

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 21-1303 & No. 22-1144

BOSTON PARENT COALITION  
FOR ACADEMIC EXCELLENCE CORP.,

*Plaintiff-Appellant,*

v.

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON;  
ALEXANDRA OLIVER-DAVILA; MICHAEL D. O'NEILL;  
HARDIN COLEMAN; LORNA RIVERA;  
JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO;  
BRENDA CASSELLIUS, Superintendent of the Boston Public Schools,

*Defendants-Appellees,*

v.

THE BOSTON BRANCH OF THE NAACP;  
THE GREATER BOSTON LATINO NETWORK;  
ASIAN PACIFIC ISLANDER CIVIC ACTION NETWORK;  
ASIAN AMERICAN RESOURCE WORKSHOP;  
MAIRENY PIMENTEL; H.D.,

*Defendants-Intervenors-Appellees,*

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On Appeal from the United States District Court  
for the District of Massachusetts  
Honorable William G. Young, District Judge

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF  
MASSACHUSETTS, INC., LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW, AND  
NATIONAL COALITION ON SCHOOL DIVERSITY  
IN SUPPORT OF DEFENDANTS-APPELLEES

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the amici curiae state that each is a not-for-profit corporation, none has a corporate parent, none issues stock, and no publicly held corporation owns 10% or more of any of them, individually or collectively.

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## STATEMENT OF INTEREST<sup>1</sup>

The American Civil Liberties Union Foundation (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. In support of these principles, the ACLU has appeared as direct counsel or amicus curiae in numerous cases concerning educational equity and the rights of students. *E.g.*, *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365 (2016); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The ACLU of Massachusetts, Inc. is an affiliate of the ACLU, and has participated as amicus curiae before this Court on education-related cases, including *Doe v. Hopkinton Public Schools*, 19 F.4th 493 (1st Cir. 2021).

The Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”) uses legal advocacy to achieve racial justice fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. As part of this work, the Lawyers’ Committee’ Educational Opportunities Project promotes

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. This brief is filed with the consent of the parties.

integration and diversity in K-12 public schools and higher education as a foundational principle, representing students and alumni as intervenors and amici in the three active race-conscious college admissions cases, and amici and other clients in several other educational opportunity cases. *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022); *Students for Fair Admissions v. Univ. of N.C.*, No. 1:14CV954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021), cert. granted, 142 S.Ct. 896 (2022); *In re Renewal Application of TEAM Acad. Charter Sch.*, 252 A.3d 1008, 1011 (2021); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, (4th Cir. 2022).

Founded in 2009, the National Coalition on School Diversity (NCSD) is a network of 50+ national civil rights organizations, university-based research centers, and state and local coalitions working to expand support for government policies that promote school diversity and reduce racial and economic isolation in elementary and secondary schools. NCSD serves as the central hub of the school diversity field, supporting brave, bold, visionary changemakers and bridgebuilders as they design, enact, implement, and uplift K-12 public school integration policies and practices. Its work is informed by an advisory panel of scholars and academic researchers working on issues of equity, diversity, and desegregation/integration.

## INTRODUCTION

At its core, this case concerns whether a City may consciously pursue diversity—encompassing racial, socioeconomic, and geographic diversity—in its public schools through race-neutral means. Or instead, as Appellants argue, whether a race-neutral school admissions policy is subject to strict scrutiny and presumed unconstitutional if the policy was selected in part based on a belief that it would advance student body diversity. Here, the district court properly rejected Appellants’ argument. The Supreme Court and this Court have also clearly affirmed that efforts to improve diversity through race-neutral means are permissible under the Equal Protection Clause. *See Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015) (affirming that government actors may “choose to foster diversity and combat racial isolation with race-neutral tools” without raising equal protection concerns); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 87 (1st Cir. 2004) (affirming that “the mere invocation of racial diversity as a goal is insufficient to subject [a policy] to strict scrutiny” and contrasting cases addressing laws involving explicit racial classifications).

The pursuit of diverse and inclusive schools is not only constitutionally permissible, but also serves to nurture and strengthen a heterogeneous democratic society. Education is pivotal to the health of a democracy—it is “the very foundation of good citizenship” and “a principal instrument in awakening the child to cultural values.” *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954); *see also Anderson*, 375 F.3d at 91 (noting the “high stakes in the

access to public education”). Diversity within public schools in turn ensures that students learn the values of equality and respect for differences. *Cf. Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment) (“Diversity . . . is a compelling educational goal a school district may pursue.”); *id.* at 743 (Roberts, C.J.) (describing student body diversity as “a worthy goal”). In schools, students can interact with peers who have vastly different experiences from their own and engage with diverse viewpoints, both of which nurture their abilities to actively participate in a heterogenous democracy. *See generally Anderson*, 375 F.3d at 95.

Achieving the benefits of diverse and inclusive schools is as important today as ever and requires explicit attention. Despite education’s critical role in a democracy, public school students across the United States and in Massachusetts are increasingly educated in racially and socioeconomically segregated classrooms. Students are becoming more racially isolated in schools, even as the state and country become more diverse.

Boston “Exam Schools”—Boston Latin School, Boston Latin Academy, and John D. O’Bryant School of Mathematics and Science—are examples of these segregated educational environments, but with notable distinctions—both practical and symbolic. The opportunities afforded by these schools are not available at all Boston public schools. Admissions to these schools is limited to only a fraction of Boston’s public school students and has long represented a golden ticket to highly-sought after college and career opportunities.



In an effort to diversify access to the opportunities offered through Exam Schools, the Boston School Committee (the “Committee”) enacted an interim plan governing 2021-2022 admissions for the Exam Schools (the “Plan”). Unlike in prior years, the Plan no longer required admissions exams. Instead it used three criteria: (1) residency in Boston; (2) minimum performance thresholds in English Language Arts and Math; and (3) performance at grade level on standardized tests. Rule 60(b) Ruling, *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, No. 21-10330-WGY, 2021 WL 4489840, at \*6 (D. Mass. Oct. 1, 2021). To select among eligible applicants, the Plan involved a multiple round assignment process including the use of zip codes to rank students after the first round. *Id.* All of the Plan’s policy changes were facially race-neutral; none considered an applicant’s race in deciding whether to admit them.

Nevertheless, Appellants argue that the intent to further diversity, including racial diversity, is inherently suspect. *See* Appellant’s Appendix 2093, First Amended Verified Complaint (asserting unconstitutional purpose based on alleged intent to achieve enrollment that “better reflects the racial, socioeconomic, and geographic diversity of all students (K-12) in the city of Boston”) (internal quotation marks and emphasis omitted); Rule 60(b) Ruling, 2021 WL 4489840, at \*10 (collecting additional citations). This argument is not only contradicted by precedent, but would severely undermine the ability of public schools to fairly distribute educational opportunities, advance democratic values, and in turn for society to reap the benefits that diverse public schools afford to students and their

communities. This Court should reject Appellants' argument and affirm the district court.

Public schooling between kindergarten and twelfth grade is a vital resource. When a state affords that resource to its children, as Massachusetts does, *see, e.g.*, Mass. Gen. Laws ch. 71, § 4, those students have “a legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause” *Goss v. Lopez*, 419 U.S. 565, 574 (1975). And in deciding how to fairly allocate that resource, school committees may permissibly consider many factors. One such factor is diversity: the notion that students of all races and backgrounds may equally take advantage of, and contribute to, the school's resources. *See Parents Involved*, 551 U.S. at 799 (Kennedy, J., concurring in part and concurring in judgment). Diversity considerations are at least as justified when the relevant K-12 resource is not available to all students, like textbooks, but instead scarce, like admission to schools whose particular curricular and extracurricular opportunities are not extended district-wide. Below, amici explain that such race-neutral efforts to pursue diversity and ensure that education is equally available to students of all races are not only constitutionally permissible, but also (1) advance democratic values; (2) remain a crucial tool in confronting growing school segregation; and (3) are pursued by school districts across the country in furthering equal access to educational opportunity.

## ARGUMENT

### I. **The Promotion of Diversity in Education Furthers the Democratic Values of Education.**

The pursuit of student body diversity, including racial diversity, through neutral means is lawful under Supreme Court precedent. This pursuit promotes our nation’s “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.” *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in judgment). The Supreme Court has long recognized that schools may pursue and “adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” *Id.* at 788. Commitment to diversity is especially important because “America’s public schools are the nurseries of democracy.” *Mahanoy*, 141 S. Ct. at 2046. Indeed, these cases illuminate the inextricable link between access to education and the health of a democracy, as education is “the very foundation of good citizenship.” *Brown*, 347 U.S. at 493; *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government.”) (internal quotation marks omitted).

Courts have repeatedly recognized the educational benefits flowing from diverse student bodies, including how student body diversity can enhance the civic function of public schools. Public schools are one of the key places in which young people can learn “the values on which our society rests.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). A core part of this learning experience includes preparation

“for citizenship in our pluralistic society” and the ability “to live in harmony and mutual respect” with people of other races and backgrounds. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (internal quotation marks omitted). A diverse student body fosters “cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” *Fisher II*, 579 U.S. at 381 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)); *see also Anderson*, 375 F.3d at 91 (finding school committee’s new assignment plan rationally related to achieving legitimate state interests in fostering “excellence, equity and diversity through access and educational opportunity throughout the Boston Public Schools”).

And “[e]qually important, student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.” *Fisher II*, 579 U.S. at 381 (internal quotation marks omitted) (quoting *Grutter*, 539 U.S. at 330). This is because “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 308; *SFFA v. Harvard*, 980 F.3d at 187 n.25.

Research supports the benefits of racial and ethnic diversity, “cognitive, social, and emotional—for *all* students who interact with classmates from different

backgrounds, cultures, and orientations to the world.”<sup>2</sup> *See also Grutter*, 539 U.S. at 330 (noting the “numerous expert studies and reports” showing the substantial benefits stemming from study body diversity). Studies find that students who reported “the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”<sup>3</sup> Researchers also find that students who attend racially and socioeconomically diverse schools have “[h]igher achievement in mathematics, science, language, and reading.”<sup>4</sup> These benefits are shown regardless of students own racial or socioeconomic status, and are cumulative over time and generational.<sup>5</sup> Such students are also more likely to have higher average test scores and enroll at a four-year college, and less likely to drop out.<sup>6</sup>

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<sup>2</sup> Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, The Century Foundation, 4 (Feb. 9, 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?agreed=1>; *see also* Linda R. Tropp & Suchi Saxena, *Re-Weaving the Social Fabric through Integrated Schools: How Intergroup Contact Prepares Youth to Thrive in a Multiracial Society*, National Coalition on School Diversity (May 2018), [http://www.school-diversity.org/wp-content/uploads/2018/05/NCSD\\_Brief13.pdf](http://www.school-diversity.org/wp-content/uploads/2018/05/NCSD_Brief13.pdf).

<sup>3</sup> Patricia Gurin, *Expert Report of Patricia Gurin*, 5 Mich. J. Race & L. 363, 365 (1999), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1217&context=mjrl>.

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<sup>5</sup> *Id.* at 1-2, 3.

<sup>6</sup> *Id.* at 4.

Diverse educational environments can even offer physical benefits. Research shows that a school’s emphasis on the value of racial and ethnic diversity “predicts better cardiometabolic health among adolescents of color.”<sup>7</sup> Conversely, students who were “isolated from peers of different racial/ethnic, linguistic, or socioeconomic backgrounds . . . are deprived of appropriate occasions for inter-group interactions” as well as “the opportunity to develop the sociocultural knowledge, shared understandings, and behavior patterns that they will need as adults in order to function harmoniously and productively in ethnically heterogenous settings—a serious problem for a society as increasingly diverse as ours.”<sup>8</sup>

Diverse education environments also benefit society. Empirical analyses have linked classroom diversity to positive “democracy outcomes,” with students experiencing “diversity in classroom settings and in informal interactions show[ing] the most engagement during college in various forms of citizenship, and the most engagement with people from different races and cultures.”<sup>9</sup> Such students “are better able to understand and consider multiple perspectives, deal

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<sup>7</sup> Cynthia S. Levine et al., *Students of Color Show Health Advantages When They Attend Schools that Emphasize the Value of Diversity*, 116 Proc. Nat’l Acad. Sci. 6013, 6013 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6442588/pdf/pnas.201812068.pdf>.

<sup>8</sup> Luis Laosa, *The New Segregation*, 10 Educ. Testing Serv. 1, 6 (2001), <https://origin-www.ets.org/Media/Research/pdf/PICPNV10N1.pdf>.

<sup>9</sup> Patricia Gurin, *supra*, at 366.

with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good.”<sup>10</sup> Students learning in diverse environments thus experience “a dramatic decrease in discriminatory attitudes and prejudices,” which increases their likelihood of living in diverse neighborhoods, emerging with greater intellectual self-confidence, and enhancing their own leadership skills.<sup>11</sup> These benefits of diversity begin in K-12 schools and “flow in all directions—to white and middle-class students as well as to minority and low-income pupils.”<sup>12</sup> The timing of exposure is particularly important as primary and secondary education is a “critical time” and “the racial attitudes children develop early on can become entrenched, life-long beliefs.”<sup>13</sup>

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<sup>10</sup> *Id.* at 365.

<sup>11</sup> Mickelson, *supra*, at 5-6.

<sup>12</sup> Wells et al., *supra*, at 14 (Feb. 9, 2016); *see also* James Laurence et al., *Prejudice, Contact, and Threat at the Diversity-Segregation Nexus: A Cross-Sectional and Longitudinal Analysis of How Ethnic Out-Group Size and Segregation Interrelate for Inter-Group Relations*, 97 *Soc. Forces* 1029 (2018); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Personality & Soc. Psych.* 751 (2006); Robert L. Linn & Kevin G. Welner, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and Supreme Court Cases*, *Nat’l Acad. of Educ.* (2007), <https://files.eric.ed.gov/fulltext/ED531144.pdf> (benefits of diverse schools include higher academic attainment, better problem solving skills, and increased cultural competency); Mickelson, *supra* (attending racially diverse schools reduces individual bias).

<sup>13</sup> Robert A. Garda, Jr., *The White Interest in School Integration*, 63 *Fla. L. Rev.* 599, 626 (2011).

For selective public schools like the Exam Schools, attention to diversity is all the more important. While these schools represent a small fraction of Boston’s, and the country’s, public schools, “they loom large symbolically.”<sup>14</sup> The Exam Schools boast long lists of notable alumni, including numerous leaders who shape our democracy through law, politics, journalism, science, and the arts.<sup>15</sup> When these pathways are available to students of all racial backgrounds, students and the public can “have confidence in the openness and integrity” of the system. *Grutter*, 539 U.S. at 332.

Conversely, when students attend racially segregated schools—even where segregation was not the result of overt animus—stigma and division grow. As courts have recognized, while “[t]he impact is greater when it has the sanction of the law,” *de facto* segregation may still produce stigma and division.<sup>16</sup> *Brown*, 347 U.S. at 494; *see also Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in judgment) (“[A]n injury stemming from racial prejudice can

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<sup>14</sup> Melissa Bailey, *A Golden Ticket: Efforts to Diversify Boston’s Elite High Schools Spur Hope and Outrage*, NBC News (Mar. 17, 2021), <https://www.nbcnews.com/news/education/golden-ticket-efforts-diversify-boston-s-elite-high-schools-spur-n1261199>.

<sup>15</sup> *Alumni, Boston Latin School*, Boston Public Schools, <https://www.bostonpublicschools.org/Page/120> (last accessed Sept. 2, 2022); *Alumni, Boston Latin Academy*, Boston Public Schools, <https://www.bostonpublicschools.org/Page/119> (last accessed Sept. 2, 2022); *Alumni, John D. O’Bryant School of Mathematics and Science*, Boston Public Schools, <https://www.bostonpublicschools.org/Page/128> (last accessed Sept. 2, 2022).

<sup>16</sup> Courts have also recognized the negative impacts of segregation for Latinx students, Native American students, and English learners. *See, e.g., Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Lau v. Nichols*, 414 U.S. 563 (1974).



hurt as much when the demanding treatment . . . stems from bias masked deep within the social order as when it is imposed by law.”).

Likewise, and again without regard to whether segregation arose from intentional segregation policies, research catalogues long-term negative consequences. For example, students who attended segregated schools continue to feel socially distanced as young adults, and are more likely to prefer same race neighborhoods, further contributing to an increasingly segregated society.<sup>17</sup> Additionally, children who are segregated by race or other groupings are taught to understand these characteristics as valid means of distinguishing people and, in turn, treating them differently.<sup>18</sup> These negative consequences are a direct threat to the health and functioning of an increasingly heterogenous, democratic society—and school communities are rightly concerned with these harms.

## **II. Pursuing Diversity Enables Schools to Curtail Increasing Segregation and Inequality.**

Public schools have especially strong reasons to consider diversity when allocating opportunities to attend selective public schools, in light of growing and troubling evidence that segregation and inequity are both damaging and intertwined, and increasing.

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<sup>17</sup> Jomills Henry Braddock, II & Amaryllis Del Carmen Gonzales, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 112 Teachers Coll. Rec. 1631 (2010), <https://journals.sagepub.com/doi/10.1177/016146811011200606>.

<sup>18</sup> Ryan D. Enos & Christopher Celaya, *The Effect of Segregation on Intergroup Relations*, 5 J. Experimental Pol. Sci. 26 (2018), <https://scholar.harvard.edu/files/renos/files/enoscelaya.pdf>.

**A. Segregation by Race is Increasing in Schools Across the Country.**

The United States population is increasingly diverse, underscoring the need for education to adequately prepare students to engage in and contribute to a heterogenous democratic society. However, while public school enrollment is also growing more diverse, schools are also increasingly segregated.

Over the past decades, nationwide public school enrollment has “grown larger in size and more diverse by race” with no singular, majority racial group.<sup>19</sup> The “two-race public school system” with a Black and white divide, characteristic of education in the civil rights era, is largely a remnant of the past.<sup>20</sup> Between 1968 and 2019, “the nation’s enrollment of white students . . . declined by 11 million . . . while the enrollment of Latinos . . . increased by 11 million.”<sup>21</sup> Additionally, “[t]here are now nearly three million Asian students and two million students who identify as multiracial.”<sup>22</sup> According to data from 2018 and 2019, English Learners constitute roughly 10% of the total U.S. student population, and 14% of all public

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<sup>19</sup> Erica Frankenberg et al., *Harming our Common Future: America’s Segregated Schools 65 Years After Brown*, Univ. Cal. L.A. C.R. Project, 15 (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

school students receive special education services under the Individuals with Disabilities Education Act (IDEA).<sup>23</sup>

Yet despite these changing demographics, public schools in the country have become increasingly segregated.<sup>24</sup> Although the Supreme Court decision in *Brown* and subsequent desegregation efforts led to a sharp decline in Black-white school segregation, desegregation peaked in the 1980s.<sup>25</sup> Since this peak, the share of “intensely segregated” schools, or schools that enroll 90-100% non-white students, has more than tripled from 1988 to 2016.<sup>26</sup> In 2016, the typical white, Black, and Latinx<sup>27</sup> student “attend[ed] a school in which the largest share of his/her schoolmates are same-race peers.”<sup>28</sup> Asian American and Pacific Islander

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<sup>23</sup> See *English Language Learners in Public Schools*, Nat’l Ctr. for Educ. Stat. (2021), [https://nces.ed.gov/programs/coe/pdf/2021/cgf\\_508c.pdf](https://nces.ed.gov/programs/coe/pdf/2021/cgf_508c.pdf); *Students With Disabilities*, Nat’l Ctr. for Educ. Stat. (2021), [https://nces.ed.gov/programs/coe/pdf/2021/cgg\\_508c.pdf](https://nces.ed.gov/programs/coe/pdf/2021/cgg_508c.pdf).

<sup>24</sup> Ayanna Runcie, *School segregation on the rise 65 years after Brown v. Board of Education*, CBS News (May 20, 2019), <https://www.cbsnews.com/news/school-segregation-on-the-rise-65-years-after-brown-v-board-of-education/>.

<sup>25</sup> Will McGrew, *U.S. school segregation in the 21st century*, Wash. Ctr. for Equitable Growth, 5 (Oct. 15, 2019), <https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/>; Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, Univ. Cal. L.A. C.R. Project, 11 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

<sup>26</sup> Frankenberg et al., *supra*, at 21.

<sup>27</sup> Latinx describes a person of Latin American origin or descent and is used as a gender-neutral or nonbinary alternative to Latino or Latina. *Latinx*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/Latinx#:~:text=Definition%20of%20Latinx,alternative%20to%20Latino%20or%20Latina%20%E2%80%A6> (last visited July 27, 2022).

<sup>28</sup> Frankenberg et al., *supra*, at 22.

(“AAPI”) students also attended schools with a disproportionately large portion of same-race peers.<sup>29</sup> White and Latinx students are the most segregated, with white students typically attending schools in which 69% of the students are white, while Latinx students typically attend schools in which 55% of the students are Latinx.<sup>30</sup> Segregation for Black students is significant although less pronounced—with the average Black student attending schools in which 47% of their peers are Black—and segregation for Black students is also rising across the U.S.<sup>31</sup>

Today, schools in the northeast are the most segregated.<sup>32</sup> Boston is no exception. Although Boston’s “social fabric has been re-knit” and “[a]ttitudes in Boston have evolved, [and] policies have changed” since the city once resisted the mandates of *Brown*, segregation persists in Boston Public Schools. *See Anderson*, 375 F.3d at 95. Although Massachusetts is becoming more diverse, “students of color are becoming more racially isolated in urban schools.”<sup>33</sup> The proportion of diverse schools in the three largest districts—Boston, Springfield, and Worcester—has decreased from 25.7% to 21.1% between the 2008 and 2019 school years.<sup>34</sup> In

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<sup>29</sup> *Id.* at 22–23.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.*

<sup>32</sup> Sean Reardon et al., *Brown Fades: The End of Court Ordered School Desegregation and the Resegregation of America Public Schools*, 31 J. Pol’y Analysis & Mgmt. 876 (2012).

<sup>33</sup> Jack Schneider et al., *School Integration in Massachusetts: Racial Diversity and State Accountability*, Beyond Test Scores Project & Ctr. for Educ. & C.R., 12 (2020), [https://cecr.ed.psu.edu/sites/default/files/Demography\\_Report\\_FINAL\\_7.24.20.pdf](https://cecr.ed.psu.edu/sites/default/files/Demography_Report_FINAL_7.24.20.pdf).

<sup>34</sup> *Id.*

these three districts, 43.4% of students “attended intensely segregated non-white schools during the 2019-2020 school year.”<sup>35</sup>

The Exam Schools are a prime example of this troubling trend. Roughly 75% of Boston public school students are Black or Latinx, “but represent only 40% of enrollment at the [Exam Schools] and only 20% of enrollment at the most selective Boston Latin School.”<sup>36</sup> For the 2020-2021 school year, Black and Latinx students accounted for only 21% of the total number of students invited to enroll in BLS, whereas white students represented 48% of invitees.<sup>37</sup> This disparity is even more concerning when taking the applicant pool into account. According to data for the 2020-2021 academic year, Black and Latinx students made up nearly 70% of all Exam School applicants, whereas white students represented only 18% of applications.<sup>38</sup> According to a study conducted by researchers at the Harvard Kennedy School, high-achieving Black and Latinx students are substantially less

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<sup>35</sup> *Id.*

<sup>36</sup> Joshua Goodman & Melanie Rucinski, *Increasing Diversity in Boston’s Exam Schools*, Harvard Kennedy Sch. Rappaport Inst. for Greater Bos., 1, 6 (Oct. 2018), [https://scholar.harvard.edu/files/joshuagoodman/files/rappaport\\_brief.pdf](https://scholar.harvard.edu/files/joshuagoodman/files/rappaport_brief.pdf) (noting “evidence that many students receive out-of-school tutoring to help prepare for” the entrance exams).

<sup>37</sup> *Data on Boston’s Exam Schools* at data sheet 2-4, Lawyers Committee for Civil Rights Boston (Mar. 18, 2020), available at <http://lawyersforcivilrights.org/our-impact/education/data-on-bostons-exam-schools/>.

<sup>38</sup> *Id.* at data sheet 1.

likely to be invited to Exam Schools, *despite* having similar standardized test scores as their white and Asian peers.<sup>39</sup>

The lack of diversity in the Exam Schools extends beyond racial diversity. State data from 2018 showed that 58.3% of Boston students were “economically disadvantaged”<sup>40</sup> but according to district officials, the actual number could be as high as 66%.<sup>41</sup> Despite this fairly high representation across BPS, economically disadvantaged students are significantly underrepresented in the Exam Schools. Economically disadvantaged students make up only 16%, 32%, and 46% of students at BLS, BLA, and O’Bryant, respectively.<sup>42</sup>

**B. Inequity Between Segregated Schools is Growing.**

Due to the increase in racially and socioeconomically segregated schools, many Black and Latinx students do not receive an education on par with white

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<sup>39</sup> Goodman & Rucinski, *supra*, at 9.

<sup>40</sup> BPS defines “economic disadvantaged” students as students who participate “in one or more of the following state-administered programs: Supplemental Nutrition Assistance Program (SNAP); Transitional Assistance for Families with Dependent Children (TAFDC); Department of Children and Families’ (DCF) foster care program; and MassHealth (Medicaid).” *The Opportunity Index*, Bos. Pub. Sch. Off. of Opportunity & Achievement Gaps (Feb. 2018), <https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Domain/2301/Opportunity%20Index%20overview%20fact%20sheet%202.10.18.pdf>.

<sup>41</sup> Max Larkin, *How Massachusetts Lost Count Of Its Poor Students*, WBUR (Aug. 1, 2019), <https://www.wbur.org/news/2019/08/01/low-income-count>.

<sup>42</sup> Peter Ciurczak, *The most diverse high school in Massachusetts is . . .*, Bos. Indicators (Feb. 28, 2020), <https://www.bostonindicators.org/article-pages/2020/february/diversity-in-massachusetts-schools>.

students.<sup>43</sup> The confluence of residential segregation and growing income inequality has led to the “double-segregation” of Black and Latinx students, meaning that Black and Latinx students are more likely to attend both racially segregated *and* high poverty schools.<sup>44</sup> Residential segregation perpetuates school funding inequalities because “it creates higher-income communities, with predominantly white school districts that have more local tax revenue for their schools, compared to fewer dollars and resources for school[s] . . . in low-income, minority neighborhoods.”<sup>45</sup> Even when comparing communities across similar income levels, Black and Latinx communities are more likely to receive fewer resources than white communities.<sup>46</sup> A 2018 study published by the U.S. Commission on Civil Rights found that Black and Latinx students have less access to high-rigor courses than white students, and are twice as likely as white students

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<sup>43</sup> See, e.g., Emma García, *Schools are still segregated, and black children are paying a price*, Econ. Pol’y Inst. (Feb. 12, 2020), <https://files.epi.org/pdf/185814.pdf>; *Public Education Funding Inequity In an Era of Increasing Concentration of Poverty and Resegregation*, U.S. Comm. on C.R., 63–64 (Jan. 2018), <https://www.usccr.gov/files/pubs/2018/2018-01-10-Education-Inequity.pdf>; Ariel Jao, *Segregation, school funding inequalities still punishing Black, Latino students*, NBC News (Jan. 12, 2018), <https://www.nbcnews.com/news/latino/segregation-school-funding-inequalities-still-punishing-black-latino-students-n837186>.

<sup>44</sup> Orfield et al., *supra*, at 11; Jao, *supra*.

<sup>45</sup> Jao, *supra*.

<sup>46</sup> McGrew, *supra*, at 11.

to attend schools with a higher percentage of inexperienced teachers.<sup>47</sup> These manifestations of inequitable funding, both in the form of reduced access to high-rigor courses and experienced teachers, inevitably result in achievement gaps for Black and Latinx students.<sup>48</sup>

The persistent inequalities of segregated schools, and their long-term consequences, are especially pronounced in BPS and the Exam Schools. A vast majority of Boston public school students attend underperforming schools, while Exam School students have “a pipeline to the best schools, the best opportunities, and best resources.”<sup>49</sup> According to state data from 2019, 90% of graduates at the Exam Schools go to college, compared with 55% in the rest of the district.<sup>50</sup>

### **III. Schools’ Efforts to Consider Admissions Policies’ Impacts on Diversity are Furthering Constitutional Values.**

Efforts to consider the impacts of existing admissions policies on school integration, diversity, and access are fully consistent with equal protection principles. These considerations fit within the Supreme Court’s framework of permissible admissions plans, in which schools may “consider the racial makeup of schools and . . . adopt general policies to encourage a diverse student body.”

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<sup>47</sup> *Public Education Funding Inequity, supra.*

<sup>48</sup> Jao, *supra.*

<sup>49</sup> Malcolm Gay, *The Race to Get Into Boston’s Exam Schools*, *The Bos. Globe* (Jan. 17, 2019), <https://apps.bostonglobe.com/magazine/graphics/2019/01/17/valedictorians/exam-school-divide> (quoting Matt Cregor, *Lawyers for Civil Rights Boston*) (internal quotation marks omitted).

<sup>50</sup> Bailey, *supra.*



*Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in judgment). And in pursuit of student body diversity, schools are permitted to employ a variety of methods consistent with equal protection:

School boards may pursue the goal of bringing together students of diverse backgrounds and races . . . 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.”

*Id.*; *see also id.* at 745 (Roberts, C.J., for the plurality) (noting activities such as “set[ting] measurable objectives to track the achievements of students from major racial and ethnic groups . . . have nothing to do with [the use of racial classifications]”) (internal citation omitted); *Anderson*, 375 F.3d at 88–90 (“To the extent that the School Committee’s adoption of the New Plan promoted choice and equitable access . . . as well as diversity, there is nothing in that mix of goals or the means of achieving them that triggers strict scrutiny under our own precedents or those of the Supreme Court.”).

The idea that public schools should strive to further the purpose of equal protection is woven throughout federal policy. Guidance funded by the U.S. Department of Education discourages schools from enacting policies that rely on standardized test scores, much like the Committee’s pre-2020 admissions plan, because such policies can further segregate schools. For example, Title IV of the Civil Rights Act of 1964 authorizes the federally-funded Equity Assistance Centers (“EACs”) to provide nationwide technical assistance and training to school boards

in the “preparation, adoption, and implementation of plans for the desegregation of public schools.” 42 U.S.C. § 2000c-2. The EACs’ “Equity-Based Framework for Achieving Integrated Schooling” manual states that “[s]ome magnet schools, for example, with competitive admissions criteria such as standardized test scores, result in further segregating students along race and class.”<sup>51</sup> In lieu of standardized testing, EACs encourage schools to pursue open enrollment policies or weighted lotteries that may consider metrics other than race.<sup>52</sup>

The National Charter School Resource Center, also funded by the U.S. Department of Education, created a toolkit to help charter school leaders reap the social and academic benefits that more diverse, integrated schooling can bring to students and communities.<sup>53</sup> The toolkit lays out various means schools may pursue, including the consideration of racial demographics, in setting broader diversity goals.<sup>54</sup> Numerous school districts across the country have used

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<sup>51</sup> See *Equity-Based Framework for Achieving Integrated Schooling*, Reg’l Equity Assistance Ctrs., 7, <https://files.eric.ed.gov/fulltext/ED591358.pdf> (last accessed August 8, 2022) (citing Jennifer Ayscue et al., *Choices Worth Making: Creating, Sustaining, and Expanding Diverse Magnet Schools*, Univ. Cal. L.A. C.R. Project (2017), <https://files.eric.ed.gov/fulltext/ED586367.pdf>).

<sup>52</sup> *Equity-Based Framework for Achieving Integrated Schooling*, *supra*.

<sup>53</sup> Nora Kern, *Intentionally Diverse Charter Schools: A Toolkit for Charter School Leaders*, Nat’l Charter Sch. Res. Ctr., 4–5 (2016), [https://charterschoolcenter.ed.gov/sites/default/files/files/field\\_publication\\_attachment/NCSRC%20Intentionally%20Diverse%20Charter%20School%20Toolkit.pdf](https://charterschoolcenter.ed.gov/sites/default/files/files/field_publication_attachment/NCSRC%20Intentionally%20Diverse%20Charter%20School%20Toolkit.pdf).

<sup>54</sup> *Id.* at 18.

constitutionally permissible metrics such as neighborhood racial constitution.<sup>55</sup>

Indeed, a recent report identified “185 school districts and charters that consider[ed] race and/or socioeconomic status in their student assignment or admission policies.”<sup>56</sup>

The ability of schools to further the goals of equal protection by fostering diversity and integration is increasingly imperative as our society becomes more complex. Public schools are indeed “the nurseries of democracy.” *Mahanoy*, 141 S. Ct. 2038. Fostering diversity of all kinds creates an environment in which students learn how to treat each other with respect and dignity, perform at higher levels, and become better prepared to integrate into a heterogenous, complex society. Nothing in the law prohibits schools from pursuing these goals or implementing the Plan. Boston was once “a city that resisted fiercely the mandate of *Brown*[,]” *Anderson*, 375 F.3d at 95, but that is no longer the case. This fierce resistance has been replaced by voluntary efforts of school boards, like the Committee, to increase diversity and integration. This evolution should be encouraged, not impeded.

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<sup>55</sup> Kendra Taylor et al., *School and Residential Segregation in Districts with Voluntary Integration Policies*, 94 Peabody J. of Educ. 371 (2019).

<sup>56</sup> Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, The Century Found. (Dec. 2, 2020), <https://tcf.org/content/report/school-integration-america-looks-like-today/>.

## CONCLUSION

The Court should affirm that “the mere invocation of racial diversity as a goal is insufficient to subject [an otherwise race-neutral plan] to strict scrutiny.”

*Bos. Parent Coal.*, 2021 WL 4489840, at \*11 (quoting *Anderson*, 375 F.3d at 87).

September 9, 2022

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 5,433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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Dated: Sept. 9, 2022

/s/ Sarah Hinger  
Sarah Hinger