

Nos. 20-1199, 21-707

In The

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
H

TABLE OF CONTENTS
INTEREST OF *AMICI CURIAE*

TABLE OF AUTHORITIES

CASES:

<i>Brown v. Board of Educ.</i> , 347 U.S. 483 (1954)	10, 13
<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
----------------------------	----

OTHER AUTHORITIES:

Anderson, Michael J., <i>Race As A Factor in</i> <i>K-12 Student Assignment Plans:</i> <i>Balancing the Promise of Brown with the</i> <i>Modern Realities of Strict Scrutiny</i> , 54 CATH. U. L. REV. 961 (2005)	18
---	----

Ayscue, Jennifer, Erica Frankenberg & Genevieve Siegel-Hawley, <i>The Complementary Benefits of Racial and Socioeconomic Diversity in Schools</i> (The Nat'l Coal. on Sch. Diversity, Rsch. Br. No. 10, 2017).....	8, 9, 10
Braddock II, Jomills Henry,	

Committee on Social Science Research Evidence on Racial Diversity in Schools, <i>Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases</i> , NAT'L ACAD. OF EDUC. (Robert L. Linn & Kevin G. Welner, eds. 2007)	7
Eaton, Susan & Gina Chirichigno, <i>The Impact of Racially Diverse Schools in a Democratic Society</i> (Nat'l Coal. on Sch. Diversity, Rsch. Br. No. 3, 2011)	11
George, Janel & Linda Darling-Hammond, <i>Advancing Integration and Equity Through Magnet Schools</i> , LEARNING POL'Y INST. (2021).....	25, 26
Holmes, Lisa J., <i>After Grutter: Ensuring Diversity in K-12 Schools</i> , 52 UCLA L. REV. 563 (2004).....	9
Information on Berkeley Unified's Student Assignment Plan, BERKELEY PUB. SCHS. (last visited July 20, 2022).....	19
Juvonen, Jaana, Kara Kogachi & Sandra Graham, <i>When and How Do Students Benefit from Ethnic Diversity in Middle School</i> , 89 CHILD DEV. 1268 (2018).....	9
Learned-Miller, Carole, <i>Cambridge Public Schools: Pioneers of Equitable Choice</i> , THE CENTURY FOUND. (2016)	21

- Mickelson, Roslyn Arlin, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence* (The Nat'l Coal. on Sch. Diversity, Rsch. Br. No. 5, 2016)..... 8, 16
- Nishina, Adrienne, Jakeem Amir Lewis, Amy Bellmore & Melissa R. Witkow, *Ethnic Diversity and Inclusive School Environments*, 54 EDUC. PSYCH. 306 (2019) 9
- Orfield, Gary, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, UCLA, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES (2009) 13
- Petty, Laura, *The Way Forward: Permissible and Effective Race-Conscious Strategies for Avoiding Racial Segregation in Diverse School Districts*, 47 FORDHAM URB. L.J. 659 (2020)..... 19, 20
- Potter, Halley, *School Segregation in U.S. Metro Areas*, THE CENTURY FOUND. (May 17, 2022)..... 12, 13
- Potter, Halley & Kimberly Quick, *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, THE CENTURY FOUND. (2016)..... 20, 22

Rafa, Alyssa & Maxine Roberts, <i>Building a Diverse Teacher Workforce</i> , EDUC. COMM'N OF THE STATES (2020)	23, 24
San Francisco Unified School District and County Office of Education Board Policy 5101.2, Elementary School Student Assignment (Dec. 2020)	15, 21
U.S. Dep't of Educ., <i>Improving Outcomes for</i>	

Wysienska-Di Carlo, Kinga, Matthew Di Carlo & Esther Quintero, <i>Teacher Segregation in Los Angeles and New York City</i> (Albert Shanker Inst., Rsch. Br., May 2016).....	23
---	----

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 1

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

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

The Court should decline that invitation to intrude on school districts' long-established authority. *Grutter* establishes an independent rule specific to

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*

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

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

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

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,

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*

housing status, and so forth.²⁹

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 C(Br)6.1(./

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 -3.2(r48.03 Tw87(nc-()-171.2(a)-4.9(.)-2.8276-241.1 2*

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 “ave-4.9(t)-siE(i)53.8(2,0 1 1 BT /F)-61.2()]TT2.9(,)-42.9(m(ho

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.

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.

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

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

August 1, 2022