

Nos. 20-1199, 21-707

**In The
Supreme Court of the United States**

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIRST & FOURTH CIRCUITS*

**BRIEF OF NATIONAL SCHOOL BOARDS
ASSOCIATION, NATIONAL ASSOCIATION OF
ELEMENTARY SCHOOL PRINCIPALS,
AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, AND AMERICAN SCHOOL
COUNSELORS ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

Francisco M. Negrón, Jr.

Sonja H. Trainor

NATIONAL SCHOOL BOARDS
ASSOCIATION

1680 Duke Street, FL 2

Alexandria, VA 22314

(703) 838-6722

Pratik A. Shah

Counsel of Record

AKIN GUMP STRAUSS
HAUER & FELD LLP

2001 K Street, NW

Washington, DC 20006

(202) 887-4000

pshah@akingump.com

Counsel for Amicus Curiae

(Additional Counsel Listed on Inside Cover)

Aileen M. McGrath
AKIN GUMP STRAUSS
HAUER & FELD LLP
580 California Street,
Suite 1500
San Francisco, CA 94104

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT.....	5
I. DIVERSITY IS A COMPELLING INTEREST THROUGHOUT THE EDUCATIONAL SYSTEM	5
A. Preventing Racial Isolation And Ensuring A Diverse Student Population As Educational Goals Are Compelling Interests	5
B. Elementary And Secondary Education With A Diverse Student Body Provides Lifelong Benefits, Enhances Civic Participation, And Promotes Democracy	6
C. School Districts Face Ongoing Challenges To Achieving Diversity	12
II. SCHOOL DISTRICTS USE TOOLS THAT COMPLEMENT, BUT ARE DISTINCT FROM, THE METHODS COLLEGES USE TO ACHIEVE THE EDUCATIONAL GOAL OF DIVERSITY	15
A. School Districts Use A Variety Of Race- Conscious Tools To Enhance Diversity Without Classifying Individual Students By Race	17
B. The Court Should Not Rule So Broadly As To Restrict School Districts' Authority To Use Lawful Diversity-Enhancing Tools	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:

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<i>Fisher v. University of Tex. at Austin</i> , 570 U.S. 297 (2013)	1, 5
579 U.S. 365 (2016)	1, 5, 17
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
<i>Parents Involved in Cmty. Schs. v. Seattle</i> <i>Sch. Dist. No. 1</i> , 551 U.S. 701 (2007)	<i>passim</i>
<i>Regents of Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978)	11

STATUTES:

20 U.S.C. § 7231b.....	25
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INTEREST OF *AMICI CURIAE*¹

The National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations that represent locally elected school board officials serving millions of public school students, NSBA advocates for equity and excellence in public education through school board leadership. NSBA's members share a deep commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive members of our society.

NSBA's members recognize the vital role of diversity as part of a top-notch education, and they have relied on this Court's longstanding precedents to inform their diversity-related efforts to foster success for all students. NSBA regularly represents its members' interests before Congress and in federal and state courts, and has participated as *amicus curiae* in many cases where this Court has considered diversity related to education, including *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) ("*Fisher II*"), *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) ("*Fisher I*"), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

¹ Letters of consent are on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae*, its members, or its counsel make a monetary contribution to the brief's preparation or submission.

The American Association of School Administrators (AASA) is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents, and senior level school administrators to cabinet members, professors, and aspiring school system leaders. AASA members are the chief education advocates for children. AASA members advance the goals of public education and champion children's causes in their districts and nationwide. As school system leaders, AASA members set the pace for academic achievement. They help shape policy, oversee its implementation, and represent school districts to the public at large.

American School Counselor Association (ASCA) is a non-profit, 501(c)(3) professional organization that supports school counselors' efforts to help students focus on career, academic, and social/emotional development. ASCA provides professional development, publications, and other resources, research, and advocacy to nearly 43,000 school counselors around the globe.

The National Association of Elementary School Principals (NAESP) is the leading advocate for elementary and middle-level principals in the U.S. and worldwide. As such, NAESP advocates for equitable outcomes for students in public education, which includes ensuring that K-12 school boards maintain the flexibility they currently have at a local level to establish and implement diversity-based, mission-aligned policies that support all of their students.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has recognized time and again, students reap lifelong educational benefits from attending a school with a diverse student body. Those benefits—including higher student achievement, the development of critical thinking and interpersonal skills necessary to thrive in the modern workplace, and increased civic engagement in our ever-more-diverse and pluralistic society—are just as important for elementary and secondary students as for college and university students.

The pursuit of diversity, and the benefits that flow from it, are not merely shared by students across the educational spectrum—they are part of a synergistic whole. Students who are educated from a young age in diverse learning environments bring their rich educational and social experiences to the university setting. Colleges and universities, in turn, benefit when their admissions pools contain such applicants. Accordingly, school districts serving elementary and secondary students have a strong interest in ensuring that *Grutter v. Bollinger*, 539 U.S. 306 (2003)—one of the pillars supporting this synergistic relationship—remains good law.

But this synergistic relationship and shared interests in diversity do not translate to shared approaches in achieving it. Universities often directly consider race as one of many factors in a competitive admissions process. By contrast, school districts serving elementary and secondary-school students use different diversity-promoting methods, which

generally do not consider race specifically and aim to achieve diversity along multiple dimensions. As Justice Kennedy observed in the K-12 context, “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body,” using “race-conscious measures to address the problem in a general way.” *Parents Involved*, 551 U.S. at 788-789 (Kennedy, J., concurring in part and concurring in the judgment). School districts throughout the country have followed that controlling guidance, and have adopted “mechanisms” that further “the goal of bringing together students of diverse backgrounds and races” without classifying any individual student by race. *Id.* at 789. These mechanisms have helped to preserve the compelling interest in diversity in schools as an educational goal, and to overcome the entrenched problem of “*de facto* resegregation in schooling” that would persist if these practices were abandoned. *Id.* at 788.

Accordingly, this Court should affirm *Grutter*, which is the foundation of the synergistic interest in diversity shared by institutions at all levels of the educational spectrum. But the Court should also maintain the distinction it has always drawn between the tools available to school districts and universities, respectively, when they work to achieve diversity. Several *amici* supporting petitioner argue otherwise, claim that this case has potential implications for K-12 schools (despite acknowledging that *Grutter* is expressly limited to the higher education context), and ask that the Court reach out to restrict the methods available to school districts as well.

The Court should decline that invitation to intrude on school districts' long-established authority. *Grutter* establishes an independent rule specific to colleges and universities. *See Parents Involved*, 551 U.S. at 725. *Grutter's* rule remains as vital and compelling now as ever before. But regardless, the critical tools that school districts use to promote diversity remain lawful under *Parents Involved*. *See id.* at 788-789 (Kennedy, J., concurring in part and concurring in the judgment). There is no reason for this Court to disturb either precedent, or the line dividing them, in this case.

ARGUMENT

I. DIVERSITY IS A COMPELLING INTEREST THROUGHOUT THE EDUCATIONAL SYSTEM

A. Preventing Racial Isolation And Ensuring A Diverse Student Population As Educational Goals Are Compelling Interests

This Court has consistently reaffirmed that schools have a compelling interest in achieving “the educational benefits that flow from student body diversity.” *Fisher II*, 579 U.S. at 376. That diversity “takes many forms,” *id.* at 380, and includes race in addition to a variety of other factors such as national origin, disability, socioeconomic status, and language attainment. This Court has recognized that a diverse student body promotes cross-racial understanding, helps to break down stereotypes, and diminishes racial isolation. *Fisher I*, 570 U.S. at 308 (“The attainment of a diverse student body *** serves values beyond race alone, including enhanced classroom dialogue

and the lessening of racial isolation and stereotypes.”). These benefits of diversity “are not theoretical but real.” *Grutter*, 539 U.S. at 330; *see also* pp. 6-11, *infra*.

The interest in diversity is as compelling in elementary and secondary education as in the college setting. The “Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.” *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment). School districts need not “accept the status quo of racial isolation in schools” created by entrenched patterns of residential segregation. *Id.* at 788. Rather, a “compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.” *Id.* at 797. Likewise, “a district may consider it a compelling interest to achieve a diverse student population,” of which race is but one component among many, including economic background, special educational needs, language proficiency, and others. *Id.* at 797-798; *see also id.* at 865 (Breyer, J., dissenting) (“Just as diversity in higher education was deemed compelling ***, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest.”).

B. Elementary And Secondary Education With A Diverse Student Body Provides Lifelong Benefits, Enhances Civic Participation, And Promotes Democracy

When schools are able to achieve diversity—including but not limited to racial and ethnic

diversity—benefits flow to all students. This Court has described those benefits at length in the higher education setting. *See Grutter*, 539 U.S. at 330-332. Those benefits are as, if not more, compelling for elementary and secondary students. An extensive body of research shows the advantages of educating students in a richly diverse environment beginning at a young age. Those advantages are well-documented and expansive, imbuing students’ educational experiences with a range of positive effects.²

First, “[d]iverse learning environments provide benefits for all students, including improved academic achievement *** and critical thinking, collaboration, and communication skills.”³ A wide array of empirical studies demonstrates that academic achievement is higher across all student populations for those who attend racially diverse schools: Students are more likely to graduate high school and attend college, and generally reach higher achievement rates using traditional metrics like standardized testing.⁴ In a

² See Committee on Social Science Research Evidence on Racial Diversity in Schools, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 32, NAT’L ACAD. OF EDUC. (Robert L. Linn & Kevin G. Welner, eds. 2007) (describing research showing academic and lifelong benefits of “[e]arly experience in desegregated schools”).

³ Arthur L. Coleman, Francisco M. Negrón, Jr., & Katherine E. Lipper, *Achieving Educational Excellence for All: A Guide to Diversity-Related Policy Strategies for School Districts* 6, NAT’L SCH. BDS. ASS’N (2011).

⁴ Kevin G. Welner, *K-12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity*, 76 REV. OF EDUC. RSCH. 349, 353 (2006) (describing research showing that

diverse school, students of all races reap the benefits.⁵ Conversely, racial isolation is a significant predictor of low graduation rates and low test scores.⁶ Students who attend segregated schools suffer from reduced academic performance, even controlling for socioeconomic status and similar factors that often contribute to differences in student achievement.⁷

Second, diversity provides significant social-emotional benefits to students attending integrated schools—benefits that educators have come to recognize are just as important as academic achievement to ensuring students’ well-rounded development. This Court has recognized these benefits, observing that diversity overcomes barriers that might otherwise divide students by “promot[ing] cross-racial understanding” and “enabl[ing] [students]

racially diverse schools “ha[ve] the smallest racial gap in achievement and the highest average achievement schoolwide”); *see also* Jennifer Ayscue, Erica Frankenberg & Genevieve Siegel-Hawley, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools* 2 (The Nat’l Coal. on Sch. Diversity, Rsch. Br. No. 10, 2017) (“Students who attend desegregated schools are less likely to drop out of high school.”); Roslyn Arlin Mickelson, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence* 1-2 (The Nat’l Coal. on Sch. Diversity, Rsch. Br. No. 5, 2016) (school diversity is associated with higher graduation rates and better rates of college attendance).

⁵ Chandi Wagner, *School Segregation Then & Now: How to Move Toward a More Perfect Union* 5, CTR. FOR PUB. EDUC. (2017).

⁶ Coleman, *supra* note 3, at 15-16.

⁷ Wagner, *supra* note 5, at 2.

to better understand persons of different races.” *Grutter*, 539 U.S. at 330 (internal quotation marks omitted, third alteration in original).

Studies confirm that observation. Reducing segregation and racial isolation leads to more positive “intergroup attitudes,”⁸ more cross-racial friendships,⁹ and reduced adherence to racial prejudice or other biased viewpoints.¹⁰ Students who attend diverse schools report feeling less vulnerable, less lonely, and less likely to be victimized; are less likely to report bullying; and are more likely to form fulfilling social relationships in general.¹¹ Students in diverse schools perceive their teachers to be more fair and academically engaged.¹² These benefits, like others, help all students, not only students of color. Research shows that all students attending diverse schools show improved rates of resilience, “individual self-determination,” and confidence.¹³

⁸ Welner, *supra* note 4, at 352.

⁹ Ayscue, Frankenberg & Siegel-Hawley, *supra* note 4, at 2.

¹⁰ Lisa J. Holmes, *After Grutter: Ensuring Diversity in K-12 Schools*, 52 UCLA L. REV. 563, 589-590 (2004); *see also* Jomills Henry Braddock II, *Looking Back: The Effects of Court-Ordered Desegregation*, in FROM THE COURTROOM TO THE CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 3, 11 (Claire E. Smrekar & Ellen B. Goldring, eds., 2009).

¹¹ Jaana Juvonen, Kara Kogachi & Sandra Graham, *When and How Do Students Benefit from Ethnic Diversity in Middle School*, 89 CHILD DEV. 1268, 1269-1270 (2018); Adrienne Nishina, Jakeem Amir Lewis, Amy Bellmore & Melissa R. Witkow, *Ethnic Diversity and Inclusive School Environments*, 54 EDUC. PSYCH. 306, 308 (2019).

¹² Juvonen, Kogachi & Graham, *supra* note 11, at 1271.

¹³ Welner, *supra* note 4, at 369.

Third, diversity in elementary and secondary education fosters long-term employment and other professional benefits. It is widely acknowledged that diversity in schools is essential to prepare students to meet the needs of twenty-first century employers, and to develop the interpersonal skills that are necessary to function in our increasingly diverse society. As this Court recognized in *Grutter*, “numerous studies show that student body diversity *** better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” 539 U.S. at 330 (internal quotation marks omitted).

As more recent studies confirm, the Court’s observation continues to ring true. People who are exposed to diversity early in life are better equipped to function in the workforce, have higher lifetime earnings, and “higher occupational attainment” over the course of their lives.¹⁴ Thus, “[g]lobal business and homegrown firms alike demand workers that can relate to, understand, and engage people from all walks of life and from diverse backgrounds.”¹⁵ Pluralistic education provides learning experiences that aid students in succeeding in the labor market as young adults and throughout the rest of their lives.

Finally, because schools are the “very foundation of good citizenship,” *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), education within a diverse student body develops traits, values, and social skills that make students productive and thriving members of

¹⁴ Ayscue, Frankenberg & Siegel-Hawley, *supra* note 4, at 2-3; *see also* Wagner, *supra* note 5, at 4.

¹⁵ Coleman, *supra* note 3, at 5.

our increasingly diverse and pluralistic democracy. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (nothing less than the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples”) (internal quotation marks omitted). Research has long shown that attending diverse schools is associated with greater civic engagement and a stronger adherence to democratic values.¹⁶

Those benefits do not accrue to individuals alone. People who are educated in diverse settings are more likely to form social relationships with people from different backgrounds, and to live in diverse and integrated communities.¹⁷ The effect is to decrease residential segregation over time, resulting in a virtuous cycle.¹⁸ And the benefits reach across generations: Research indicates, for instance, that the beneficial effects of diverse, desegregated schools lead to better educated parents, which are in turn associated with higher achieving children and grandchildren.¹⁹ These positive outcomes uplift our society as a whole.

¹⁶ Welner, *supra* note 4, at 352; *see also* Coleman, *supra* note 3, at 15.

¹⁷ Wagner, *supra* note 5, at 5.

¹⁸ Susan Eaton & Gina Chirichigno, *The Impact of Racially Diverse Schools in a Democratic Society* 3-4 (Nat’l Coal. on Sch. Diversity, Rsch. Br. No. 3, 2011).

¹⁹ Wagner, *supra* note 5, at 5.

C. School Districts Face Ongoing Challenges To Achieving Diversity

Although the importance of an integrated educational experience is increasing in our ever-more-diverse society, the challenges to achieving diversity are growing as well. Many communities across the country are increasingly segregated, often resulting in the resegregation of neighborhood schools. “Voluntary migration patterns and economic segregation have replaced legally imposed divisions.”²⁰ This *de facto* segregation began to increase rapidly in the 1980s, and has only intensified in recent years.²¹ The results have been dramatic: As of the 2018-2019 school year, one in six public school students attended an intensely segregated school, *i.e.*, a school where over 90 percent of students share the same racial background.²² That statistic had not improved significantly as of the 2020-2021 school year.²³ Roughly 40 percent of Black and

²⁰ Coleman, *supra* note 3, at 5.

²¹ Welner, *supra* note 4, at 362.

²² Halley Potter, *School Segregation in U.S. Metro Areas*, THE CENTURY FOUND. (May 17, 2022), available at <https://tcf.org/content/report/school-segregation-in-u-s-metro-areas/?agreed=1.&agreed=1>.

²³ U.S. Gov’t Accountability Off., *K-12 Education: Student Population Has Significantly Diversified, But Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines* 19 (June 2022), available at <https://www.gao.gov/assets/gao-22-104737.pdf> (noting that 14 percent of students attended schools where 90 percent or more of the students were of a single race or ethnicity).

Latinx students attend intensely segregated schools—up from fewer than one in three in 1988.²⁴

Paradoxically, school resegregation has occurred at dramatic rates even in some of the Nation’s most diverse cities. Many cities with high levels of racial diversity, such as New York City and Milwaukee, have dramatically segregated schools.²⁵ Chicago, Newark, and Philadelphia also display high levels of segregation in schools.²⁶ That resegregation has occurred even though the U.S. population in general (and in these cities specifically) is much more diverse than it was in the decades after *Brown* was decided.²⁷ Residential segregation alone does not explain the complexity of the problem of school desegregation. Poverty and family instability also contribute to and perpetuate segregation in schools. In recent years, various other factors have exacerbated segregation in schools, including student flight to private schools, which increased during the COVID-19 pandemic.²⁸

School districts also face legal and community-based constraints in how they address segregation and achieve diversity. From a legal perspective, school districts must abide by this Court’s pronouncements regarding the tools available to school districts wishing to achieve greater diversity. Those measures

²⁴ Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 12, UCLA, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (2009).

²⁵ Potter, *supra* note 22.

²⁶ *Id.*

²⁷ *See id.*

²⁸ *See id.*

generally include using assignment plans and creating attendance zones that are crafted with an awareness of student characteristics generally, but which do not treat individual students differently on account of race. *See* Coleman, *supra* note 3, at 33-35; *see also* pp. 17-26, *infra*. Those measures draw directly from Justice Kennedy’s controlling opinion in *Parents Involved*, which described the measures available to school districts as including “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). As Justice Kennedy explained, “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” *Id.*

Each school board must also account for the particular needs of its unique community, the interests and values shared by families, and the levels of resources and community support available. A particular district’s interest in diversity, and the tools it chooses to achieve it, will vary depending on those factors in addition to the nature and scope of the impediments to diversity in that district. Some school districts will prioritize racial and ethnic diversity, whereas other districts may place greater weight on diversity in socioeconomic status, parental income,

housing status, and so forth.²⁹ School boards must have the flexibility to choose diversity tools that reflect their unique community needs, based on community input and engagement, and that serve a broad array of community values and interests.³⁰

II. SCHOOL DISTRICTS USE TOOLS THAT COMPLEMENT, BUT ARE DISTINCT FROM, THE METHODS COLLEGES USE TO ACHIEVE THE EDUCATIONAL GOAL OF DIVERSITY

As the above discussion demonstrates, colleges and school districts have a shared interest in achieving diversity, although they often approach that interest from different perspectives. Indeed, that common interest in achieving diversity is mutually reinforcing, with integration at each educational level helping to uplift students at other stages of the spectrum, because all schools are part of a continuum of student learning and development. Students who are exposed to diversity throughout their lives are better prepared for the pluralistic university setting. *See* pp. 6-11, *supra*. Colleges seeking high-quality applicants find such students when K-12 schools have successfully fostered diverse student bodies. *See* Harvard Br. 5-6; UNC Br. 4-5. And high school students wishing to pursue higher education are more

²⁹ Coleman, *supra* note 3, at 34.

³⁰ *See* San Francisco Unified School District and County Office of Education Board Policy 5101.2, Elementary School Student Assignment (Dec. 2020) (emphasizing importance of community engagement and outreach).

likely to do so when they have attended integrated schools.³¹ Accordingly, school districts have a strong interest in ensuring that *Grutter* remains good law and continues to foster the synergistic and reciprocal relationship that improves the educational experience for all students.

At the same time, however, this Court must maintain the line it has always drawn between the tools available to achieve diversity at the post-secondary and K-12 levels, respectively. That line reflects the very different methods that each set of institutions commonly uses to accomplish diversity: Whereas universities sometimes directly consider race as one of many factors in a competitive admissions process, school districts generally do not directly consider the race of any one student when developing policies that will enhance diversity. For that reason—as petitioner acknowledges (Br. 57)—*Grutter* does not directly impact the mechanisms available to school districts. Indeed, it is common ground that *Parents Involved*, and not *Grutter*, sets the ground rules that K-12 institutions must follow when attempting to achieve greater diversity in schools. Pet’r Br. 57; see also Pac. Legal Found. Br. 12-13; Parents Defending Educ. Br. 2.

Certain *amici* supporting petitioner nevertheless argue that this Court should extend its decision in this case to the K-12 context, and inject itself into a political debate about the programs that many school districts use (such as magnet schools) as part of broader efforts to promote diversity and achieve

³¹ Mickelson, *supra* note 4, at 1-2.

equity. Pac. Legal Found. Br. 12-13; Parents Defending Educ. Br. 4-18; Former Fed. Offs. of the U.S. Dep’t of Educ. Off. for Civil Rts. Br. 20-26.

The Court should decline that invitation. The policies school districts use are consistent with *Parents Involved* and lawful regardless of *Grutter*. The Court need not, and should not, revisit either longstanding precedent. But in no event should this Court reach out to unsettle precedent that petitioner acknowledges is not at issue here. Br. 57.

A. School Districts Use A Variety Of Race-Conscious Tools To Enhance Diversity Without Classifying Individual Students By Race

As petitioner agrees (Br. 57), the methods K-12 school districts use to achieve diversity do not resemble the individualized admissions processes at stake here or in the other cases where the Court has considered post-secondary practices. *Grutter*, 539 U.S. at 312-316; *see also Fisher II*, 579 U.S. at 371-375. The reason is straightforward: “The individualized admissions process required by the *Grutter* Court *** makes little or no sense as applied to K-12 schools.”³² Rather, school districts follow the road map Justice Kennedy set forth in *Parents Involved*, which gives school districts flexibility to use methods that consider the general “impact a given approach might have on students of different races” without “assign[ing] *** individual students by race.” 551 U.S. at 789 (Kennedy, J., concurring in part and

³² Welner, *supra* note 4, at 361.

concurring in the judgment). These common methods, used at school districts across the country, are race conscious but do not use racial classifications.

School Attendance Zones: One of the most common techniques for achieving diversity is to “draw[] attendance zones with general recognition of the demographics of neighborhoods,” with an eye towards achieving diversity within individual schools. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment). School districts throughout the country have used this approach to successfully reduce resegregation and increase diversity.³³ Intentionally designed attendance zones can bring students from different backgrounds together without taking individual students’ races or ethnicities into account when they are assigned to schools.

Many school districts draw attendance zones using census-block data indicating a neighborhood’s generalized racial composition or socioeconomic status. For instance, the City of Berkeley, California, uses “geographically-based diversity indices” drawn from census data that reflect parent education level, parent income level, and race. That information is translated into geographically contiguous school assignment zones that aim to maximize diversity while still enabling families to send their children to a

³³ See Michael J. Anderson, *Race As A Factor in K-12 Student Assignment Plans: Balancing the Promise of Brown with the Modern Realities of Strict Scrutiny*, 54 CATH. U. L. REV. 961, 998 (2005).

school close to home.³⁴ The policy has been hailed as a resounding “success” for integrating Berkeley’s schools, with strong “proportional distribution of students of different races across all of Berkeley’s elementary schools.”³⁵ Each individual school roughly mirrors the racial diversity of the school district and city as a whole, without treating individual students differently on account of race.³⁶

Other jurisdictions have successfully used similar census-tract, data-driven approaches to redesign assignment zones. The City of Nashville, Tennessee, uses a composite of factors, including “race and ethnicity, household income, language-learner status, and disability status” to design school zones.³⁷ The Jefferson County, Kentucky, school district—which includes the City of Louisville—likewise uses census-block data on “average household income, percentage of white residents, and educational attainment” to create a “diversity index rating” used to adopt attendance-zone boundaries for clusters of elementary schools.³⁸ Hillsborough County, Florida, broadly

³⁴ See Information on Berkeley Unified’s Student Assignment Plan, BERKELEY PUB. SCHS., available at <https://www.berkeleyschools.net/information-on-berkeley-unifieds-student-assignment-plan/> (last visited July 20, 2022).

³⁵ See Laura Petty, *The Way Forward: Permissible and Effective Race-Conscious Strategies for Avoiding Racial Segregation in Diverse School Districts*, 47 FORDHAM URB. L.J. 659, 697-701 (2020).

³⁶ *Id.*

³⁷ *Id.* at 701-703.

³⁸ *Id.* at 703-709.

considers the “balance of student populations” in addition to “considerations of safe student transportation,” “access to schools,” and “financial efficiency” in drawing attendance zones.³⁹ By frequently adjusting school boundaries to reflect these interests in addition to “community input,” Hillsborough has achieved significant racial diversity, particularly at the high school level.⁴⁰

Equitable Choice Systems: To overcome the persistent challenge of residential segregation, other school districts have moved away from using geographic zones as the exclusive method for assigning students to schools. Many districts have enacted equitable “controlled choice” assignment systems, which allow families to choose among a set of options for school assignment and can encourage them to seek placements outside of their local neighborhood.⁴¹

For instance, the San Francisco Unified School District recently redesigned its attendance policy to allow families to choose schools within large geographic zones drawn to “reflect the diversity of the

³⁹ *Id.* at 705-706.

⁴⁰ *Id.* at 706-707 (“High schools with more than 100 students on average enrolled 23% Black students, 35% Hispanic students, 34% White students, and 4% Asian students.”).

⁴¹ Wagner, *supra* note 5, at 18; *see also* Halley Potter & Kimberly Quick, *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity* 14-15, THE CENTURY FOUND. (2016).

city of San Francisco’s students as a whole.”⁴² Families are guaranteed a school within their assigned zone but are not automatically assigned to any school in particular. Instead, families rank their school preferences and students are assigned to a school via a lottery that incorporates tiebreakers reflecting equity considerations (including a preference for students who reside in public housing or in “historically underserved areas of San Francisco”).⁴³

Similarly, the Cambridge Public School district in Massachusetts follows a “Controlled Choice Plan” that emphasizes socioeconomic integration measured by whether students qualify for the Federal Free & Reduced Lunch Program. School assignments aim to match families to their choice of school, but family choice is “balanced against the district’s interest in creating equitable schools” along socioeconomic lines.⁴⁴ Cambridge’s program has successfully achieved diversity in schools without directly considering race at all.⁴⁵

⁴² San Francisco Unified School District Board Policy 5101.2, *supra* note 30.

⁴³ *Id.*

⁴⁴ Cambridge Public Schools, *About Controlled Choice*, available at https://www.cpsd.us/departments/src/making_your_choices/about_controlled_choice#:~:text=The%20Controlled%20Choice%20Policy%20is.from%20a%20neighborhood%20schools%20model (last visited July 20, 2022).

⁴⁵ Carole Learned-Miller, *Cambridge Public Schools: Pioneers of Equitable Choice* 11, THE CENTURY FOUND. (2016).

Controlled choice programs provide benefits for school districts and families alike. For districts, the programs often “eliminate[] the need to redraw boundaries due to changes in housing and demographic patterns,” and thus can reduce the frequency with which districts need to re-evaluate their assignment systems.⁴⁶

For families, controlled choice gives them agency in the assignment process and the ability to choose schools that will meet their children’s particular needs. Families also benefit from unique educational pathways that are often included as part of controlled choice. Studies have shown that controlled choice assignment systems are particularly effective when paired with the availability of “special programs,” *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment), like language immersion programs or creative arts programs, to “attract students to certain schools and incubate diverse student bodies,” Coleman, *supra* note 3, at 35-36.

Districts with choice programs also typically devote resources to student recruitment and family engagement—targeting low-income families and others who may have reduced access to information—to keep families informed of the array of options they have as part of a choice system. Potter & Quick, *supra* note 41, at 14; *see also Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (school boards may “recruit[] students *** in a targeted fashion” to “bring[] together students

⁴⁶ Cambridge Public Schools, *supra* note 44.

of diverse backgrounds”). In these ways, controlled choice programs not only promote diversity but also increase levels of family engagement and parental support, with cascading benefits for students’ educational experiences.

Targeted Faculty Recruiting: Consistent with Justice Kennedy’s conclusion that school boards may enhance diversity by “recruiting *** faculty in a targeted fashion,” *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment), many districts have increased outreach efforts and adopted policies to attract diverse teachers and faculty. Studies confirm that the absence of staff diversity is correlated with student segregation.⁴⁷ Increasing diversity among teachers has been found to improve diversity among students, with accompanying benefits for both students (who are exposed to a wider range of role models and report improved educational experiences and less absenteeism) and teachers (who report higher “job satisfaction, collaboration, and career commitment”).⁴⁸

To achieve these goals, school districts have developed programs shown to help create a diverse workforce. Some districts have adopted loan repayment programs, scholarships, and similar

⁴⁷ Kinga Wysienska-Di Carlo, Matthew Di Carlo & Esther Quintero, *Teacher Segregation in Los Angeles and New York City* 1 (Albert Shanker Inst., Rsch. Br., May 2016).

⁴⁸ *Id.* at 2-3; see also Alyssa Rafa & Maxine Roberts, *Building a Diverse Teacher Workforce* 3, EDUC. COMM’N OF THE STATES (2020).

financial incentives to attract diverse faculty.⁴⁹ For instance, Connecticut provides mortgage assistance to teachers who attended a high school in an underserved part of the state, or who graduated from a historically Black college or Latino-serving university. New Mexico provides scholarships and loan repayment assistance for applicants who teach in “designated high-need positions.”⁵⁰ Other districts use “grow-your-own programs” to recruit teachers raised in communities working to achieve school diversity. These programs—currently used in Colorado, Illinois, Minnesota, and Washington—generally include financial assistance as well as professional support for new teachers.⁵¹ Still other districts provide alternative certification programs to reduce the barrier professional licensure may create for some teachers (including teachers of color). Connecticut and New Jersey, among other states, have enacted legislation creating alternative credentialing processes and helping teachers of color to obtain placements in underperforming schools.⁵²

Magnet Schools: School districts also use magnet schools and other specialized programs (like language immersion programs, arts-focused curricula, or STEM programming) to foster school diversity. As Justice Kennedy recognized, and federal law confirms, specialized programs can help bring students from different backgrounds together. *See Parents Involved*,

⁴⁹ Rafa & Roberts, *supra* note 48, at 4-5.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 5-6.

⁵² *Id.* at 6-7.

551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (“allocating resources for special programs” promotes diversity); *see also* 20 U.S.C. § 7231b (magnet schools are designed “to bring students from different social, economic, ethnic, and racial backgrounds together”).

These specialized programs, including magnet schools, have been shown to increase diversity and improve students’ academic experience in other related ways. For instance, a study evaluating interdistrict magnet schools in Hartford and New Haven, Connecticut found that magnet schools not only attract more diverse student bodies, but also provide enhanced “peer support for academic achievement” and help foster stronger “multicultural interests” among students.⁵³ Another study examining magnet schools in Omaha, Nebraska found that magnet schools enhanced racial and socioeconomic diversity while also leading to dramatic improvements in test scores for students.⁵⁴ The federal Government Accountability Office reports that 44 percent of traditional public schools were attended by students of predominantly the same race/ethnicity

⁵³ Casey Cobb, Robert Bifulco & Courtney Bell, *Evaluation of Connecticut’s Interdistrict Magnet Schools* ES2-4, UNIV. OF CONN., CTR. FOR EDUC. POL’Y ANALYSIS (2009).

⁵⁴ Janel George & Linda Darling-Hammond, *Advancing Integration and Equity Through Magnet Schools* 15, LEARNING POL’Y INST. (2021).

in the 2020-2021 school year, as compared to roughly a quarter (26 percent) of magnet schools.⁵⁵

Although some specialized schools use selective admissions practices, many enroll students via lottery or through another noncompetitive process. Indeed, the federal Magnet Schools Assistance Program, which provides funding for certain magnet schools, encourages school districts “to select students to attend magnet school programs by methods such as lottery, rather than through academic examination.”⁵⁶ Many school districts have achieved the benefits that magnet schools offer—increased diversity and an improved academic experience—without using a competitive admissions process. *See* George & Darling-Hammond, *supra* note 54, at 21 (describing success of San Diego’s nonselective magnet school programs).

B. The Court Should Not Rule So Broadly As To Restrict School Districts’ Authority To Use Lawful Diversity-Enhancing Tools

These common, diversity-enhancing mechanisms are “race conscious” in that they aim “to encourage a diverse student body, one aspect of which [may be] its racial composition.” *Parents Involved*, 551 U.S. at 788-789 (Kennedy, J., concurring in part and concurring in the judgment). They “address the problem” of diversity “in a general way and without

⁵⁵ U.S. Gov’t Accountability Off., *K-12 Education*, *supra* note 23, at 15.

⁵⁶ U.S. Dep’t of Educ., *Improving Outcomes for All Students: Strategies and Considerations to Increase Student Diversity* 11 (2017).

treating each student in a different fashion solely on the basis of a systematic, individual typing by race.” *Id.* These tools are thus fully consonant with the Court’s decision in *Parents Involved*. *Id.* at 789. As petitioner agrees, *Grutter* does not implicate these practices. Br. 57.

Several *amici* supporting petitioner urge this Court to adopt an approach that would preclude school districts from considering race *at all* when developing student assignment processes or creating special school programs. Pac. Legal Found. Br. 13-20 (claiming such assignment tools accomplish “racial balancing”); Parents Defending Educ. Br. 9 (characterizing school districts seeking diversity as being “aestheticists”). Policy positions, such as how to design student enrollment or admissions programs, should be determined at the local level through community discussions with school boards and school board elections. They should not be determined, as *amici* urge, through a broad ruling in a case involving university admissions.

Parents Involved, not *Grutter*, already creates the guard rails school districts must follow when enacting race-conscious policies. *Parents Involved*, 551 U.S. at 725. These policies are lawful under *Parents Involved* regardless of *Grutter*. *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment). They are not at issue in this case.

Amici’s arguments reflect a particular policy disagreement about magnet high school admissions practices at a handful of competitive schools. Parents Defending Educ. Br. 13. But such admissions

policies—like other policies related to student assignment and school administration—are best left to local community control. *See* pp. 14-15, *supra*. Individual school boards have adopted admissions policies that reflect local priorities and respond to community input.⁵⁷ Local policymakers, not courts, are best suited to make these policy choices.

Those arguments go far beyond—and conflict with—the relief petitioner seeks. Petitioner claims that the Universities could comply with constitutional equal protection principles by implementing “race-neutral alternatives,” including extending preferences to “socioeconomically disadvantaged students” and adopting other programs (like “recruitment efforts” or “partnerships with disadvantaged high schools”) to “maintain[] diversity” while “eliminat[ing] the use of race.” Br. 83-85. These proposals are similar to the non-individualized, race-conscious policies that school districts already use widely. *See* pp. 17-26, *supra*. A holding that any such policy adopted with an awareness of the impact on diversity constitutes unlawful “racial balancing,” *see, e.g.*, Pac. Legal Found. Br. 13 (challenging admissions policies “driven by an interest in increasing racial diversity”); Parents Defending Educ. Br. 14-15 (challenging all “indirect means of racial balancing,” including Boston policy allocating school assignments based on zip code), would completely disempower educational institutions from considering race and diversity in any context or in any way. Public schools must be able to use diversity-creating tools, long recognized by this Court

⁵⁷ *See* Welner, *supra* note 4, at 361.

as constitutional, to provide the pedagogical benefits of diversity to their students.

The Court can, and should, avoid wading into this fray by focusing on the question presented in this case. The diversity efforts of K-12 school districts are governed by *Parents Involved's* distinct framework. There is no basis for the Court to disturb that separate precedent.

CONCLUSION

For the foregoing reasons, the judgments of the lower courts should be affirmed.

Respectfully submitted.

Francisco M. Negrón, Jr.
Sonja H. Trainor
NATIONAL SCHOOL BOARDS
ASSOCIATION

Pratik A. Shah
Counsel of Record
Aileen M. McGrath
AKIN GUMP STRAUSS
HAUER & FELD LLP

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