion that any race-neutral government

policy must be subject to strict scrutiny simply because policymakers aimed to foster greater equity, break down barriers to access, or avoid arbitrary exclusion.

ARGUMENT

The District Court below correctly applied the precedent of this Court and the Supreme Court in denying Plaintiff-Appellants' motion for a preliminary injunction. The *Amici* States and District of Columbia write to underscore how Plaintiff-Appellants' arguments in this case diverge from that precedent and the profound negative consequences that would follow from accepting them. First and most obviously, Plaintiff-Appellants' theory threatens to preempt the use of even race-neutral means for ensuring equitable access to education for all of our students. Second, beyond the realm of education, Plaintiff-Appellants' theory threatens to constrain governmental policymakers as they determine how best to allocate many other kinds of benefits and burdens, potentially subjecting race-neutral policies to strict scrutiny whenever policymakers choose a policy in part to ensure that resources reach, or burdens do not disproportionately fall upon, communities heretofore underserved or overburdened. Our Constitution's guarantee of "equal protection of the laws" cannot and should not be understood to *preclude* government from working to serve all people.

I. A Race-Neutral School Admissions Policy Is Not Subject to Strict Scrutiny Simply Because Policymakers May Have Been Aware of Its Potential Impact on Various Demographic Groups, Including Racial Groups.

There is no basis in this Court's or the Supreme Court's cases for the notion that strict scrutiny must be applied to a race-neutral policy if policymakers aimed to remove an obstacle to access that had a disproportionate impact on underrepresented demographically identifiable groups, including particular racial groups. To the contrary, courts around the country have joined this Court in upholding precisely these kinds of race-neutral policies that aim to distribute benefits and burdens equitably across and within our communities.

Under long-established doctrine, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The Supreme Court requires proof of discriminatory intent before finding an Equal Protection Clause violation because it understands that legislators and administrators are "properly concerned with balancing numerous competing considerations" when governing. *Id.* at 264-65. Importantly here, a discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1975). Instead, a discriminatory purpose requires "that the decisionmaker . . . selected or

reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

Thus, as this Court has repeatedly recognized, "mere awareness of the consequences of an otherwise [race-]neutral policy will not suffice" to demonstrate that a decisionmaker acted with a discriminatory purpose. *Lower Merion*, 665 F.3d at 548 (quoting *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002)); *accord Feeney*, 442 U.S. at 279. Rather, the plaintiff must demonstrate a "[r]acially discriminatory purpose" to impose those adverse effects. *Lower Merion*, 665 F.3d at 548 (citing *Feeney*, 442 U.S. at 279).

The Supreme Court thus "has never held that strict scrutiny should be applied to a school plan in which race is not a factor merely because the decisionmakers were aware of or considered race when adopting the policy." *Id.* at 548. Rather, "it is permissible to consider the racial makeup of schools," including in "drawing attendance zones with general recognition of the demographics of neighborhoods." *Parents Involved*, 551 U.S. at 788-89 (Kennedy J., concurring); *accord Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 545 (2015) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means [than explicitly considering race], including strategic site selection of new schools; [and] drawing attendance

zones with general recognition of the demographics of neighborhoods." (quoting *Parents Involved*, 551 U.S. at 789 (Kennedy J., concurring))).

This Court accordingly upheld such a race-neutral school-assignment plan in *Doe v. Lower Merion School District*. While drafted with an awareness of racial demographic data and informed by consultants who identified one of the relevant "Community Values" as "explor[ing] and cultivat[ing] whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion," the plan was intended to equalize the size of student enrollment between the two high schools at issue, minimize travel time and transportation costs for students, foster educational continuity, and increase walkability. *Id.* at 532, 557. In deciding whether the school district's plan amounted to impermissible racial discrimination, this Court recognized that "the mere awareness or consideration of race should not be mistaken for racially discriminatory intent or for proof of an equal protection violation." *Id.* at 548. The Court therefore appropriately declined to apply strict scrutiny "merely because the decisionmakers were aware of or considered race when adopting the policy." *Id.*

Courts around the country have likewise declined to apply strict scrutiny to race-neutral school-assignment plans that were drafted with an awareness of racial demographic data. For example, in *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 90 (1st Cir. 2004), the First Circuit upheld "a racially neutral assignment

system that was designed to maximize, not minimize, equitable distribution of seats in the public schools" in Boston through a more limited degree of "walk zone" priority for school admissions. *Id.* at 85. Aiming to remedy a system "burdened with significant inequity," the challenged plan allocated only 50% (rather than the prior 100%) of seats based on students' walking-distance proximity to schools in an effort to address inequities created by the fact that some neighborhoods were over-served with the number of available seats for schools within walking distance, others were under-served, and some students had no schools whatsoever within walking distance. *Id.* at 80-82, 87. The court rejected the plaintiffs' argument that the plan should be subjected to strict scrutiny simply because, in the wake of a federal court ruling requiring the school district to cease use of race-conscious means of ensuring diversity in the city's schools, school officials had pursued "diversity as one of the several goals" of the new race-neutral student assignment system—a commitment which the plaintiffs in that case "equate[d] . . . with an illegitimate commitment to racial balancing." *Id.* at 85. Rather, the court observed, an intent to "increas[e] minority participation and access is not suspect." *Id.* at 87; *accord Boston Parent Coal. for Acad. Excellence Corp. v. City of Boston*, 996 F.3d 37, 46 (1st Cir. 2021).

Similarly, in *Spurlock v. Fox*, the Sixth Circuit rejected claims that a school-assignment plan employed racial classifications requiring strict scrutiny or evinced

a discriminatory purpose simply "because its drafters 'made use of detailed racial and ethnic data throughout the process of development,'" in adopting "measures that would have the least possible effect on increasing racial isolation and exacerbating the racial achievement gap." 716 F.3d 383, 394, 399 (6th Cir. 2013). As the court there noted, "[t]he claim that considering demographic data amounts to segregative intent flies in the face of the Supreme Court's holding that 'disparate impact and foreseeable consequences, without more, do not establish a constitutional violation.'" *Id.* at 398 (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979)); *see also, e.g.*, *Lewis v. Ascension Parish School Board*, 806 F.3d 344, 356-58 (5th Cir. 2015) (holding that school plans that decisionmakers draft with consideration of racial demographics, but that do not contain express racial classifications, are facially neutral and not subject to strict scrutiny absent evidence of discriminatory purpose).

Moreover, considering equal protection claims in a variety of other contexts, the Supreme Court has expressly approved the use of race-neutral tools to remove barriers to access that may disproportionately affect underrepresented racial groups. In the employment context, for example, the Supreme Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process." *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Concerning government

contracting, the Court has noted that, if minority business enterprises "disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). And in the housing context, the Supreme Court held that "race may be considered in certain circumstances and in a proper fashion" to advance "race-neutral efforts to encourage revitalization of communities" that have long faced barriers to access. *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 545.

Plaintiff-Appellants introduce a pernicious notion in their effort to circumvent the conclusion compelled here by this precedent. While they agreed below that "'[t]here's absolutely nothing wrong with a school district saying that we want to improve academic performance among any particular group, racial or non-racial,'" 2022 WL 3155408, at *12 (quoting ECF No. 47, Tr. 29:15-18), they nevertheless assert that discriminatory intent must be found in Philadelphia's race-neutral policy because one of the Board of Education's stated goals—increasing the percentage of Black and Hispanic eighth-grade students who, by virtue of their academic achievements, "are *qualified* to attend Special Admission High Schools," J.A. 235 (emphasis added)—necessarily entails "*reducing* the percentage of Asian-American and white students in the pool of 'qualified' applicants" in the lottery for admission. Plaintiff-Appellants' Br. 35. Yet the supposed harm from this

broadening of the pool of students who achieve academic success stems simply from the fact that, for schools with a fixed number of students, a race-neutral policy change eliminating a barrier to access that disproportionately affects underrepresented groups will tend to diminish the percentage of students admitted from other groups—a mere mathematical fact, not discriminatory animus. *See Feeney*, 442 U.S. at 279. As the court below noted, the School District's "[c]onsideration of whether prior practices allowed for racial bias to exist in the admissions process and a desire to safeguard against the potential for race-based[] discrimination . . . does not constitute a racially *discriminatory* motive. It constitutes the opposite." No. 2:22-cv-01509-CFK, 2022 WL 3155408, at *8 (E.D. Pa. Aug. 8, 2022). Plaintiff-Appellants' theory thus defies the longstanding *Arlington Heights* framework, which requires evidence of discriminatory intent, 429 U.S. at 265—not just awareness of a policy's potential impacts on various demographically identifiable groups. *See Lower Merion*, 665 F.3d at 548.[1] And,

[1] Plaintiff-Appellants also claim that the admissions plan here amounts to "outright racial balancing," Br. 26-27. The District Court correctly rejected this argument, finding that the plan was not targeted at achieving any particular racial balance nor even increasing diversity, but rather to remove barriers to "equal access to the School District's elite criteria-based schools" for "all *qualified* students," No. 2:22-cv-01509-CFK, 2022 WL 3155408, at *9 (E.D. Pa. Aug. 8, 2022). Further, as the court also found, the very mechanics of the plan cut against any claims of unlawful racial balancing. *See id.* at *8. The four schools at issue are "diverse in distinct ways," a fact that "logically cuts against [Plaintiff-Appellants'] assertion that the zip code preference policy was instituted . . . toward the ultimate goal of having the (footnote continued)

as described further below, Part II, *infra*, such a distortion of *Arlington Heights* would severely hamper governmental policymakers' ability to serve our residents.

This Court should therefore affirm the decision below and reaffirm that discriminatory intent is not imputed to decisionmakers based on their mere consideration of demographic data when devising a race-neutral admissions plan.

II. Adopting Plaintiff-Appellants' Theory Risks Imposing Drastic and Far-Reaching Consequences in the Many Realms in Which Policymakers Necessarily Are Aware of and Consider Policies' Impacts Across Racial Groups.

The notion that a race-neutral policy aiming in part to increase equitable access necessarily amounts to invidious race discrimination not only is unfounded in our constitutional jurisprudence, but also threatens sweeping negative consequences if adopted. As the Supreme Court has long recognized, there are numerous areas in which policymakers are and must be "'aware of race . . . just as [they are] aware of . . . a variety of other demographic factors'" when they make decisions, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)), and, indeed, "a whole range of tax, welfare, public service, regulatory, and licensing statutes" may foreseeably "be more burdensome" for particular racial groups, *Washington v.*

(footnote continued)
population at each of these schools mirror the racial demographic breakdown" of Philadelphia overall. *Id*.

Davis, 426 U.S. 229, 248 (1976). The Equal Protection Clause does not forbid such policies on the theory that mere awareness of such burdens amounts to an intent to discriminate, nor does it effectively require policymakers to remain willfully ignorant of their policies' impact across different demographic groups. *See id.* (noting that subjecting all such programs to strict scrutiny "would be far reaching and would raise serious questions about, and perhaps invalidate," many). Yet Plaintiff-Appellants' theory would potentially require strict scrutiny any time policymakers change a policy to more effectively and equitably distribute benefits and burdens across our communities, because such changes necessarily arguably adversely affect any group that received a greater share of the benefit or a lesser burden under the status quo. Such a rule would gravely impair governments' ability to make sound policy, virtually locking in place whatever happens to be the current demographic distribution of benefits and burdens.

Basic race-neutral public health measures, for example, could become susceptible to strict scrutiny under Plaintiff-Appellants' proposed theory. Governments at all levels have grappled with the COVID-19 pandemic's disproportionate impacts on communities that are medically underserved.[2]

[2] *See, e.g.*, Helene Gayle *et al*., *Framework for Equitable Allocation of COVID-19 Vaccines*, National Academies of Sciences, Engineering, and Medicine (2020); National Institutes of Health, *NIH to Assess and Expand COVID-19 Testing for Underserved Communities* (Sep. 30, 2020), https://tinyurl.com/fnm6zk59;

(footnote continued)

Federal, state, and local data show significant disparities in COVID-19 cases and deaths between people of color and their white counterparts.[3] Several factors contribute to these disparities, including long-existing inequities that have resulted in, among other things, lack of access to safe and affordable housing, lack of access to quality healthcare and health insurance, and lower incomes.[4]

Recognizing this demographic reality, legislators and public health policymakers across the country have taken steps to help allocate scarce resources

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(footnote continued)
Massachusetts Department of Public Health, *Baker-Polito Administration Launches Targeted Outreach Initiative in 20 Hardest Hit Communities to Increase Equity in COVID-19 Vaccine Awareness and Access; $1M to Support Vaccination in Historically Underserved Communities* (Feb. 16, 2021), https://tinyurl.com/4fbrm5kr.

[3] *See, e.g.*, Benjamin Mueller, *In Rural America, Covid Hits Black and Hispanic People Hardest*, N.Y. Times (July 28, 2022); CDC, *COVID-19 Weekly Cases and Deaths per 100,000 Population by Age, Race/Ethnicity, and Sex* (last updated Dec. 3, 2022), https://tinyurl.com/3e6ct57f; Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, Kaiser Family Foundation (Aug. 22, 2022), https://tinyurl.com/4jht942c; Sarah A. Lister *et al*., *Health Equity and Disparities During the COVID-19 Pandemic: Brief Overview of the Federal Role*, Cong. Rsch. Serv., R46861 (2021); Nambi Ndugga *et al*., *Early State Vaccination Data Raise Warning Flags for Racial Equity*, Kaiser Family Foundation (Jan. 21, 2021), https://tinyurl.com/99kty57n.

[4] *See* Adelle Simmons *et al.*, *Health Disparities by Race and Ethnicity During the COVID-19 Pandemic: Current Evidence and Policy Approaches*, U.S. Dep't of Health and Hum. Serv., Off. of the Assistant Sec'y for Plan. & Evaluation, Issue Brief (Mar. 16, 2021), https://tinyurl.com/46ta6ex2.

to these and other communities in need.[5] The states comprising the Third Circuit are no exception. For example, Pennsylvania established a COVID-19 Health Equity Response Team to "mitigate the negative impact of COVID-19 among vulnerable populations,"[6] and Pennsylvania's Department of Health created its own population vulnerability index to inform their vaccine distribution plan, looking to social factors such as population demographics, language barriers, preexisting diseases, and other health-related risk factors.[7] Similarly, New Jersey established its own COVID-19 Task Force on Racial and Health Disparities, which acted through public hearings and legislative efforts to address health care inequities among vulnerable populations, such as the State's "minority and marginalized communities."[8] And during the height of the pandemic, the Governor of Delaware

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[5] *See, e.g.*, Exec. Order No. 13995, 86 C.F.R § 7193 (Jan. 21, 2021) (establishing a COVID-19 Health Equity Task Force to make recommendations on "mitigating the health inequities caused or exacerbated by the COVID-19 pandemic and for preventing such inequities in the future"); Massachusetts Executive Office of Health & Human Services, *COVID-19 Equity Plan* (Mar. 14, 2022), https://tinyurl.com/y39svew6.

[6] Pennsylvania Department of Health, *COVID-19 Health Equity Response Team*, https://tinyurl.com/mrydja4x (identifying vulnerable populations including, among others, rural Pennsylvanians, pregnant women, and racial and ethnic minorities).

[7] Pennsylvania Department of Health, *COVID-19 Vaccine Equitable Distribution* (Jan. 11, 2021), https://tinyurl.com/2x6wvu6m.

[8] New Jersey Department of Health, *NJ COVID-19 Task Force on Racial and Health Disparitie*s, https://tinyurl.com/2dmnz7yr; New Jersey Department of Health, *COVID-19 Task Force on Racial and Health Disparities Continues Public Hearings* (Nov. 1, 2022), https://tinyurl.com/5bhn9ab8.

signed an order requiring vaccine partners to provide race and ethnicity data for every person they vaccinated in order to be able to assess whether vaccines were reaching people reflective of the diversity of the state as a whole, and the State undertook extensive community outreach programs to ensure that occurred.[9]

If Plaintiff-Appellants' theory were to prevail, however, health policy that has as one of its goals increasing resources for underserved groups in order to promote health equity—even if it does not explicitly factor race into any individual grant of a resource—could be subject to strict scrutiny, because, where resources are finite, an increase in resources for some racial groups "can be achieved only by *reducing*" the availability of those resources for others. Plaintiff-Appellants' Br. 35. In other words, their theory implies, policymakers act presumptively unconstitutionally if they intentionally use limited resources to attempt to remedy known health disparities among demographically identified racial groups, even if they use solely race-neutral policies, and even if they simply work to remove inequitable and unnecessary obstacles to access that they know have a disproportionate impact on certain groups. *See Spurlock*, 716 F.3d at 394 ("If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the

[9] *See* Delaware Division of Public Health, Coronavirus Response, *Message from the Governor* (last accessed Dec. 13, 2022), https://tinyurl.com/mr2dbh7p.

demographic realities of their jurisdictions and the potential demographic consequences of their decisions.").

By condemning many efforts to ensure that the benefits of public policymaking reach all of our communities, Plaintiff-Appellants' theory thus threatens to ossify the distribution of benefits and burdens across our society in untold irrational and pernicious ways. While the Equal Protection Clause requires the States to meet strict scrutiny where we find it necessary to use individual racial classifications to achieve policy aims, it imposes no such constraint on race-neutral policies aiming to achieve equity, address barriers to access, or simply function in a world shaped by demographic realities.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision below.

Respectfully submitted,

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CERTIFICATES

Certificates of Compliance and Bar Membership

1. I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a 14-point proportionally spaced serif font.

2. I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,074 words, excluding the parts of the brief exempted under Rule 32(f).

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of this electronic brief is identical to the text in the hard, paper copies of the brief.

4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using CrowdStrike Windows Sensor (version 6.48.16207.0) and that no virus was detected.

5. Pursuant to Third Circuit Local Appellate Rule 28.8(d), I hereby certify that I am a member of the bar of this Court.

/s/ Elizabeth N. Dewar
Elizabeth N. Dewar

Dated: December 22, 2022

Certificate of Service

I hereby certify that on December 22, 2022, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elizabeth N. Dewar
Elizabeth N. Dewar

Dated: December 22, 2022