

No. 20-1199 & 21-707

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the First Circuit**

**BRIEF FOR THE COUNCIL OF THE
GREAT CITY SCHOOLS AS AMICUS CURIAE IN
SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

The Council of the Great City Schools (the “Council”) is a coalition of 76 of the nation’s largest urban public-school systems² and is the only national

¹ Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and no persons other than amicus curiae or its counsel made a monetary contribution to the brief’s preparation or submission.

² Albuquerque Public Schools; Anchorage School District; Arlington Independent School District (Texas); Atlanta Public Schools; Aurora Public Schools (Colorado); Austin Independent School District; Baltimore City Public Schools; Birmingham City Schools; Boston Public Schools; Bridgeport Public Schools; Broward County Public Schools; Buffalo Public Schools; Charleston County School District; Charlotte-Mecklenburg Schools; Chicago Public Schools; Cincinnati Public Schools; Clark County School District (Las Vegas); Cleveland Metropolitan School District; Columbus City Schools; Dallas Independent School District; Dayton Public Schools; Denver Public Schools; Des Moines Public Schools; Detroit Public Schools Community District; District of Columbia Public Schools; Duval County Public Schools (Jacksonville); East Baton Rouge Parish School District; El Paso Independent School District; Fayette County Public Schools (Lexington, Kentucky); Fort Worth Independent School District; Fresno Unified School District; Guilford County Schools (Greensboro, North Carolina); Hawaii State Department of Education; Hillsborough County Public Schools (Tampa); Houston Independent School District; Indianapolis Public Schools; Jackson Public Schools; Jefferson County Public Schools (Louisville, Kentucky); Kansas City Public Schools; Long Beach Unified School District (California); Los Angeles Unified School District; Memphis-Shelby County Schools (formerly Memphis City Schools, Tennessee); Metro Nashville Public Schools; Miami-Dade County Public Schools; Milwaukee Public Schools; Minneapolis Public Schools; New Orleans Public Schools; New York City Department of Education; Newark Public Schools; Norfolk Public Schools; Oakland Unified School District;

organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of school districts with enrollments greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership, based on urban characteristics. The Council's member districts have a combined enrollment of over 7.6 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The Council has a strong interest in the outcome of this case, as more than three-quarters of Great City Schools' students are from minority backgrounds, primarily African American, Hispanic, or Asian American.³ The Council and its member districts are

Oklahoma City Public Schools; Omaha Public Schools; Orange County Public Schools (Orlando); The School District of Palm Beach County; The School District of Philadelphia; Phoenix Union High School District; Pinellas County Public Schools; Pittsburgh Public Schools; Portland Public Schools; Providence Public School District; Puerto Rico Department of Education; Richmond Public Schools; Rochester City School District; Sacramento City Unified School District; San Antonio Independent School District; San Diego Unified School District; San Francisco Unified School District; Santa Ana Unified School District; Seattle Public Schools; St. Louis Public Schools; St. Paul Public Schools; Toledo Public Schools; Tulsa Public Schools; Washington, D.C. Public Schools; Washoe County School District (Reno, Nevada); and Wichita Public Schools.

³ Of the approximately 7.6 million students enrolled in the Council's members' schools, 26% are African American, 44% are

deeply committed to providing high quality and equitable educational opportunities for all the nation's schoolchildren. They also are committed to preserving, for all their students, post-secondary opportunities that fairly reflect their true academic potentials. Finally, the Council and its member districts strongly support efforts to promote the educational benefits of diverse public-school enrollments and avoid the harms of racial isolation through race-neutral measures and, where necessary, narrowly tailored race-conscious ones.

SUMMARY OF ARGUMENT

In 2003, when concluding her opinion for the majority in *Grutter v. Bollinger*, Justice O'Connor famously expressed her hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. 306, 343 (2003). Unfortunately, all indications illustrate that her prognostication was unduly optimistic. While the educational benefits of a diverse student body remain every bit as compelling as they were 44 years ago when the Court decided *University of California v. Bakke*, 438 U.S. 265 (1978), the obstacles to achieving such student bodies have only increased since Justice O'Connor's confirmation of that conclusion 19 years ago. There is no reason to depart from these decades of established precedent.

Hispanic, 18% are White, 7% are Asian/Pacific Islander. The terms "Black" and "African American," as well as "Hispanic" and "Latino," are used interchangeably for purposes of this brief; the Council attempts to defer throughout to the terminology of the study or other authority being cited.

Despite the best efforts of school districts like the Council's members to create more diverse schools, racial segregation has increased over the last two decades. As a result, educational inequities persist.

Because of unequal economic and educational opportunities, African American and Hispanic students suffer from educational outcomes at the elementary and secondary level that often do not fairly reflect their academic potential. As a result, race-neutral efforts to promote diversity at select colleges and universities like Harvard and the University of North Carolina cannot effectively promote diverse enrollments and do not treat many minority students equitably. Race-conscious policies remain—necessary to create diverse enrollments benefitting all students, and to recognize the potential of minority students disproportionately deprived of equal opportunities at the elementary and secondary level. And when these minority students are admitted to selective universities, far from being some sort of “mismatch,” they succeed at identical rates as students from other racial and ethnic groups.

Finally, while this issue is not before the Court in these consolidated cases, diversity is also a compelling interest in elementary and secondary schools, contrary to the claims of several *amici* in support of Petitioner. It is well established both that diverse school enrollments are beneficial, and that racial isolation is often harmful. There is no reason in these cases to question Justice Kennedy's controlling opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (“*PICS*”). Indeed, the growing *de facto* segregation and persistent educational inequity in our nation's public

schools make race-neutral and narrowly tailored race-conscious efforts at the elementary and secondary level more critical than ever.

I. School Segregation and Educational Inequality Persist.

The progress toward desegregation in elementary and secondary schools in the United States that commenced in the civil rights era has faltered since the late 1980s, and much of that progress has been reversed.⁴ Today, public schools across the nation are nearly as segregated as they were five decades ago.⁵ One result of this has been persistent educational inequality for minority students, which is reflected in continuing racial and ethnic achievement gaps.

A. *De Facto* Segregation has been Growing in Elementary and Secondary Schools.

In June 2022, the non-partisan U.S. Government Accountability Office (“GAO”) released a report following up on a 2016 investigation into racial

⁴ Jeremy Fiel & Yongjun Zhang, *With All Deliberate Speed: The Reversal of Court-Ordered School Desegregation, 1970–2013*, 124 Am. J. Socio. 1685 (May 2019); John Logan, Elisabeta Minca & Sinem Adar, *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 Socio. Educ. 287 (June 19, 2012); Sean Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Segregation*, 40 Ann. Rev. Socio. 199 (July 2014); Kori Stroub & Meredith Richards, *From Resegregation to Reintegration: Trends in the Racial/Ethnic Segregation of Metropolitan Public Schools, 1993–2009*, 50 Am. Educ. Rsch. J. 497 (June 1, 2013).

⁵ Erica Frankenberg et al., *Harming Our Common Future: America’s Segregated Schools 65 Years after Brown*, UCLA Civil Rts. Project (May 10, 2019).

disparities in elementary and secondary schools.⁶ The report paints a disturbing picture of widespread segregation. In the 2020-21 school year, “[m]ore than a third of students (about 18.5 million) attended a predominantly same-race/ethnicity school—where 75 percent or more of the student population is of a single race/ethnicity.”⁷ Approximately half of all Black and Hispanic students attended schools with predominantly—75% or more—minority enrollment.⁸ Moreover, approximately 14% percent of all students attended schools in which their racial or ethnic group constituted more than 90% of the total student enrollment. Put differently, more than one in ten White, Hispanic, Black, Asian American, and American Indian/Alaska Native students attended a school that was almost exclusively comprised of students of their own race.⁹ Moreover, this *de facto* segregation is present in every region of the country—most prominently in the Midwest and Northeast, where 59% and 47% of all schools are predominantly same-race/ethnicity—as well as in urban, suburban, and rural areas.¹⁰

⁶ Jacqueline M. Nowicki, *K-12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines* (2022) (“GAO Report”); *see also*, Sequoia Carrillo & Pooja Salhotra, *The U.S. Student Population is More Diverse, but Schools are Still Highly Segregated*, Nat’l Pub. Radio (July 14, 2022, 5:13 AM), <https://www.npr.org/2022/07/14/1111060299/school-segregation-report>.

⁷ GAO Report, *supra* note 6.

⁸ *Id.* at 13.

⁹ *Id.* at 11.

¹⁰ *Id.* at 17-21.

This lingering school segregation cannot be attributed to any single factor. Historic discriminatory practices like the “redlining” of Black neighborhoods established racially and socioeconomically segregated neighborhoods, many of which remain segregated nearly 100 years after redlining began in the 1930s.¹¹ More modern trends, like the splintering of school districts into new “secession” school districts, also contribute to school segregation.¹² Some also attribute resegregation in part to the decline in court-ordered desegregation plans beginning in the 1990s.¹³ Specifically, since the Court’s ruling in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), many school districts have become unitary and adopted student assignment plans that have increased segregation in their schools.¹⁴ Whatever its cause, elementary and secondary school segregation persists today with adverse consequences for many young students.

B. One Result of Such Segregation is Persistent Educational Inequality.

As noted above, modern *de facto* segregation traces back to the 1930s and the redlining of Black neighborhoods labeled as “hazardous” for mortgage lenders. Redlining made it difficult—often impossible—for individuals of color to buy homes,

¹¹ Bruce D. Baker et al., *Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity*, Albert Shanker Institute (April 2022), at 10.

¹² GAO Report, *supra* note 6, at 20.

¹³ See Daniel S. Levine, *Schools Resegregate After Being Freed From Judicial Oversight, Stanford Study Shows*, Stanford Report (Dec. 5, 2012).

¹⁴ *Id.*

start businesses, or improve their properties.¹⁵ The natural result of these trends was that owner occupancy in these communities was reduced, property values decreased, housing quality slipped, financial investments in those neighborhoods declined, and racial segregation increased.¹⁶

Racial housing disparities remain stark. Compared to White families, the typical Black and Hispanic family home has both a lower value and a higher property tax rate. One scholar characterizes this incongruity as “effectively a Black/Hispanic tax required to try to raise additional revenue for local public services, including schooling, to offset the lower values of their taxable properties.”¹⁷ The gap between median Black household and median White household wealth is also greater now than it was in the 1960s.¹⁸ Meanwhile, the median annual Black income dropped between 2000 and 2018, while the median White income rose over the same period.¹⁹ Consequently, in

¹⁵ Baker et al., *supra* note 11, at 10-11. Among other discriminatory practices, non-White families were effectively barred from securing federally-insured home loans through the Federal Housing Administration (FHA) from the 1930s through the 1960s.

¹⁶ Michael Casserly et al., *Mirrors or Windows: How Well Do Large City Public Schools Overcome the Effect of Poverty and Other Barriers?*, Council of the Great City Schools, (June 2021), at 44.

¹⁷ Baker, et al., *supra* note 11, at 23.

¹⁸ See Heather Long & Andrew Van Dam, *The Black-White Economic Divide is as Wide as it was in 1968*, Washington Post (June 4, 2020). Median Black household wealth as a percent of median White household wealth was lower in 2016 (8.7%) than it was in 1968 (9.4%). *Id.*

¹⁹ *Id.*

2019, the percentages of Black and Hispanic children living in poverty were two to three times higher than those of White (and Asian) students.²⁰

Because public school funding throughout the United States is highly dependent on local property taxes, “where one lives—particularly in which district—in no small part determines how well one’s neighborhood’s schools are funded.”²¹ As a result, more Black and Hispanic families often reside in school districts that receive less local revenue and do not have resources adequate to their needs.²² In areas with high concentrations of poverty—including a disproportionate percentage of predominately Black and Hispanic neighborhoods—school districts face perpetual difficulties raising adequate revenue for student funding. “This creates a feedback loop, in which the districts that need the most resources tend to receive the fewest. Such deprivation depresses the economic outcomes of these districts’ students, which in turn perpetuates the geographic isolation and concentrated poverty that generates lower revenue and higher costs.”²³

A recent case study of seven metropolitan school districts found significant racial disparities in per-student funding.²⁴ The study looked at “actual

²⁰ GAO Report, *supra* note 6, at 6.

²¹ Baker et al., *supra* note 11, at 1.

²² *Id.* at 8.

²³ *Id.* at 7 (citation omitted).

²⁴ *Id.* at 27. The study looked at the following districts: Baltimore (MD), the Bay Area (CA), Birmingham (AL), Hartford (CT), Kansas City (MO/KS), San Antonio (TX), and the Twin Cities (MN/WI).

spending per pupil and estimated spending required to achieve national average test scores for the typical student of each race/ethnicity within each metro area.”²⁵ The study found that “[o]n average, spending for the typical white student is \$3,066 per pupil above estimated adequate levels, whereas spending is \$3,058 below adequate for the average Black student and \$2,100 below adequate for the average Hispanic student—that is, ‘opportunity gaps’ of roughly \$6,000 and \$5,000 per pupil for Black and Hispanic students, respectively.”²⁶

Such unequal funding results in unequal opportunities. A recent study by the UCLA Civil Rights Project concluded that “[t]he strongest networks of opportunity in terms of well-prepared peer groups, qualified, experienced teachers, a rich and challenging curriculum, and advanced courses and experiences, a network of connections and information about colleges are mostly found in middle-class White and [Asian/Pacific Islander] schools.”²⁷ Students who are not part of the “strongest networks of opportunities” have a very different experience. As a different study concluded: “[M]ost students of color attend schools which reflect the problems of poverty,” including “less qualified teachers, peer groups, parent influence ... the most risk of hunger, homelessness, untreated health problems and many other forms of inequality,” all of

²⁵ *Id.*

²⁶ *Id.* at 28.

²⁷ Gary Orfield & Danielle Jarvie, *Black Segregation Matters: School Segregation and Black Educational Opportunity*, UCLA Civil Rts. Project (Dec. 2020), at 35.

which hinder students' ability to succeed and schools' capacity to provide equal educational opportunities.²⁸

C. Unequal Educational Opportunities Contribute to Continuing Racial and Ethnic Achievement Gaps.

Racial disparities in student academic achievement narrowed significantly when public schools were at their most desegregated during the 1970s and 1980s. However, in recent decades, because of continuing segregation and persistent educational inequality, racial gaps have widened across virtually every standard measure of educational outcomes.²⁹

One notable example comes from a 2019 study conducted by The National Center for Education Statistics which analyzed disparities in student achievement.³⁰ The study found that White fourth grade students on average outscored Black students by 25 points in math and 26 points in reading, and White eighth grade students outscored Black students

²⁸ Frankenberg et al., *supra* note 5, at 25.

²⁹ Mark Berends & Roberto Peñalosa, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective*, 112 *Tchrs. Coll. Rec.* 978 (2010); Nat'l Assessment of Educ. Progress, *School Composition and the Black-White Achievement Gap*, U.S. Dep't of Educ. (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf; Lauren Musu-Gillette et al., *Status and Trends in the Education of Racial and Ethnic Groups 2017*, Nat'l Ctr. For Educ. Stats. (2017), <https://nces.ed.gov/pubs2017/2017051.pdf>.

³⁰ Nat'l Assessment of Educ. Progress, *The Nation's Report Card: Results from the 2019 Mathematics and Reading Assessments*, U.S. Dep't of Educ. (2019), https://www.nationsreportcard.gov/mathematics/supportive_files/2019_infographic.pdf.

by 32 points in math and 28 points in reading.³¹ Similarly, White fourth grade students outscored Hispanic students by 18 points in math and 21 points in reading, while White eighth grade students outscored Hispanic students by 24 points in math and 20 points in reading.³² The achievement gaps between White and Black and Hispanic students are even wider in large, urban public school systems.³³ In sum, “students attending schools with concentrations of disadvantaged racial minority populations achieve less academic progress than their otherwise comparable counterparts in more racially balanced or integrated schools.”³⁴

The persistent racial achievement gaps cannot be explained away by socioeconomic disparities alone. When students’ relative socioeconomic status is a controlled variable, racial disparities in academic performance persist, driven by the inequitable

³¹ *Id.* at 2.

³² *Id.*

³³ Nat’l Assessment of Educ. Progress, *The Nation’s Report Card: Achievement Gaps Dashboard*, U.S. Dep’t of Educ., https://www.nationsreportcard.gov/dashboards/achievement_gaps.aspx#/. In 2019, in fourth grade, White students in large city public schools outscored Black students by 31 points in math and 32 points in reading, while in eighth grade, White students outscored Black students by 38 points in math and 33 points in reading. *Id.* In 2019, White fourth grade students outscored their Hispanic peers by 22 points in math and 26 points in reading. *Id.* In 2019, White eighth grade students outscored their Hispanic peers by 30 points in math and 25 points in reading. *Id.*

³⁴ Roslyn Arlin Mickelson et al., *Effects of School Racial Composition on K–12 Mathematics Outcomes: A Metaregression Analysis*, 83 Rev. Educ. Rsch. 121 (2013), at 121.

opportunities discussed above.³⁵ For example, a study by the Center for Education Policy Analysis at Stanford University concluded that racial achievement gaps are present even in states with “near zero” racial socioeconomic disparities.³⁶ The study also found that states with similar levels of socioeconomic disparities had substantially different achievement gaps, suggesting “that socioeconomic disparities are not the sole cause of racial achievement gaps.”³⁷

While some large city schools have made progress in narrowing the achievement gap of historically disadvantaged students,³⁸ it is clear that, despite

³⁵ Ctr. for Educ. Pol’y Analysis, *Educational Opportunity Monitoring Project: Racial and Ethnic Achievement Gaps*, Stanford Univ., <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/#fifth>; see also GAO Report, *supra* note 6, at 7.

³⁶ Ctr. for Educ. Pol’y Analysis, *supra* note 35. The Stanford study combined racial gaps in income, poverty rates, unemployment rates, and educational attainment into a single index of racial and socioeconomic disparities. The study found that a state’s racial socioeconomic disparity was generally a good predictor of its racial achievement gap, but also recognized that other factors—like “the availability and quality of early childhood education, quality of public schools, patterns of residential and school segregation, and state educational and social policies”—play important roles in reducing or exacerbating racial achievement gaps. *Id.*

³⁷ *Id.*

³⁸ Casserly et al., *supra* note 16, at 71. This study not only confirmed the persistence of achievement gaps between White and Black or Latino students in urban public schools but also highlighted efforts by school districts to close these gaps.

these improvements, the goal of closing the achievement gap has not yet been achieved.

II. Because of Racial Isolation and Educational Inequality, Race-Neutral Higher Education Admissions Procedures Are Often Inadequate to Produce Diverse College and University Enrollments.

Due to increasing racial and ethnic segregation at the elementary and secondary level and its adverse educational effects, race-conscious admissions policies in higher education are even more crucial today than when the Court decided *Grutter v. Bollinger*.³⁹

In *Grutter*, Justice O'Connor famously predicted that race-conscious college admissions practices might no longer be necessary in 25 years.⁴⁰ However, it became evident to Justice O'Connor less than five years after the decision that her optimistic prediction likely would not happen. Justice O'Connor publicly opined on multiple occasions about the lack of progress being made toward achieving equity in higher education, and as discussed above, her vision of equity is yet to be realized in elementary and secondary education. In an essay co-written by Justice O'Connor, she stated that “unless substantial progress is made, higher education will continue to face the dilemma of choosing between educational achievement and diversity.”⁴¹

³⁹ 539 U.S. 306 (2003).

⁴⁰ *Id.* at 343.

⁴¹ Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education Over the Next Twenty-Five Years: A Need for Study and Action*, in *The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa*

In the Council’s 2007 Amicus Brief to this Court in *PICS*, the Council also argued that holistic admissions policies in higher education would remain necessary as long as racial and ethnic achievement gaps persisted.⁴² As discussed in Section I.C, achievement gaps persist. Unfortunately, holistic admissions processes that include consideration of race and ethnicity remain necessary because race-neutral admissions procedures often unfairly exclude qualified minority applicants and do not successfully promote diverse college and university enrollments.

65 (David L. Featherman et al. eds., 2010). Similarly, during a 2008 keynote address, Justice O’Connor reiterated that, “In today’s America, I’m inclined to think that race still matters in painful ways.” Emily Dupraz, *Affirmative Action is Still Necessary, Says O’Connor in HLS Keynote Address*, Harv. L. Today (Oct. 27, 2008), <https://today.law.harvard.edu/affirmative-action-is-still-necessary-says-oconnor-in-hls-keynote-address/>.

⁴² Brief for the Council of Great City Schools as Amicus Curiae Supporting Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), at 12. “Similarly, this Court’s hopes for *Grutter* turn critically on the ability of local districts to address the racial isolation that underlies the achievement gap. In *Grutter*, the Court made plain its wish that affirmative action in college admissions might soon be rendered obsolete. 539 U.S. at 346 (‘As lower school education in minority communities improves, an increase in the number of [qualified minority] students may be anticipated. From today’s vantage point, one may hope . . . that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.’). But as long as the achievement gap remains, so too will the necessity of affirmative action admissions in higher education. *Grutter* cannot be ‘sunsetting’ until the achievement gap is closed and more minority students are eligible for selective colleges without the need for affirmative action.” *Id.*

Multiple studies show that institutions who ban race-conscious admissions procedures have less diverse student populations. One such study that evaluated the impact of bans on the consideration of race in admissions found that bans at the “more selective institutions” result in statistically significant declines in both African American and Hispanic enrollments.⁴³ Banning race-conscious admissions procedures also can indirectly result in less diverse applicant pools. In a 2015 study, researchers found that laws such as Michigan’s ban on race-conscious admissions in 2006 also effectively limit other actions administrators can take to address racism on campus.⁴⁴ And when the public perception of an institution is that it is not committed to racial diversity or addressing racism, students of color may be discouraged from even applying, resulting in less diversity at the institution.

A. Traditional Measures of College Readiness Do Not Fairly Reflect the Academic Promise of Many Minority Students, Particularly Many African American and Hispanic Students.

Even though colleges and universities have legitimate reasons for looking at things like grades

⁴³ See Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. Econ. & Stats 3 (Aug. 2012). The states in the study were California, Florida, Texas, and Washington. The “more selective institutions” came from the 1995 US News and World Report’s top 50 universities.

⁴⁴ Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 Am. Educ. Rsch. J. 828 (Oct. 1, 2015).

and standardized test scores during the admissions process, those measures alone are inadequate to fairly reflect the potential of minority students, in part because of the inequities discussed in Section I.

Test scores are one of the most, if not the most, traditional measures of success at the elementary and secondary level. But test scores do not always present the full picture and are not the best predictor of college success. Because African American and Hispanic students often do not have access to equal educational opportunities, judging their future potential based solely on past performance is inadequate.

To fairly evaluate students coming out of high school, colleges and universities must engage in a holistic review that considers other factors. When colleges and universities place a heavy emphasis on test scores, they cut off a large portion of traditionally disadvantaged students from their enrollment, even though high standardized test scores do not equal college success. For example, many standardized tests were also developed for a primarily White demographic and, therefore, reading and writing sections can end up assessing an individual's familiarity with the type of language used in White middle class homes rather than their actual verbal abilities.⁴⁵ Similarly, colleges also often look at the rigor of classes an applicant has taken in high school when determining whether a student is ready for the

⁴⁵ See generally Roy Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 Harv. Educ. Rev. 1 (2003); Maria V. Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 Harv. Educ. Rev. 106, 126 (2010).

level of rigor at an institution, but African American and Hispanic students do not have the same opportunities. Indeed, many schools that serve mostly Black and Hispanic students do not offer as many of these courses as other schools,⁴⁶ and many schools that are more racially diverse deny Black and Hispanic students access to these classes.⁴⁷

In sum, because of imperfections in the academic measures themselves as well as the educational inequities discussed in Section I, the college admissions process is not an equal playing field for many minority students, and race-neutral measures often fail to create truly diverse student enrollments.

B. Many Colleges and Universities Effectively Use Narrowly Tailored Race-Conscious Admissions Policies to Create Diverse Enrollments to Benefit All Students.

Colleges and universities have properly recognized that race-conscious measures remain necessary to promote the educational benefits of diversity for all students, and in reliance on this Court's longstanding precedents, have sought to promote those benefits through narrowly tailored race-conscious admissions

⁴⁶ See U.S. Dep't of Educ., Office for Civil Rts., *2015-2016 Civil Rights Data Collection: STEM Course Taking* (Apr. 2018), <https://ocrdata.ed.gov/assets/downloads/stem-course-taking.pdf>, at 5.

⁴⁷ Kayla Patrick et al., *Inequities in Advanced Coursework: What's Driving Them and What Leaders Can Do*, The Educ. Trust (Jan. 2020), <https://edtrust.org/wp-content/uploads/2014/09/Inequities-in-Advanced-Coursework-Whats-Driving-Them-and-What-Leaders-Can-Do-January-2019.pdf>.

policies. Narrowly tailored admissions policies provide greater access to qualified African American and Hispanic students in particular, and the students admitted pursuant to such policies succeed at rates comparable to other students.

Despite the persistence of achievement gaps at the elementary and secondary level, historically disadvantaged students have proven to be successful when provided with access to post-secondary opportunities. Opponents of race-conscious admissions policies argue there is an “academic mismatch” when minority students attend schools pursuant to these policies.⁴⁸ These students, however, are not a “mismatch”⁴⁹ with selective institutions. In fact, having an SAT score below the institutional average does not undermine the performance or well-being of individual minority students, and if anything, minority students who benefited from race-conscious admissions policies earn higher grades and leave school at lower rates than other students.⁵⁰ Black students who attend selective institutions are more

⁴⁸ See Brief for Richard Sander as Amicus Curiae in Support of Petitioner, *Students for Fair Admissions v. President & Fellows of Harvard Coll.* and *Students for Fair Admissions v. Univ. of N.C., et al.*, Nos. 20-1199 & 21-707 (May 9, 2022).

⁴⁹ The term “mismatch” comes from what is referred to as the mismatch hypothesis, the viewpoint that lowering admissions standards for minority students sets them up for failure by placing them in academic settings for which they are not prepared. See Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 38 Soc. Sci. Rsch. 531 (June 2007). Mismatch is the gap between the strength of a particular student’s credentials and those of the model student at that school. *Id.*

⁵⁰ *Id.* at 544.

likely to earn a degree than Black students who attend less selective institutions.⁵¹ For example, minority students who have lower SAT scores than the average student perform just as well, if not better, than the average student in college.⁵² Studies also have shown that there is no support for the mismatch hypothesis when it comes to occupational status or graduation rate.⁵³

Several Ivy League schools, like Harvard, successfully use race-conscious admissions policies. The National Center for Education Statistics reports graduation rates for students at Ivy League schools.⁵⁴

⁵¹ William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton Univ. Press 1998).

⁵² Fischer & Massey, *supra* note 49, at 544.

⁵³ Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?*, 37 J. of Coll. & Univ. L. 491, 512 (June 1, 2011).

⁵⁴ IPEDS Data Ctr., *Integrated Postsecondary Education Data System*,

<https://nces.ed.gov/ipeds/datacenter/InstitutionList.aspx?goToReportId=6> (last visited July 26, 2022). The statistics are based on full-time, first-time degree or certificate seeking undergraduates who completed their program within 150% of the normal time of program completion for students who enrolled in 2014. See IPEDS Data Ctr., *Brown Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Columbia Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Cornell Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Dartmouth Coll. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Harvard Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Univ. of Pa. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Princeton Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.; IPEDS Data Ctr., *Yale Univ. Academic Year 2020-21*, Nat'l Ctr. for Educ. Stats.

For both Black and Hispanic students, the graduation rates are 90% or greater.⁵⁵ These graduation rates are comparable to graduation rates for White and Asian students at these institutions.⁵⁶ This shows that holistic admissions policies, refusing to simply ignore the realities of race, promote greater diversity and do not create any mismatch between students and schools. Rather, they give minority applicants access that is reflective of their academic potential.

As a result, as long as *de facto* segregation, unequal educational opportunities, and the consequent achievement gaps at the elementary and secondary level persist, narrowly tailored race-conscious measures are likely to remain necessary to promote diverse college and university enrollments and to give promising minority applicants a fair shot. Conversely, limiting the ability for colleges and universities to use holistic admissions processes would both harm all students by subjecting them to a less diverse higher education experience

⁵⁵ *Id.* For Black or African American undergraduate students, the graduation rates are Brown: 95%, Columbia: 94%, Cornell: 94%, Dartmouth: 92%, Harvard: 97%, Princeton: 97%, University of Pennsylvania: 93%, Yale: 95%. For Hispanic or Latino undergraduates, the graduation rates are Brown: 93%, Columbia: 96%, Cornell: 92%, Dartmouth: 96%, Harvard: 98%, Princeton: 94%, University of Pennsylvania: 90%, Yale: 95%. *Id.*

⁵⁶ *Id.* For White undergraduates, the graduation rates are Brown: 97%, Columbia: 95%, Cornell: 95%, Dartmouth: 96%, Harvard: 98%, Princeton: 99%, University of Pennsylvania: 96%, Yale: 97%. For Asian undergraduates, the graduation rates are Brown: 94%, Columbia: 98%, Cornell: 97%, Dartmouth: 97%, Harvard: 99%, Princeton: 90%, University of Pennsylvania: 98%, Yale: 98%. *Id.*

and also hinder the ability of many minority students to reach their full potential.

III. There Also Continues to Be a Need for Narrowly Tailored Race-Conscious Student Assignment Measures at the Elementary and Secondary Level.

Even though the issue is not before the Court in this case, because *amici* in support of Petitioner have raised it, the Council notes that the use of narrowly tailored race-conscious measures at the elementary and secondary school level, though perhaps less common than in higher education, remains a necessary tool. As this Court has recognized, public school districts have their own distinct compelling governmental interests in promoting the educational benefits of diverse school enrollments and avoiding the harms of racial isolation.⁵⁷ Because, as discussed in Section I.A., racial segregation is increasing in elementary and secondary schools, narrowly tailored race-conscious student assignment policies in some circumstances remain necessary at the elementary and secondary level.

The Court has historically granted local school districts broad discretion to establish and implement educational policy for the communities they serve. This is a wise approach for several reasons. First, school districts have extensive knowledge of their respective communities and a unique perspective of which policies will suit the needs of their students. Due to their firsthand knowledge, local school districts

⁵⁷ *PICS*, 551 U.S. at 789 (Kennedy, J., concurring) (listing examples of permissible race conscious methods by which K-12 schools can pursue the educational benefits of diversity).

are in the best position to make policy decisions for public education. Second, most school boards are elected by voters in local school districts. A school district's most important constituents are thus the parents whose children attend the schools governed by the locally elected school board. Thus, local boards have both the responsibility and accountability that requires them to respond to concerns regarding children's education.

Moreover, the well-recognized educational benefits of diversity are at least as compelling at the elementary and secondary school level as they are in higher education. The measured benefits of diversity are strongest with students of younger ages. Research suggests that school integration efforts were most effective for young children⁵⁸ and early exposure to diverse environments is linked to more positive interracial attitudes.⁵⁹ Academic outcomes are also

⁵⁸ Roland G. Fryer & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 Rev. Econ. & Stats. 447 (May 2004); Roland G. Fryer & Steven D. Levitt, *The Black-White Test Score Gap Through Third Grade*, Nat'l Bureau Econ. Rsch. (Jan. 2005); Ronald R. Ferguson & Jal Mehta, *An Unfinished Journey: The Legacy of Brown and the Narrowing of the Achievement Gap*, 85 Phi Delta Kappan 656 (May 1, 2004).

⁵⁹ Jaana Juvonen et al., *When and How Do Students Benefit From Ethnic Diversity in Middle School?*, 89 Child Dev. 1268 (July/Aug. 2018) ("Across all four pan-ethnic groups, school-level ethnic diversity was associated with lower sense of vulnerability (i.e., feeling safer, less victimized, and less lonely) as well as perceptions of teachers' fair and equal treatment of ethnic groups and lower out-group distance."); David S. Crystal, Melanie Killen & Martin Ruck, *It is Who You Know That Counts: Intergroup Contact and Judgments about Race-Based Exclusion*, 26 Brit. J. Dev. Psychol. 51 (Mar. 2008).

better for all students in diverse schools.⁶⁰ As noted above, during the peak years of school desegregation in the 1970s and 1980s, the racial achievement gap closed rapidly before it began expanding again in the subsequent decades.⁶¹ A recent study from Stanford University’s Center for Education Policy Analysis found that school segregation is one of the most significant causes of the racial achievement gap.⁶² For example, the gap in SAT scores between Black and White students is larger in segregated districts. A 2006 study showed that the SAT score disparity is

⁶⁰ Roslyn Arlin Mickelson et al., *A Metaregression Analysis of the Effects of School Racial and Ethnic Composition on K–12 Reading, Language Arts, and English Outcomes*, 7 Soc. Race & Ethnicity 401 (2021) (“The results indicate a small, negative, statistically significant relationship between the percentage of a school’s disadvantaged minority enrollment and the mean reading achievement of the students who attend it. The negative association is stronger when segregation is measured by percentage Black and is stronger for high school students. These two findings suggest that the disadvantages of segregated education cumulate as more structurally vulnerable students transition from elementary to secondary school. Additional results suggest that a school’s racial composition effect is not the same as its socioeconomic status composition effect.”). See also Roslyn Arlin Mickelson et al., *Effects of School Racial Composition on K–12 Mathematics Outcomes: A Metaregression Analysis*, 83 Rev. Educ. Rsch. 121 (2013) (“Results indicate that school racial isolation has a small statistically significant negative effect on overall building-level mathematics outcomes.”).

⁶¹ Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, The Civil Rts. Project, Harvard Univ. (July 2021).

⁶² Sean Reardon, Demetra Kalogrides, & Kenneth Shores, *The Geography of Racial/Ethnic Test Score Gaps* (Ctr. for Educ. Pol’y Analysis, Working Paper No. 16-10, May 2018).

25% smaller in completely integrated districts when compared to completely segregated districts.⁶³

Diverse elementary and secondary schools also provide social and cultural benefits. Racially diverse classrooms are proven to counteract stereotypical and racist attitudes.⁶⁴ These effects are long-lasting. Students who attend diverse high schools are more likely to live in diverse localities later in life.⁶⁵ Integrated environments also produce students with more confidence, greater leadership skills, and reduced anxiety.⁶⁶

These are not novel concepts, and they have long been recognized by this Court. As the Court said in *Brown v. Board of Education*, “A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to

⁶³ David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap* (Nat’l Bureau of Econ. Rsch., Working Paper No. 12078, Mar. 2006).

⁶⁴ Rebecca S. Bigler & Lynn S. Liben, *A Developmental Intergroup Theory of Social Stereotypes and Prejudices*, *Advances in Child Dev. & Behavior* 39 (2006); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Personality & Soc. Psychol.* 751 (2006).

⁶⁵ K. J. R. Phillips et al., *Integrated Schools, Integrated Futures? A Case Study of School Desegregation in Jefferson County, Kentucky, From the Courtroom to the Classroom: The Shifting Landscape of School Desegregation*, at 239-70 (Claire Smrekar & Ellen Goldring eds., Harv. Educ. Press 2009).

⁶⁶ Linda R. Tropp & Suchi Saxena, *Re-weaving the Social Fabric Through Integrated Schools: How Intergroup Contact Prepares Youth to Thrive in a Multicultural Society*, *Nat’l Coal. on Sch. Diversity* (May 2018); Shana Levin et al., *The Effects of Ingroup and Outgroup Friendship on Ethnic Attitudes in College: A Longitudinal Study*, 6 *Grp. Processes & Intergroup Rel.* 76 (2003).

[retard] the educational and mental development of [African American] children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”⁶⁷ Moreover, the benefits of early exposure to diverse schools are widely recognized and accepted by elementary and secondary school leaders and practitioners. For example, the California Department of Education describes its belief and purpose as follows: “California will provide a world-class education for all students, from early childhood to adulthood. . . Together, as a team, we prepare students to live, work, and thrive in a multicultural, multilingual, and highly connected world.”⁶⁸

The increasing *de facto* segregation discussed in Section I.A. demonstrates that the continuing need for the type of narrowly tailored race-conscious measures allowed under *PICS*, 551 U.S. 701 (2007). Petitioner’s *amici* misunderstand and misconstrue *PICS*. While the Court struck down Seattle School District’s student assignment plan after finding that it failed to meet the requirements of narrow tailoring, the Court also acknowledged that elementary and secondary schools can use narrowly tailored race-conscious measures to promote the benefits of diversity and avoid the consequences of racial isolation. *Id.* at 789 (Kennedy, J., concurring). While “[a]ssigning to each student a personal designation according to a crude system of individual racial classifications” is

⁶⁷ 347 U.S. 483, 494, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954), supplemented *sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

⁶⁸ *Belief & Purpose*, Cal. Dep’t of Educ., <https://www.cde.ca.gov/eo/mn/mv/> (last visited July 7, 2022).

unconstitutional, “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races through other means.” *Id.* Permissible methods available to public school districts include (1) strategic selection of sites for new schools; (2) attendance boundaries drawn with “general recognition of the demographics of neighborhoods”; (3) allocation of “resources for special programs”; (4) “targeted” recruiting of students and faculty; and (5) “tracking enrollments, performance, and other statistics by race.” *Id.* As Justice Kennedy pointed out in his concurrence, the Constitution does not mandate that public schools sit idly by as the problems of segregation and racial isolation continue to grow. *Id.* at 788 (Kennedy, J, concurring) (writing that he “cannot endorse that conclusion” that “the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools”). Thus, in *PICS*, the “Court kept race-conscious policies alive, while at the same time making it much more difficult for school districts to balance school enrollments based on that consciousness.”⁶⁹

The benefits of and need for such measures in some circumstances obviously remain, and the concerns about their application expressed by Petitioner’s *amici* are factually and legally unfounded. For example, the measures discussed by Petitioner’s *amici* in three Council member districts—Boston, San Francisco, and New York—are no longer being implemented and in any event are not race-conscious student assignment plans that would demand strict

⁶⁹ Amy Stuart Wells, *Seeing Past the “Colorblind” Myth of Education Policy*, Nat’l Educ. Pol’y Ctr. (Mar. 2014), at 5.

scrutiny. Although Petitioner’s *amici* characterize Boston Public Schools’ decision to temporarily pause its “selective program for high performing fourth, fifth and sixth graders” called Advanced Work as driven by the district’s desire to be “antiracist,”⁷⁰ the district actually paused that program because the district was unable to administer the standardized test used for admissions due to the COVID-19 pandemic.⁷¹ Similarly, San Francisco Unified School District (“SFUSD”)⁷² passed an interim resolution in 2020 to replace the academic admissions criteria at Lowell

⁷⁰ Brief of Hamilton Lincoln Law Inst. et al. as *Amici Curiae* Supporting Petitioner, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard Coll.* (Nos. 20-1199 & 21-707), at 8-9 n.4 (citing Meg Woolhouse, *Boston Public Schools Suspends Test for Advanced Learning Classes; Concerns About Program’s Racial Inequities Linger*, GBH News (Feb. 26, 2021)).

⁷¹ Ali Swenson, *Boston Schools Aren’t Suspending Advanced Classes*, AP News (Mar. 4, 2021) (fact-checking “erroneous reports that Boston’s public school system would stop offering some advanced classes because the majority of students taking them were White and Asian”); Chelsey Cox, *Fact Check: Pandemic to Blame for Advanced Program Testing Suspension in Boston*, USA Today (Mar. 8, 2021). GBH News originally tweeted, “ICYMI: Boston Public Schools announced Friday that they will be suspending a program that provided advanced work to some students after discovering that over 70% were White or Asian, even though nearly 80% of all BPS students are Hispanic and Black.” @GBHNews, Twitter (Feb. 28, 2021, 12:00 PM), <https://twitter.com/GBHNews/status/1366085775775961091>. Later that day, GBH News tweeted, “CORRECTION: This tweet erroneously stated Boston Public Schools’ advanced work program is being suspended. The city is only suspending the entrance exam, not the program.” @GBHNews, Twitter (Feb. 28, 2021, 6:54 PM), <https://twitter.com/gbhnews/status/1366189643880923138>.

⁷² Brief of Hamilton Lincoln Law Inst., *supra* note 70, at 8-9 n.4.

High School, a selective enrollment school, with a random lottery system for one year because it was unable to administer the standardized test used for admission due to the pandemic.⁷³ SFUSD passed another interim resolution in 2021 to extend the prior year's interim admissions criteria.⁷⁴ While the District is examining its use of academic admissions criteria,⁷⁵ it also has moved to reinstate the academic admissions criteria at Lowell for the 2023-24 school year.⁷⁶ Likewise, the New York City Department of

⁷³ S.F. Unified Sch. Dist. & Cnty. Office of Educ., *Press Release: SF Board of Education Approves Maintaining Current Admissions Criteria for Lowell High School for 2022-23 School Year* (Dec. 17, 2021); S.F. Unified Sch. Dist., *Resolution to Adopt an Interim Lowell Admissions Policy for the 2021-22 School Year* (Oct. 20, 2020), <https://go.boarddocs.com/ca/sfusd/Board.nsf/files/BUdT6W75DB92/%24file/Interim%20Lowell%20Admissions%20Policy.pdf>.

The academic-based admissions policy for Lowell High School is described in S.F. Unified Sch. Dist. & Cnty. Office of Educ., *Board Policy 5120.1* (Oct. 9, 2018), <https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=AZS28M7BDEA9>.

⁷⁴ S.F. Unified Sch. Dist., *Board Agenda, Superintendent's Resolution No. 2010-20Sp1 to Adopt an Interim Lowell Admissions Policy for the 2021-22 School Year* (Oct. 20, 2020), <https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=BUDT6M75DB8C>.

⁷⁵ SFUSD, *SF Board of Education Approves Maintaining Current Admissions Criteria for Lowell High School for 2022-23 School Year* (Dec. 17, 2021); The academic-based admissions policy for Lowell High School is described in Board Policy 5120.1, available at <https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=AZS28M7BDEA9>.

⁷⁶ S.F. Unified Sch. Dist., *Superintendent's Resolution to Extend the Interim Lowell Admissions Policy for the 2023-2024 School Year* (June 22, 2022),

Education (“NYDOE”), has been cited as an example of the evils of race-conscious student assignment.⁷⁷ While former mayor Bill de Blasio released a plan in 2018 to “improve diversity” by eliminating the Specialized High School Admissions Test (SHSAT),⁷⁸ since de Blasio left office on January 1, 2022, there have been no efforts to implement his plan. As of March 2022, Schools Chancellor David Banks, moreover, said there would be “no changes” to NYCDOE’s high school admissions process.⁷⁹ None of the measures cited by Petitioner’s *amici* are race-conscious: Even if selective admissions criteria had been eliminated to improve diversity—and ultimately

<https://go.boarddocs.com/ca/sfusd/Board.nsf/goto?open&id=CD6PRK65D273>; S.F. Unified Sch. Dist., *Superintendent’s Resolution No. 225 24Sp1 (Amended) to Form a Task Force to Provide Community Informed Recommendations to Improve District High Schools* (June 22, 2022), <https://go.boarddocs.com/ca/sfusd/Board.nsf/files/CFDW22833EF0/%24file/Amended%20-%20Resolution%20to%20Form%20a%20Task%20Force%20to%20Provide%20Recommendations%20to%20Improve%20High%20Schools%20-%20Google%20Docs.pdf>.

⁷⁷ Brief of Hamilton Lincoln Law Inst., *supra* note 70, at 8-9 n.6.

⁷⁸ Bill de Blasio, *Our Specialized Schools have a Diversity Problem. Let’s Fix It*, Chalkbeat (June 2, 2018). The SHSAT is taken by eighth and ninth grade students to determine eligibility for admission into one of NYCDOE’s eight selective-enrollment high schools. *Specialized High School Admissions Test*, N.Y.C. Dep’t of Educ., <https://www.schools.nyc.gov/learning/testing/specialized-high-school-admissions-test> (last visited July 7, 2022).

⁷⁹ Jillian Jorgensen, *Exclusive: Schools Chancellor Will Not Make Last-Minute Changes to High School Admissions Process*, Spectrum News NY1 (Mar. 9, 2022).

they were not in any of these three districts—such action would not trigger strict scrutiny.

The attempts of Petitioner’s *amici* to twist newspaper headlines about Council member districts into arguments against race-conscious student assignment measures at the elementary and secondary levels are nothing but a strawman, addressing an issue not presented in this case. But due to the resurgence of segregation and the persistence of racial and ethnic achievement gaps, school districts, including members of the Council, must retain their limited authority under *PICS* to take race into account in a narrowly tailored way. Furthermore, since all the measures about which Petitioner’s *amici* complain are in fact race-neutral, the recent examples actually show that school districts are extremely careful to remain within the bounds of existing law.

To upset this balance, particularly in a case in which the issue has not been addressed at all in the courts below, would be both misguided and damaging to public education. Not only would it subvert the long tradition of local control by school districts, but it also would undermine deliberate, careful, and incremental efforts necessary to counteract further resegregation of our Nation’s public schools.

CONCLUSION

For these reasons, the judgments of the courts below should be affirmed.

Respectfully submitted,

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