

21-1303, 22-1144

IN THE
United States Court of Appeals
FOR THE FIRST CIRCUIT

BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE CORP.,

Plaintiff-Appellant,

—v.—

THE SCHOOL COMMITTEE OF THE CITY OF BOSTON; ALEXANDRA
OLIVER-DAVILA; MICHAEL O’NEIL; HARDIN COLEMAN; LORNA RIVERA;
JERI ROBINSON; QUOC TRAN; ERNANI DEARAUJO; BRENDA CASSELLIUS,

Defendants-Appellees,

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

**BRIEF FOR *AMICI CURIAE* ANTI-DEFAMATION LEAGUE,
THE BLACK ECONOMIC COUNCIL OF MASSACHUSETTS,
THE BOSTON BAR ASSOCIATION, THE GREATER BOSTON
CHAMBER OF COMMERCE, THE JEWISH ALLIANCE FOR
LAW AND SOCIAL ACTION, KING BOSTON, AND THE
MASSACHUSETTS IMMIGRANT AND REFUGEE ADVOCACY
COALITION IN SUPPORT OF DEFENDANTS-APPELLEES
AND DEFENDANTS-INTERVENORS-APPELLEES**

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), undersigned counsel for *Amici Curiae* (“*Amici*”) state that Appellees have consented to the filing of this brief and Appellant does not oppose its filing.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel for *Amici* states that no counsel for the parties authored this brief in whole or in part, and no party, party’s counsel, or person or entity other than *Amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), undersigned counsel hereby certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: September 9, 2022

By: /s/ Adam S. Gershenson
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INTEREST OF *AMICI CURIAE*

Undersigned *Amici Curiae* (collectively, “*Amici*”) are non-profits, organizations, and business entities that support Boston’s public education system. Each has an interest in and directly benefits from having local students—their future employees and Boston’s leaders of tomorrow—educated in schools that are geographically, racially, and socioeconomically diverse, and which represent the broad array of perspectives and lived experiences in Boston. *Amici* who join this brief are the Anti-Defamation League, the Black Economic Council of Massachusetts, the Boston Bar Association, the Greater Boston Chamber of Commerce, the Jewish Alliance for Law and Social Action, King Boston, and the Massachusetts Immigrant and Refugee Advocacy Coalition.¹

Amici file this brief in support of Defendants-Appellees and Defendants-Intervenor-Appellees to affirm the important and compelling interest that the Boston School Committee (the “School Committee”) has in fostering diversity—geographic, racial, socioeconomic, and otherwise—in the Boston Public Schools (“BPS”).

This case concerns admission to several of Boston’s highly selective public schools: the Boston Latin School (“BLS”), the Boston Latin Academy, and the John D. O’Bryant School of Mathematics and Science (collectively, “the Exam Schools”).

¹ Statements of interest from *Amici* are set forth in the Addendum to this brief.

These schools are consistently ranked as among the top schools in Boston, and BLS is ranked as one of the top public high schools nationally. But, as with many other prestigious institutions in the United States, the Exam Schools have remained largely inaccessible to far too many students—disproportionately excluding students of color and students residing in some of Boston’s lowest-income zip codes.

Amici urge the Court to affirm the district court’s decision upholding the School Committee’s temporary admissions program (the “Program”) for Boston’s highly selective Exam Schools for the 2021–22 school year. This Program was crafted to make the admissions process more equitable, and it succeeded. *Amici* understand that efforts like the Program are critical to broadening the pool of highly talented students who otherwise would not have access to schools like the Exam Schools. *Amici* also know that such measures greatly benefit all students, their schools, and the communities at large.

RELEVANT BACKGROUND

In increasingly diverse cities like Boston, public schools play a critical role in shaping the next generation of community and business leaders. Yet even as our cities grow more diverse, segregation, discrimination, and inequity persist. As the district court recognized, the BPS are a prime example. For too long, there has been inequitable access to the highly selective Exam Schools, particularly for students of color and students residing in some of Boston’s lowest-income zip codes, with many

students across the city left with no choice but to attend underperforming schools.²

The reasons for this are manifold, including longstanding systemic racism in Boston, grade inflation in certain schools that serve as “feeders” to the Exam Schools,³ and wealthier families’ prolific use of private tutors to prepare for entrance exams, which gives certain students an unfair advantage over those whose families cannot afford these aids.⁴

As the district court rightly held, the School Committee’s one-year program to remedy this inequity was constitutional—a ruling this Court should affirm.

Unequal Access to the Exam Schools and the Resulting Impact. Boston’s students have faced sizeable barriers to admission to the Exam Schools that disproportionately impact Boston’s most marginalized students and operate powerfully across geographic, racial, and socioeconomic lines. For example, the School Committee’s data confirmed that a student from West Roxbury (where just

² Malcolm Gay, *The race to get into Boston’s exam schools*, The Boston Globe (Jan. 17, 2019), <https://apps.bostonglobe.com/magazine/graphics/2019/01/17/valedictorians/exam-school-divide>.

³ James Vaznis, *Proposal to suspend exam schools admissions test highlights inequities*, The Boston Globe (Oct. 20, 2020), <https://www.bostonglobe.com/2020/10/20/metro/proposal-suspend-exam-schools-admissions-test-highlights-inequities> (noting that 69% of Exam School applicants from a school in West Roxbury had A-plus averages).

⁴ See Joshua Goodman & Melanie Rucinski, *Increasing Diversity in Boston’s Exam Schools*, Harv. Kennedy Sch. Rappaport Inst. at 6 (Oct. 2018), 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).

4.8% of Boston’s school-aged children reside, but where the median income for a family with school-aged children is \$138,000, Appendix (“App.”) at 1988), was approximately *five times more likely* to gain admission to the Exam Schools relative to a student from East Boston (where nearly twice as many school-aged children, 9%, reside, and where these families’ median income is approximately \$40,000, or nearly a third of the median family income for those living in West Roxbury). *Id.* Indeed, over the three application cycles prior to the Program, 441 West Roxbury students were invited to the Exam Schools, compared to only 185 East Boston students. *Id.* at 1749–50. Students in Boston’s low-income zip codes have rarely received the “golden ticket” that entrance into the Exam Schools represents.

These geographic and socioeconomic disparities have manifested in a persistent lack of racial diversity at the Exam Schools. In 1971, when Black students represented *over 30%* of Boston’s student population, they comprised fewer than 2% of the population at BLS⁵—the highest ranked Exam School.⁶ *Id.* at 167 (Joint Agreed Statement of Facts (“JSOF”) ¶ 11). Only after court-ordered adjustments to admissions did Black and Latinx admissions increase. When court supervision

⁵ Carrie Jung, *Not Always an Exam School: The History of Admissions at Boston’s Elite High Schools*, WBUR (Mar. 5, 2020), <https://www.wbur.org/edify/2020/03/05/boston-exam-school-admissions-history>.

⁶ See U.S. News & World Report, *Best High Schools: Boston Latin School* (<https://www.usnews.com/education/best-high-schools/massachusetts/districts/boston-public-schools/boston-latin-school-9285>) (last accessed: July 15, 2022) (ranking BLS #26 in national rankings).

ceased, the School Committee attempted to pursue race-conscious measures to increase diversity at the Exam Schools.⁷ Lawsuits by white families, however, led the School Committee to abandon such efforts or any other express consideration of an individual student's race as part of the admissions process,⁸ and the number of Black and Latinx students at BLS plummeted in the absence of any concerted effort to foster diversity. By 2005, Black and Latinx students respectively comprised 9.4% and 6.7% percent of the students at BLS—substantially less than half of their composition of the overall Boston population.⁹ Even in 2021–22, Black students represented just 9.7% of the BLS student body, despite Black students comprising 29.0% of the student population in the school district as a whole.¹⁰

Students from marginalized communities in Boston are being denied significant opportunities and advantages that Appellant has acknowledged are “unsurpassed” by “typical public high schools.” *Id.* at 28 (Verified Complaint ¶ 18). According to Massachusetts state data, 90% of Exam School graduates go on to attend college, while only 55% of other BPS graduates do.¹¹ Exam School students

⁷ See Jung, *supra* n.5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Enrollment Data*, Mass. Dep't Educ., <https://profiles.doe.mass.edu/profiles/student.aspx?orgcode=00350560&orgtypecode=6> (last visited July 14, 2022).

¹¹ Melissa Bailey, *A golden ticket: Efforts to diversify Boston's elite high schools spur hope and outrage*, NBC News (Mar. 17, 2021),

also gain admission to elite colleges in striking numbers. For example, BLS alone sent 23 students from the Class of 2021 to Harvard College.¹²

The One-Year Program.¹³ Mindful of persistent inequities in access to the Exam Schools, the School Committee decided to adopt the Program. It was a temporary one-year measure, proposed pursuant to a considered judgment by school administrators about how best to handle the impact of the COVID-19 pandemic. In the years before the pandemic, admission to the Exam Schools was based on students' GPAs and scores on certain entrance exams administered in-person to prospective students. For the 2021–22 school year, the Committee considered the difficulties of administering an in-person exam due to the pandemic, the inability to ensure test security with remote test administration, and the “[d]isparate impact of educational disruption on low-income families and families of color.” App. at 244.

<https://www.nbcnews.com/news/education/golden-ticket-efforts-diversify-boston-s-elite-high-schools-spur-n1261199>.

¹² *Class of 2021, Boston Latin Argo*, June 2021, at 40 (<https://blsargo.org/wp-content/uploads/2021/06/2021GraduationPDFfinalFINAL-compressed-1.pdf>).

¹³ Because the Program was in place for only the 2021–22 school year and given the lack of injunctive or damages relief available to the Coalition as the only plaintiff in this case, Appellees have argued that this case no longer presents a live case or controversy under Article III of the United States Constitution. *See* Brief of Defendants-Appellees at 27–34, *Boston Parent Coalition for Academic Excellence Corp. v. The School Committee of the City of Boston, et al.*, Nos. 21-1303, 22-1144, Doc. 00117916970 (1st Cir. Sept. 2, 2022); Brief of Defendants-Intervenors-Appellees at 48–53, *Boston Parent Coalition for Academic Excellence Corp. v. The School Committee of the City of Boston, et al.*, Nos. 21-1303, 22-1144, Doc. 00117917385 (1st Cir. Sept. 2, 2022).

For these reasons, the Program suspended the entrance exam as an admission requirement for the Exam Schools.

With no entrance exam required, the School Committee transparently adopted the Program, which had three easily administrable steps to guide admission and placement. First, the Program adopted a uniform set of admissions criteria to identify those students who qualified for admission. App. at 177 (JSOF ¶ 51). Second, the Program allocated invitations for 20% of seats at each Exam School based solely on GPA. App. at 179 (JSOF ¶ 57). Third, the Program allocated the remaining 80% of seats at each Exam School based on a combination of student GPA and zip code. App. at 179 (JSOF ¶¶ 58–59).

At step two, the Program admitted students to their preferred school on a city-wide basis. At step three, the Program assigned each zip code certain seats based on the percentage of school-aged children living in that zip code. App. at 179 (JSOF ¶¶ 59–60). Eligible students were ranked by GPA within their zip code. App. at 179 (JSOF ¶ 58). Zip codes were then ranked by median income for a family with school-age children, and then 10% of each zip code's available seats were filled in order of students' GPAs, beginning with the lowest median income zip code.¹⁴ App. at 1987. If a student's first-choice seat was not available, then the student was

¹⁴ Bos. Pub. Sch., Exams Schools Admissions Summary for the 2021–22 School Year (2022), <https://www.bostonpublicschools.org/Page/8654>.

assigned to their second- or third-choice seat. *Id.* This process was repeated for ten “rounds,” until all seats were filled. *Id.* By using zip codes, the Program had the practical effect of enhancing multiple forms of diversity because it (1) considered candidates from all of Boston’s zip codes and (2) prioritized zip codes where families with students have the lowest incomes.¹⁵

SUMMARY OF ARGUMENT

As this Court has already recognized, the Program “exclusive[ly] use[d] . . . race-neutral admissions criteria . . .” *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 45 (1st Cir. 2021); *id.* at 46 (“Here . . . all selection criteria are indisputably facially neutral.”). Despite the absence of race as a consideration in any individual student’s admission to an Exam School under the Program, Appellant contends that the Program somehow violated the Equal Protection Clause of the Fourteenth Amendment and Massachusetts law. App. at 2047–52, 2091–93. As the district court concluded twice, and for reasons this Court

¹⁵ When compared to grade 7 invitations sent for the 2020–21 school year, historically underrepresented groups of students in grade 7 received an increased percentage of invitations to Boston’s Exam Schools for the 2021–22 school year: students experiencing housing insecurity and students in the care of the Department of Children and Families (+4 percentage points); economically disadvantaged students (+8 percentage points); English learners (+7 percentage points); students with disabilities (+2 percentage points); Black students (+6 percentage points); and Latinx students (+4 percentage points). *See Bos. Pub. Sch., Exams Schools Admissions Summary for the 2021–22 School Year (2022)*, *supra* n.14.

has already expressed, Appellant is wrong. *See Bos. Parent Coal.*, 996 F.3d at 41; *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 2021 WL 4489840 (D. Mass. Oct. 1, 2021); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 2021 WL 1422827 (D. Mass. Apr. 15, 2021), *opinion withdrawn sub nom. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 2021 WL 3012618 (D. Mass. July 9, 2021).

Regardless of whether rational basis review or strict scrutiny applies,¹⁶ the Program is constitutional.¹⁷ Unconstitutional racial balancing occurs when an

¹⁶ As this Court has already held in this case, “a public school system’s inclusion of diversity as one of the guides to be used in considering whether to adopt a facially neutral plan does not by itself trigger strict scrutiny.” *Bos. Parent Coal.*, 996 F.3d at 47; *see also Anderson v. City of Bos.*, 375 F.3d 71, 87 (1st Cir. 2004) (“[T]he mere invocation of racial diversity as a goal is insufficient to subject [a facially neutral school selection plan] to strict scrutiny.”).

¹⁷ Appellant’s focus on some School Committee members’ stray remarks regarding the longstanding racial inequity in Boston and the impact of any admissions program on Black and Latinx students is misplaced. The Supreme Court has repeatedly affirmed that schools need not be indifferent to whether the admissions programs they pursue will allow them to achieve the educational benefits of diversity. *See Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2211–12 (2016) (“*Fisher II*”) (approving the University of Texas’s review of racial demographics for student enrollment to help determine whether admissions policies were successful to obtain “sufficient racial diversity”); *Grutter v. Bollinger*, 539 U.S. 306, 329–330 (2003) (concluding that the University of Michigan Law School’s interest in a “critical mass” of underrepresented students was not racial balancing). Here, the modest demographic shifts that the Program projected across three schools for a single school year are more consonant with an intent to achieve the educational benefits of a diverse student body than with any attempt at racial balancing. *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, 364 F. Supp. 3d 253, 283 (S.D.N.Y. 2019).

institution seeks “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” *Grutter*, 539 U.S. at 329–330 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)). Here, there is no evidence that the School Committee ever sought a specific percentage of students of any race or ethnicity. Nor is there evidence that the temporary Program imposed any sort of racial quota. Instead, the record shows that the Program established admissions and placement criteria according to academic achievement and student preference. For most students, the Program also allocated available seats *proportionate to the percentage of school-aged children in a given zip code* and relied on the median family income of a given zip code to allow students from the lowest income zip codes to place at an Exam School first. Neither of these concerns race.¹⁸

As this Court has already observed, “no student’s race will be the reason for admission or rejection.” *Boston Parent Coal.*, 996 F.3d at 47. Thus, the Court should affirm the district court’s ruling and follow the holdings of the panel of this Court that denied Appellant’s emergency request to stay the judgment. *Amici* offer two additional reasons why the Court should affirm the district court’s ruling:

¹⁸ Even if the mere correlation of zip codes with racial demographics in Boston had some constitutional significance in this case (which it does not), race would remain, at most, but “one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.” *Grutter*, 539 U.S. at 340.

First, public schools have a compelling interest in ensuring student body diversity. Public schools play a central role in educating our nation’s children and in supporting future leaders who can challenge bias in themselves and others as they work to build a more just and inclusive society. In an increasingly diverse country, Boston schools, including the Exam Schools, have strong incentives to foster and maintain a diverse student body so that students receive the myriad, well-established educational benefits of diversity.

Second, the Boston business community has a unique interest in ensuring that the Exam Schools can pursue admissions programs that attract, educate, and graduate talented students from diverse backgrounds. Diverse and inclusive workforces consistently outperform homogenous workforces because they reflect a broader talent pool and capture different perspectives in strategic decision-making. And students educated in diverse environments are better equipped to navigate such diverse workplaces. This means that diverse graduates from Boston’s Exam Schools have a unique competitive advantage—a selling point for Boston and businesses looking to attract talent to Boston.

ARGUMENT

I. BOSTON HAS A COMPELLING INTEREST IN DIVERSITY AT THE EXAM SCHOOLS.

The Supreme Court has clearly and repeatedly held that there is a “compelling interest in securing the *educational* benefits of a diverse student body.” *Grutter*, 539

U.S. at 333 (emphasis added); *see also Fisher II*, 136 S. Ct. at 2208 (emphasis added); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 308–09 (2013) (“*Fisher I*”); *Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.) (“[A]ttainment of a diverse student body” is “clearly . . . a constitutionally permissible goal”). The parties agreed in the district court that diversity in all forms—geographic, racial, socioeconomic, national origin, worldview, and other factors—benefits all students. App. at 181 (JSOF ¶ 69). This is because students with diverse backgrounds “may bring . . . experiences, outlooks, and ideas that enrich the training of [a school’s] student body,” *Bakke*, 438 U.S. at 314, and because diversity helps ensure “cross-racial understanding,” the “break[ing] down [of] racial stereotypes,” and the “promo[tion] [of] learning outcomes,” “enab[ling] [students] to better understand persons of different races,” “better prepar[ing] students for an increasingly diverse workforce and society,” and “better prepar[ing] them as professionals,” *Grutter*, 539 U.S. at 330; *Fisher II*, 136 S. Ct. at 2210.¹⁹

Although the Supreme Court’s decisions recognizing the educational benefits of diversity arose in the context of higher education, that interest is no less

¹⁹ *Fisher II* also forecloses arguments such as the claim Appellant advanced below that the Exam Schools are somehow already diverse “enough.” *Compare* App. at 2045 (arguing that “the Exam Schools already display substantial racial diversity”), *with Fisher II*, 136 S. Ct. at 2211 (rejecting the argument that the school’s plan was unlawful because the school had already achieved a “critical mass” of diversity within its student body).

compelling when applied to public high schools. As the Supreme Court recognized in the landmark case of *Brown v. Board of Education*, which concerned “children of both elementary and high school age,” these schools provide students with “the very foundation of good citizenship” and are “a principal instrument in awakening the child to cultural values . . . [and] in preparing him for later professional training” 347 U.S. 483, 486 n.1, 493 (1954), *supplemented* 349 U.S. 294 (1955). Following this same logic, Justice Kennedy concluded more recently that “[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).²⁰

²⁰ Most courts following *Parents Involved* have deemed Justice Kennedy’s concurrence controlling. See *Spurlock v. Fox*, 716 F.3d 383, 395 (6th Cir. 2013) (assuming the concurrence controls); *United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 683 n.5 (M.D.N.C. 2009) (concluding that the concurrence controls under *Marks v. United States*, 430 U.S. 188, 193 (1977)); *Hart v. Cmty. Sch. Bd.*, 536 F. Supp. 2d 274, 282 (E.D.N.Y. 2008) (same). *But see Christa McAuliffe*, 364 F. Supp. 3d at 282 n.25 (disagreeing that the concurrence is controlling under *Marks*). Legal scholarship has also recognized Justice Kennedy’s concurrence as controlling. See J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 Harv. L. Rev. 158, 170 (2007) (“As the narrowest rationale in support of the prevailing judgment, the Kennedy opinion becomes the controlling one and the subject of close scrutiny for educators and lawyers alike.”); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv. L. Rev. 131, 137 (2007) (“Kennedy’s opinion appears controlling.”).

This Court has recognized that, whether or not Justice Kennedy’s concurrence is controlling, the concurrence “reinforces, rather than undercuts, our reasoning and holding in *Anderson*.” *Bos. Parent Coal.*, 996 F.3d at 48. Under that reasoning, public schools may, consistent with the Constitution, take into consideration the demographics of schools when designing admissions plans. *Id.*

There is also “no logical reason why increasing racial diversity in high schools would not benefit students to the same extent” as university students. *Christa McAuliffe*, 364 F. Supp. 3d at 283. Indeed, social science studies confirm in at least four ways that the benefits of diversity to students in the K-12 context are largely indistinguishable from those that the Court embraced in *Grutter*.

First, diversity improves collaboration across difference and helps breaks down racial stereotypes. Researchers Philipp Jugert and Allard Feddes found that “cross-ethnic friendships ha[ve] positive psychosocial consequences which include better social adjustment and more positive attitudes towards ethnic out-groups.”²¹ The Century Foundation, an independent think tank, concluded that, “when school settings include students from multiple racial groups, students become more comfortable with people of other races, which leads to a dramatic decrease in

²¹ Philipp Jugert & Allard R. Feddes, *Children’s and adolescents’ cross-ethnic friendships*, in *The Wiley Handbook of Grp. Processes in Children and Adolescents* 373, 389 (Oct. 2015).

discriminatory attitudes and prejudices.”²² Other empirical studies have reached similar conclusions about the impact of diversity.²³

Second, diversity correlates with improved student satisfaction, self-confidence, and leadership skills, and abundant data shows that this positive relationship is stronger among students who had more experiences with diverse learning environments before college.²⁴ Students who attend racially diverse schools benefit from “exposure to other students who are different from themselves,” bringing with them “novel ideas and challenges” that lead “to improved cognitive

²² Amy S. Wells, et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, The Century Foundation (Feb. 9, 2016), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/>; *see also id.* (“[D]iverse classrooms, in which students learn cooperatively alongside those whose perspectives and backgrounds are different from their own, are beneficial to all students . . . because they promote creativity, motivation, deeper learning, critical thinking, and problem-solving skills.”).

²³ *See, e.g.*, Aprile D. Benner & Robert Crosnoe, *The Racial/Ethnic Composition of Elementary Schools and Young Children’s Academic and Socioemotional Functioning*, 48 *Am. Educ. Rsch. J.* 621, 621-46 (2011); Shelly Brown-Jeffy, *The Race Gap in High School Reading Achievement: Why School Racial Composition Still Matters*, 13 *Race, Gender & Class* 268, 268-94 (2006); *see also* Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation*, 81 *N.C. L. Rev.* 1513, 1548–49 (2003) (“[D]iversity inhibits ‘automacity’ in thinking: the tendency to travel down the same thinking paths we developed in the past. In diverse learning environments thinking is pushed to broader and deeper levels associated with critical thinking.”).

²⁴ *See generally* Nicholas A. Bowman & Nida Denson, *What’s Past is Prologue: How Precollege Exposure to Racial Diversity Shapes the Impact of College Interracial Interactions*, 53 *Rsch. in Higher Educ.* 406, 406–25 (2012).

skills, including critical thinking and problem solving.”²⁵ Moreover, diverse schools lead to more interethnic and interracial friendships, which “are crucial to child development, decreasing prejudice and developing positive racial attitudes.”²⁶

Third, when students who are exposed to diverse environments in secondary school reach college, they tend to report higher levels of satisfaction and emotional wellbeing.²⁷ In other words, the educational benefits of diversity in higher education are *compounded* when students come to college having already participated in diverse educational environments. Research has “found that students who enter college with substantial experience interacting with diverse peers were more likely to see the world from someone else’s perspective and to value the importance of diversity. They reported that interactions with diverse college peers changed attitudinal, cognitive, and democratic values, cultural awareness and concern for the public good.”²⁸

Fourth, evidence suggests that increasing diversity in schools helps *all*

²⁵ Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, *supra*, at n.22.

²⁶ Cinzia Pica-Smith & Timothy A. Poynton, *Supporting Interethnic and Interracial Racial Friendships Among Youth to Reduce Prejudice and Racism in Schools: The Role of the School Counselor*, 18 Am. Sch. Counselor Ass’n 82, 83 (2018).

²⁷ See Nicholas A. Bowman & Nida Denson, *What’s Past is Prologue*, *supra*, at n.24.

²⁸ Roslyn Arlin Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 Rev. Of Rsch. in Educ. 197, 226 (Mar. 2012).

students. As K-12 researchers Roslyn Mickelson and Mokubung Nkomo determined, “[w]hether a school is racially and socioeconomically diverse or segregated makes a critical difference for K-12 achievement across the curriculum.”²⁹ Specifically, “[s]tudents who attend racially and socioeconomically diverse schools are more likely to achieve higher test scores and better grades, to graduate from high school, and to attend and graduate from college” as compared to their otherwise comparable counterparts who attend less diverse schools.³⁰ Indeed, “[t]he preponderance of empirical social science about U.S. education disseminated since the late 1980s reports that diverse schools and classrooms are positively associated with higher school performance at all ages and in all subjects, more cross-racial friendships among youth, greater acceptance of cultural differences, and declines in racial prejudice[,] and thus result in undermining the intergenerational perpetuation of stereotypes and fears.”³¹

These benefits for *all* students confirm that diversity in public high schools is a compelling government interest and underscore why measures like the Program are so important for Exam School students.

²⁹ Mickelson & Nkomo, *supra* n.28.

³⁰ *Id.*

³¹ Roslyn Arlin Mickelson (forthcoming 2023), Mark Berends, Barbara Schneider, & Stephen Lamb (Eds) “School Diversity and Life Course Outcomes” Handbook on the Sociology of Education SAGE.

II. ADMISSIONS PROGRAMS LIKE THE PROGRAM HELP BUSINESSES RECRUIT DIVERSE, TALENTED, AND COMPETITIVE WORKFORCES.

As the Supreme Court observed in *Grutter*, “[t]he 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 (emphasis added). This Court recently acknowledged the business community’s “interest in having a well-educated, diverse hiring pool,” and recognized that “policies like those approved by the Supreme Court in *Grutter* are essential to [the business’] ongoing efforts to attract and benefit from the best possible people.” *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 980 F.3d 157, 187, 187 n.25 (1st Cir. 2020) (holding that Harvard’s policies aimed at increasing admissions of Black, Latinx, and other underrepresented students were constitutional), *cert. granted* 142 S. Ct. 895 (2022).

The Exam Schools at issue in this appeal are a crucial part of the pipeline by which highly competitive and diverse students in Boston enter the local talent pool from which Boston businesses hire. Many Exam School graduates attend universities in and around Boston, and some of Boston’s largest and most prominent businesses hire students from the Exam Schools at notable rates.³² For their part,

³² A recent search on LinkedIn of the alumni who attended one Exam School (BLS) shows that nearly two-thirds (6,043 out of 9,905 alumni) work in the Greater Boston area, many working for notable local employers such as Boston

Amici have expended substantial resources to attract, retain, and provide pathways to leadership for young people from diverse backgrounds for at least three reasons.

First, Boston businesses, law firms, nonprofit organizations, and government agencies, including *Amici*, must compete with other cities—nationally and globally—to attract customers, clients, and employee talent. A 2019 management consultant study shows that the world’s most competitive cities have a growing and diverse workforce.³³ The study ranked Boston 21st globally, *behind* several other U.S. cities, including Washington D.C., Los Angeles, Chicago, and New York.³⁴ To remain competitive, Boston must ensure that *all* its students, including Black, Latinx, and other students facing economic instability and/or experiencing poverty—have equitable access to top-tier public schools, especially the Exam Schools. By doing so, these highly qualified students will be more likely to gain the educational foundation that will pave the way for them to pursue career opportunities at organizations such as *Amici*.

Children’s Hospital (56 identified alumni), State Street (47 alumni), Fidelity Investments (37 alumni), Dana-Farber Cancer Institute (33 alumni), and Liberty Mutual Insurance (34 alumni). Boston Latin School, LinkedIn, <https://www.linkedin.com/school/boston-latin-school/people/> (last visited August 31, 2022).

³³ Andres Mendoza Pena & Nicole Dessibourg-Freer, *Talent makes the city*, The Hill (June 14, 2019), <https://thehill.com/opinion/finance/448371-talent-makes-the-city> (last accessed Sept. 9, 2022).

³⁴ *A question of talent: how human capital will determine the next global leaders*, A.T. KEARNEY (2019), <https://www.kearney.com/global-cities/2019>.

Second, recruiting talented individuals from diverse backgrounds to foster an inclusive and equitable working environment is critically important given Boston’s history of racial segregation in its schools and workforce and the racism that persists today.³⁵ *Amici* have accordingly worked to strengthen their diversity, equity, and inclusion initiatives with the goal of attracting and retaining diverse workforces and elevating diverse employees to positions of leadership. More broadly, Massachusetts businesses have responded to the goal of fostering diversity by beginning “a diversity executive hiring spree” in recent years.³⁶

Third, in today’s modern economy, a diverse and inclusive workforce is a necessity for the financial well-being of *Amici* and other businesses, for multiple reasons:

Diversity is good for business: Diversity in schools matters partly because of “the overriding importance of preparing students for work[.]” *Grutter*, 539 U.S. at 331. Diverse organizations perform better financially than non-diverse

³⁵ See The Spotlight Team, *Boston. Racism. Image. Reality*, The Boston Globe (Dec. 10, 2017), <https://apps.bostonglobe.com/spotlight/boston-racism-image-reality/series/image/> (noting “Google the phrase ‘Most racist city,’ and Boston pops up more than any other place, time and time again.”). The Boston Globe Spotlight Team, in a troubling report investigating racism in the City, reported that “among eight major cities, [B]lack people ranked Boston as least welcoming to people of color. More than half—54 percent—rated Boston as unwelcoming.” *Id.*

³⁶ Zeninjor Enwemeka, *Change, or Checking the Box? Mass. Companies are on a Diversity Exec Hiring Spree*, WBUR (Aug. 17, 2020), <https://www.wbur.org/bostonmix/2020/08/17/chief-diversity-officers-gaining-popularity> (last accessed Mar. 24, 2021).

organizations. According to an oft-cited study by global consulting firm McKinsey & Company, companies in the top quartile of “ethnic and cultural diversity” outperformed companies in the bottom quartile by 36 percent in terms of overall profitability.³⁷ The study recommended that companies “ensure the representation of diverse talent,” “enable equality of opportunity,” and “foster belonging through unequivocal support for multivariate diversity” to generate an increased likelihood of “financial outperformance.”³⁸ A 2019 Gartner study predicted that, “[t]hrough 2022, 75% of organizations with frontline decision-making teams reflecting a diverse and inclusive culture will exceed their financial targets.”³⁹ Finally, a study by Harvard economists found that the success rate of acquisitions and IPOs undertaken by venture capital partners of the same ethnicity was on average significantly lower (*i.e.*, 30%) than for those undertaken by partners of different ethnicities.⁴⁰

³⁷ Sundiatu Dixon-Fyle, et al., *Diversity wins: How inclusion matters*, McKinsey & Company (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>.

³⁸ *Id.*

³⁹ Manasi Sakpal, *Diversity and Inclusion Build High-Performance Teams*, Gartner (Sept. 20, 2019), <https://www.gartner.com/smarterwithgartner/diversity-and-inclusion-build-high-performance-teams>.

⁴⁰ Paul A. Gompers & Silpa Kovvali, *The Other Diversity Dividend*, Harvard Bus. Rev. (July–Aug. 2018), <https://hbr.org/2018/07/the-other-diversity-dividend>. The authors further noted: “Over the past several years one of us (Paul Gompers) has examined the decisions of thousands of venture capitalists and tens of thousands of investments, and the evidence is clear: Diversity significantly improves financial

Diversity spurs innovation: As Justice Powell articulated, “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.” *Bakke*, 438 U.S. at 313. Experts have determined that by maximizing the range of thoughts and ideas housed within it, an organization today is “more likely to have access to the breadth of information necessary to solve complex problems.”⁴¹ Diversity also leads to innovation, because “[m]ultiple and varied voices have a wide range of experiences, and this can help generate new ideas about products and practices.”⁴² A 2011 Forbes study found that “a diverse and inclusive workforce can . . . help ensure that a company’s products and services are respectful of their clients’ cultures.”⁴³ Another study found that “[d]iverse work teams, including racially and ethnically diverse teams, generate ideas that are more creative, effective, and feasible than non-diverse teams, but only when diverse teams are able to work together effectively.”⁴⁴ A 2018 report by locally-based Boston Consulting Group similarly found that companies

performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns.”

⁴¹ Stanley F. Slater, et al., *The Business Case for Commitment to Diversity*, 51 Bus. Horizons 201, 203 (2008).

⁴² Christiaan Rizy, et al., *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce*, Forbes Insights (2011), at 5, https://www.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf.

⁴³ *Id.*

⁴⁴ Poppy Laretta McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Grp. Rsch. 248, 260–61 (May 1996).

with more diverse leadership teams report higher innovation revenue.⁴⁵ These findings are consistent with *Amici's* experience that a diverse workforce allows a company to draw on a variety of backgrounds and perspectives, spurring innovation and creativity.

Diversity promotes retention: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332. Indeed, in *Amici's* experience, diversity promotes employee engagement and satisfaction, and, ultimately, improves retention. According to a 2015 study, 83% of millennials reported higher levels of engagement when they perceived their organization as fostering inclusion.⁴⁶ In a 2019 survey, 70% of respondents said they would consider looking for a new job if their employer did not demonstrate a commitment to diversity.⁴⁷ Pursuing diversity, equity, and

⁴⁵ Rocío Lorenzo, et al., *How Diverse Leadership Teams Boost Innovation*, Bos. Consulting Grp. Henderson Inst. (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation>. “Innovation revenue” here means “total revenue from new products and services launched over the past three years.” *Id.*

⁴⁶ Christie Smith & Stephanie Turner, *The Radical Transformation of Diversity and Inclusion: The Millennial Influence*, Deloitte (2015), at 13, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-inclus-millennial-influence-120215.pdf>.

⁴⁷ *Diversity in the Workplace Statistics: Job Seeker Survey Reveals What Matters*, Yello, <https://yello.co/blog/diversity-in-the-workplace-statistics/> (last visited Mar. 24, 2021).

inclusion thus helps Boston businesses face the challenge of recruiting and retaining top talent.

Institutional actors and shareholders demand diversity: Institutional actors in the markets where Boston businesses operate value diversity. For example, NASDAQ has implemented rules that require NASDAQ-listed companies to have, or publicly disclose why they do not have, at least two directors who increase the diversity of their leadership (including at least one self-identified female director and at least one director who self-identifies as an “underrepresented minority” or LGBTQ+).⁴⁸ The rules also require public disclosure of diversity statistics using a standardized format on an annual basis. Shareholders have also impressed upon businesses a need to pursue diversity initiatives; institutional investors have recently shown a greater willingness to use their proxy votes to increase board diversity,⁴⁹ and there have been a series of shareholder derivative suits resulting from overly homogeneous boards.⁵⁰

⁴⁸ *Nasdaq’s Board Diversity Rule What Nasdaq-Listed Companies Should Know*, Nasdaq (Feb. 18, 2022), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>.

⁴⁹ Lisa Hayles, *The case for diversity: Why institutional investors are using their proxy votes to leverage greater board diversity*, Financial Director (July 10, 2019), <https://www.financialdirector.co.uk/2019/07/10/the-case-for-diversity-why-institutional-investors-are-using-their-proxy-votes-to-leverage-greater-board-diversity>.

⁵⁰ Francesca Odell, et al., *3 Cases Spotlight Shareholder Interest in Public Co.*

For each of these reasons, Boston has a significant interest in ensuring equitable access to Boston's top schools, including the Exam Schools, for all its talented students. Upholding the Program that was thoughtfully, lawfully, and fairly crafted to address serious inequities exacerbated by the pandemic is one critical step forward, with clear and otherwise unachievable benefits for Boston's schoolchildren and its business community.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should uphold the district court's conclusion that the Program was constitutional, and rule in favor of Appellees.

Diversity, Law360 (Aug. 4, 2020), <https://www.law360.com/articles/1296071/3-cases-spotlight-shareholder-interest-in-public-co-diversity>.

Dated: September 9, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: September 9, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, this amicus brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

Dated: September 9, 2022

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ADDENDUM

Anti-Defamation League (ADL): The ADL is a leading anti-hate organization founded in 1913 with a timeless mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Education equity is central to ADL's work, and through our anti-bias education programming in K-12 schools, we have seen first-hand how diverse learning environments challenge students to explore new ideas, to see issues from other points of view, and to rethink their own premises and prejudices. ADL accordingly supports the School Committee of the City of Boston's decision to suspend the entrance exam for the 2021-22 school year and instead use criteria that valued high academic standards, increased neighborhood equity, and socioeconomic inclusion to determine admission to its three highly selective exam schools. ADL further supports Defendants-Intervenors-Appellees the Boston Branch of the NAACP, Greater Boston Latino Network, Asian Pacific Islander Civic Action Network, Asian American Resource Workshop, Maireny Pimentel, and H.D.

Black Economic Council of Massachusetts, Inc. (BECMA): BECMA is a nonprofit organization headquartered in Boston and founded in November 2015 to help address the growing racial wealth gap. BECMA's mission is to advance the economic well-being of Black businesses, organizations, and residents of Massachusetts through advocacy, business and leadership development, and

strategic partnerships. Representing the over 2,000 Black firms that employ 14,000 local residents, BECMA has a mandate to advocate for Black people across the diaspora on all issues regarding the economic development of our communities.

As future entrepreneurs and integral members of the workforce, BECMA knows that our children and youth are our community's most precious resource. Our interests in this case are simple and clear: we are committed to ensuring that all students, especially Black students, receive equitable opportunities for success in the City of Boston. Educational opportunities and attainment are a key indicator for future economic and personal success, and we support admissions policies at Boston's exam schools that are informed and determined through a lens of equity. The COVID-19 pandemic and subsequent economic crisis has exacerbated the existing socioeconomic inequities facing children, youth, and families in the City of Boston. We support the Boston School Committee's temporary one-year measure to not require entrance exams while it sought permanent solutions to longstanding issues of unequal access to the City's Exam Schools. BECMA knows the incredible opportunities afforded to students in the City's Exam Schools, and we applaud efforts to ensure diversity, equity, and inclusion—in all forms—so that students can learn and thrive in classrooms that reflect Boston, and ultimately, positively contribute to the local economy and the building of generational wealth.

Boston Bar Association (BBA): BBA traces its origins to meetings

convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. This case, which addresses a plan applicable only to the 2021–22 academic year at Boston's Exam Schools, implicates two of the most significant aspects of the BBA's mission: promoting education and diversity. The Education Clause of the Massachusetts Constitution, the oldest functioning state constitution, was drafted by Adams and reportedly was his favorite provision of the document. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 533 & n.40 (Mass. 1993). Consistent with that history, the BBA strives to further educational interests in the legal profession and in society. The BBA has developed and implemented a number of diversity initiatives, including formally partnering with various affinity bar associations, establishing a "Diversity, Equity, and Inclusion" section for its members, administering mentoring and judicial internship programs, and engaging in other pipeline and recruitment work with law schools and public schools. Since 1993, the BBA has managed a Summer Jobs Program designed to offer diverse high-school students from Boston public schools the opportunity to develop critical professional skills and learn about new career pathways. More recently, in response to a 2018 settlement in *S.A. v. Boston Public Schools*, the BBA partnered with legal

services on an initiative to inform community groups about new school-discipline rights and ensure that community members know how to report violations, to help keep students on a path toward educational and professional success.

The Greater Boston Chamber of Commerce (GBCC or Chamber): The Chamber is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The Chamber represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region. Our purpose is to make Greater Boston the best place for all businesses and all people to thrive. Preparing, attracting, and retaining a diverse and talented workforce is essential to achieving that goal, and the Chamber has made it a priority to expand educational and economic opportunities to underrepresented groups. The Chamber believes the efforts of the Boston School Committee promote equity, opportunity, and diversity for the city's student population in a manner that is well within its legal and constitutional authority, as held by the district court. These efforts will help prepare a diverse pool of students to enter the workforce and ensure the region retains its competitive edge while promoting an economy that includes and gives equal opportunities to all.

Jewish Alliance for Law and Social Action (JALSA): JALSA is a membership-based non-profit organization based in Boston working for social and economic justice, civil and constitutional rights, and civil liberties for all. JALSA

has a long history of supporting racial justice, education equity, and the ability of all people to live, work, and learn with dignity in a world of equal opportunity.

King Boston: King Boston envisions a radically inclusive and equitable Boston where BIPOC thrive, grounded in joy and wellbeing. Honoring King's legacy through The Embrace memorial in the Boston Common, we work to dismantle structural racism through our work at the intersection of arts and culture, community, and research and policy. During the 1965 Freedom Rally in Boston, the Kings and other Boston civil rights leaders outlined a foundation for social change in Boston. Through pathways of Education, Racial Equity, Housing, and Community Wealth Building, those leaders understood that economic justice is an essential measure of racial equity, inclusion, and justice. Over five decades later, those four pathways are still blocked for some Bostonians. Today, King Boston is strategically focusing on seven harm areas that are the most impacted by structural racism - culture, criminal justice, transportation, housing, education, well-being, and wealth creation. We intend to help eliminate these harms or increase well-being in these sectors in everything we do. We fully recognize that eliminating structural racism and fostering well-being is not something we do alone. We are part of a fabric of community that is committed to this work, nurtured and developed through relationships, convenings, introductions, and programs like our New Boston Coalition. The Embrace memorial, the Embrace Ideas Festival, films, and podcasts

are all activations of our arts and culture work. As we continue to execute and refine our research and policy agenda to address the harm areas, we want to underscore that it is not our intention to solve these harm areas alone. We intend to be an amplifier, coalition participant, data collector and analyzer, “community note-taker”, advocate, and accountability partner. As we know, education serves as one of the most critical resources to economic justice. Therefore, our public education system is key to providing access to a world-class learning environment. Dr. King stated that education has the opportunity to provide moral and civic education and prepare one for meaningful skill and work. The organization’s work in education equity is part of the movement to dismantle structural racism, and fully realize the potential for everyone to thrive in the “New Boston.”

Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA):

MIRA includes 23 Boston-based member organizations, and it recruits employees from our Commonwealth’s rich and varied immigrant communities in order to effectively address the needs and aspirations of these communities. In Boston, nearly 30 percent of city residents are foreign born. The Boston School Committee admissions program for the 2021–22 school year ensured that motivated young people who resided in the city’s many distinct ethnic neighborhoods had equitable access to an education that can prepare them for leadership, consistent with our mission.”