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The Legacy of Brown v. Board of Education: Achieving Student Body Diversity in All Levels of Education

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THE LEGACY OF BROWN V. BOARD OF EDUCATION: ACHIEVING STUDENT BODY DIVERSITY IN ALL LEVELS OF EDUCATION

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ABSTRACT

This Article addresses the legal standard by which school admissions programs may be judged and validated as school districts struggle to achieve student body diversity. As the Supreme Court recognized in its seminal decision, *Brown v. Board of Education*, education "is the very foundation of good citizenship." Twenty years after that case was decided, Thurgood Marshall, who had argued that separate was not equal in the *Brown* case, observed as a Justice of the Court that "unless our children begin to learn together, there is little hope that our people will ever learn to live together." Because achieving student body diversity cannot be separated from a consideration of the race of the students, school admission programs face a constitutional challenge, whether they consider race as part of its selection process or do not consider the racial composition of their student bodies and are, therefore, not diverse. Taking center stage in this struggle is Thomas Jefferson High School for Science and Technology, a highly selective magnet school that was recently sued by a coalition of parents of Asian American students challenging changes it made to its admissions policy. A federal district court has invalidated the program on equal protection grounds, and an appeal of that decision is currently pending before the United States Court of Appeals for the Fourth Circuit. Although the Supreme Court has twice upheld race-conscious plans used by colleges and universities, there is some question whether the Court will apply this precedent to elementary, middle, or high school plans or whether the Court will

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continue to allow race to be considered in any admissions program at any level of education.

In light of the importance of diversity in this nation's classrooms, which the Supreme Court has repeatedly noted, the principles established by the Supreme Court upholding race-conscious admissions plans should continue to apply and should not be limited to colleges and universities but should apply with equal force to elementary, middle, and high school admissions programs. If these principles are not applied to these programs or if the Supreme Court invalidates any consideration of race in admissions programs at all levels of education, then the late Justice Ginsburg's warning will come to pass: Schools will not stop considering every characteristic of applicants, including race, to achieve student body diversity but will instead resort to "winks, nods, and disguises" to achieve that goal. If the principles are applied, and schools are permitted to consider race as one factor of many for each applicant, then the *Brown v. Board of Education* legacy will endure, and schools can work openly to achieve diversity at all levels of education.

I. INTRODUCTION

In 2007, Justice Kennedy acknowledged that the "enduring hope is that race should not matter; the reality is that too often it does."[1] Today, it is clear that race does matter. It divides communities, as recently seen with the murders of George Floyd and the grocery shoppers in Buffalo, but the many races and ethnicities in our country also enrich our culture and expand our viewpoints. To maximize the benefits that come from the sharing of ideas, colleges and universities openly consider race as a factor in their admissions decisions. The United States Supreme Court has twice upheld these programs against equal protection challenges.[2] Despite what appears to be settled law in this area, Harvard College and the University of North Carolina are currently defending their race-conscious admissions programs, and the Court has granted certiorari to review these claims.[3] Given the current ideological divide within the Court and its decisions overruling other apparently settled law,[4] it is possible that its college admissions decisions will be overturned,[5] but the issue of achieving diversity will remain of utmost importance to all of the nation's educational institutions.[6] As

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[1] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

[2] *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 388-89 (2016) (upholding the constitutionality of the University of Texas at Austin's race-conscious admissions program); Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (upholding the constitutionality of the University of Michigan Law School's race-conscious admissions program).

[3] Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 980 F.3d 157, 203-04 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896, 896 (2022) (consolidating petitions for writ of certiorari to the United States Court of Appeals for the Fourth Circuit and to the Supreme Court and granting certiorari on the consolidated petition).

[4] *See generally* N.Y. State Rifle and Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022) (invalidating a New York law requiring people to show a specific need to carry a firearm in public); Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2284-85 (2022) (overruling Roe v. Wade, 410 U.S. 113, 113 (1973)).

[5] *See* Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue to Protect Them*, 12 NE. U.L. REV. 56, 60, 62 (2020) (discussing the possibility that a majority of the sitting Supreme Court Justices may vote to ban the consideration of race from university admissions programs).

[6] *See* Brief of Amici Curiae Brown University et al., in Support of Respondent at 1, 3, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 142 S. Ct. 895 (2022) (Nos. 20-1199, 21-707), 2022 (stating universities "speak with one

recognized by the Court in its most recent decision on this issue, "enrolling a diverse student body promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."[7]

Of equal or perhaps more importance is the struggle to achieve diversity in elementary, middle, and high schools. As the Supreme Court recognized in its seminal decision, *Brown v. Board of Education*: Education "is the very foundation of good citizenship."[8] Twenty years after that case was decided, Thurgood Marshall, who had argued that separate was not equal in the *Brown* case, observed as a Justice of the Court that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."[9] Agreeing that student body diversity is important, school systems across the country have striven and continue to strive for students of all backgrounds, races, and cultures to attend school together.[10]

Traditionally, children have attended neighborhood schools close to their homes, but the neighborhood school model has generated and continues to generate segregated schools.[11] Although this segregation is not state-sponsored and, therefore, not patently unconstitutional, it does not promote the exposure to different races and cultures

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voice to emphasize the profound importance of a student body diversity - including racial and ethnic diversity—to their educational mission").

[7] Fisher v. Univ. of Tex., 579 U.S. 365, 381 (2016) (citation omitted).

[8] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954), *aff'd*, 349 U.S. 294 (1955).

[9] Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

[10] *See All In: Schools L.A. County Can Count On We Are All In*, LA. CTY. OFF. EDUC., https://www.lacoe.edu/Home/Schools-LA-County-Can-Count-On (last visited Aug. 1, 2022) (indicating the Los Angeles school system "embrac[es] the diversity of our many communities and their needs"); *Equity and Cultural Responsiveness*, FAIRFAX CNTY. PUB. SCH., https://www.fcps.edu/equity (last visited Aug. 1, 2022) (emphasizing the importance of "understanding of diversity, equity, and inclusion").

[11] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 712 (2007) (noting "the effects of racially identifiable housing patterns on school assignments"); *see also* Stephen Menendian, *U.S. Neighborhoods are More Segregated Than a Generation Ago, Perpetuating Racial Inequality*, NBC NEWS (Aug. 16, 2021, 7:04 PM), https://www.nbcnews.com/think/opinion/u-s-neighborhoods-are-more-segregated-generation-ago-perpetuating-racial-ncna1276372 (noting that "more than 80 percent of major metropolitan areas in the United States were actually more segregated in 2019 than they were in 1990").

that educators seek.[12] In the attempt to achieve diversity in their schools, many districts have adopted magnet school programs that encourage children to attend schools across neighborhood lines that focus on particular interests like science and math, or fine arts and performing arts, which may help to foster diversity in the classroom.[13] Because of resource and space limitations, school districts are often forced to implement policies to decide who can attend these schools.[14] They may employ a lottery system which randomly assigns children to particular schools or assign students to schools based on a variety of factors, including assigning siblings to the same school, requiring a certain level of proficiency in the particular areas of interest focused on by the school, and considering the racial makeup of a school and the race of the child requesting admission.[15]

Because achieving student body diversity cannot be separated from a consideration of the race of the students, school admission programs face constitutional challenges, whether they consider race as part of its selection process or do not consider the racial composition of their schools and are, therefore, not diverse.[16] Currently taking

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[12] *See Parents Involved*, 551 U.S. at 725 (noting the school districts' argument that "educational and broader socialization benefits flow from a racially diverse learning environment").

[13] *See What Are Magnet Schools*, MAGNET SCHOOLS OF AM., https://magnet.edu/about/what-are-magnet-schools (last visited Aug. 1, 2022) (noting that magnet schools "attract children of various socio-economic background, race and academic achievement levels" and do so "regardless of zip code").

[14] *See, e.g.,* Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 560 F. Supp. 3d 929, 934 n.3 (D. Md. 2021) (noting that the district's magnet schools developed admissions policies because they could accommodate only 26% of all applicants).

[15] *Compare What Are Magnet Schools*, MAGNET SCHOOLS OF AM., https://magnet.edu/about/what-are-magnet-schools (last visited Aug. 1, 2022) (noting that "most schools determine student acceptance by a lottery system"), *with Parents Involved*, 551 U.S. at 711-12, 716 (challenging Seattle's plan that assigned high school students to schools based on sibling placement, the racial composition of the chosen school, and the race of the student requesting admission, and the plan implemented in Jefferson County, Kentucky, that assigned elementary school students to the schools they request, unless that assignment "would contribute to the school's racial imbalance").

[16] *See, e.g.,* Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., No. 8:20-cv-02540-PX, 2022 WL 3019762, at *11 (D. Md. July 29, 2022) (dismissing a challenge by Asian American students to changes made by school district that decreased the number of Asian American students admitted into a highly competitive middle school magnet school program); Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *1 (E.D. Va. Feb. 25, 2022), *appeal docketed*, No.

center stage in the fight is Thomas Jefferson High School for Science and Technology ("TJ"), a school in northern Virginia that has repeatedly been ranked the number one school in the country by US News.[17] TJ is a highly selective magnet school serving students interested in math, science, and technology.[18] Accustomed to enjoying its national reputation for excellence, TJ has garnered attention recently for a lawsuit challenging its admissions policy.[19] Responding to a demand by the Virginia legislature that it demonstrate its commitment to and movement toward diversity and inclusion, TJ reviewed its student population and was forced to admit that the number of Black students enrolled at the school was "too small to report."[20] To remedy this problem, the Fairfax County School Board (the "Board" or "School Board"), charged with overseeing the operation of TJ, reviewed many options to increase diversity at the school and chose a program that is, on its face, racially neutral but changed the demographics of the school, increased the number of Black students and decreased the number of Asian-American students admitted.[21] As a result, Asian-American students planning to apply for admission sued and, in February 2022, the United States District Court for the Eastern District of Virginia granted summary judgment in favor of the plaintiffs and invalidated the plan.[22] The School Board has appealed that decision and, responding to the Board's concern that there was no time to change its

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22-1280 (4th Cir. Mar. 15, 2022) (describing a coalition of parents that challenged changes to school's admissions policies having a disparate impact on Asian-American applicants); *Parents Involved*, 551 U.S. at 711 (discussing parents challenging schools districts' plans "to classify students by race and rely upon that classification in making school assignments").

[17] *See Thomas Jefferson High School for Science and Technology*, US NEWS & WORLD REP. (last visited Sept. 12, 2022), https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology-20461 (ranking TJ number 1 in the nation in 2022, based on performance on "state-required tests, graduation and how well they prepare students for college").

[18] THOMAS JEFFERSON HIGH SCH. SCI. & TECH., https://tjhsst.fcps.edu/about (last visited Sept. 12, 2022) (stating its mission "to provide students with a challenging learning environment focused on math, science, and technology, to inspire joy at the prospect of discovery, and to foster a culture of innovation based on ethical behavior and the shared interests of humanity").

[19] *See Coal. for TJ*, 2022 WL 579809 at *1 ("The Coalition was founded in August 2020 to oppose changes to admissions at TJ.").

[20] *Id.* at *2.

[21] *Id.*

[22] *Id.* at *11.

admissions policies to respond to the court's decision, the United States Court of Appeals for the Fourth Circuit agreed to stay the decision pending the appeal.[23] Notably, one appellate judge agreed with the court to stay the district court's decision and expressed his "grave doubts" that the district court's decision was correct on either the law or the facts,[24] and another disagreed that a stay was warranted, opining that the school board had not made "a sufficiently 'strong showing' of likely success on the merits in view of the risk that, by granting a stay, we would perpetuate the denial of Asian Americans' constitutional rights."[25]

Thus, the outcome of that case on appeal is not certain, and this Article analyzes the case under current Supreme Court precedent. Given the importance of diversity at all levels of society, from elementary school to college, and throughout the workforce, schools will continue to find ways to achieve it. Part II of this Article addresses the struggle elementary, middle, and high schools have faced in their attempts to achieve student body diversity in their schools. Part III discusses the current Supreme Court decisions upholding college admissions programs that consider each applicant's race as one of many factors to ensure student body diversity. Part IV presents the admissions plan adopted by TJ and the lawsuit challenging that plan, and Part V considers the application of Supreme Court precedent to uphold TJ's admissions program and others like it at the high school, middle school, and elementary school level. Finally, Part VI concludes that validating admissions plans followed by schools at all levels of education that consider race as one of many factors of each applicant will best reflect what schools across the country are doing to achieve student body diversity and will encourage an open dialogue about what works best. As the late Justice Ginsburg observed, schools that "candidly disclose their consideration of race seem to me preferable to those that conceal it."[26]

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[23] *Coal. for TJ*, 2022 WL 986994, at *1.
[24] *Id.* at *1 (Heytens, J., concurring).
[25] *Id.* at *7 (Rushing, J., dissenting).
[26] Gratz v. Bollinger, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting).

II. THE SEARCH FOR STUDENT BODY DIVERSITY IN ELEMENTARY AND HIGH SCHOOLS

The United States Supreme Court announced, in *Brown v. Board of Education*, "in the field of public education the doctrine of 'separate but equal' has no place."[27] Since then, elementary and high school systems have struggled to achieve student body diversity within their schools and have consistently failed.[28] In her concurring opinion in the 2003 decision in *Grutter v. Bollinger*,[29]* Justice Ginsburg reviewed data for 2000–2001 and noted that "71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body."[30] She went on to note that "schools in predominantly minority communities lag far behind others measured by the educational resources available to them."[31]

Twenty years later, schools still "remain heavily segregated by race and ethnicity" and "black children are paying a price."[32] Relying on "the most comprehensive study of education performance in the country" conducted by the National Center for Education Statistics' National Assessment of Educational Progress (NAEP),[33] the Economic Policy Institute reported that, as of 2020, "Black children are still relegated to separate and unequal schools."[34] Importantly, this persistent segregation has prevented Black children from reaching their potential, because, as supported by the results of the NAEP study, "[w]hen black children have the opportunity to attend the same schools that white children routinely attend, black children perform markedly

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[27] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954*), aff'd,* 349 U.S. 294 (1955).
[28] Emma García, *Schools Are Still Segregated And Black Children Are Paying A Price*, ECON. POL'Y INSTITUTE (Feb. 12, 2020), https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/.
[29] Grutter v. Bollinger, 539 U.S. 306 (2003) (Ginsburg, J., concurring).
[30] *Id.* at 345 (citing E. Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, HARV. U., at 4 (Jan. 2003), http://www.civilrights project.harvard.edu/research /reseg03/AreWeLosingtheDream.pdf.).
[31] *Id.*
[32] García, *supra* note 28, at 1.
[33] *Id.*
[34] *Id.* (noting that "a black child faces a very high probability of ending up in a school where a majority of her peers are both poor and students of color").

better on standardized math tests, which we use here as a measure of education performance."[35]

The traditional method for assigning students to schools is to assign them to schools in their neighborhood, and this has perpetuated the segregation of our schools because black and white families live in separate neighborhoods.[36] Based on a "mountain of research," the Brookings Institution has noted that "Black students are seven times more likely than white students to attend high-poverty schools with a high share of students of color," which is "consistently linked to lower academic achievement levels."[37] Trying to remedy this problem, schools across the country have moved away from assigning students to schools in their neighborhoods and, instead, allow them to choose where they want to attend school.[38] Many districts have created magnet schools that focus on specific areas like fine or performance arts, music, and science and technology, hoping to draw a diverse group of students out of their neighborhoods and into these schools.[39] As described by one organization that offers resources to parents, teachers, and school districts interested in forming magnet schools, magnet schools are "the single largest form of public school 'choice,'" and are "open to all students regardless of zip code."[40] Other school districts have adopted plans that allow students to rank the schools within the

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[35] *Id.*

[36] *See* Tracy Hadden Loh et al., *The Great Real Estate Reset, Separate and Unequal: Persistent Residential Segregation is Sustaining Racial and Economic Injustice in The U.S.*, BROOKINGS INST. (Dec. 16, 2020), https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/; *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 712 (2007) (recognizing the "effects of racially identifiable housing patterns on school assignments").

[37] Loh, et al., *supra* note 36; *see also* Menendian, *supra* note 11 (noting that where you live determines "how much money you earn, the quality of your education and even the likelihood you'll go to jail").

[38] *See, e.g., Parents Involved*, 551 U.S. 701 (reviewing assignment plans adopted by Seattle, Washington, and Jefferson County, Kentucky).

[39] *See, e.g.,* CHARLESTON CNTY. SCH. OF THE ARTS, https://www.ccsdschools.com/Page/37 (offering majors to middle school and high school students in "instrumental band, creative writing, dance, piano, string orchestra, theater, visual art, and vocal music"); THOMAS JEFFERSON HIGH SCH. SCI. & TECH., *supra* note 18 (offering education focused on math, science, and technology).

[40] *What Are Magnet Schools*, *supra* note 13 (offering "individually themed curricula").

district according to their individual preferences and, if there is space in those schools, the students may attend the school of their choice.[41]

While the theory behind these schools rests on sound principles and the goal of respecting student choice is laudable, the reality is that schools have limited space and resources that limits the number of students any one school can accept.[42] Schools are, therefore, forced to implement processes for selecting which students may attend, and paying attention to the racial composition of each school invites equal protection concerns.[43] Districts that try openly to achieve racial diversity within their schools face challenges based on equal protection grounds from parents whose children are denied admission, and their plans are often invalidated, as highlighted by the lawsuit recently decided by a federal district court in Virginia that invalidated the admissions program at TJ.[44] The school's program and the lawsuit against the school is reviewed in Part IV below. Under existing Supreme Court precedent upholding race-conscious plans used by colleges and universities, as discussed below, race-conscious plans adopted in elementary, middle, and high schools like the one challenged in Virginia, may be upheld.

III. ACHIEVING STUDENT BODY DIVERSITY CAN JUSTIFY THE CONSIDERATION OF RACE IN ADMISSIONS PLANS

In *Regents of University of California v. Bakke*,[45] the United States Supreme Court held that a "special admissions program" used by the university to reserve a specific number of seats "to increase the representation of 'disadvantaged' students" violated an applicant's right to equal protection.[46] In that case, a white male applied to the

[41] *See Parents Involved*, 551 U.S. 701, 711, 716 (noting Seattle's plan allowing ninth graders to rank schools according to their preference and Jefferson County, Kentucky's plan allowing elementary school students to indicate their first and second choice of schools).
[42] *See id.* at 711 (noting that preferred schools are often "oversubscribed").
[43] *See id.* at 711-12, 716 (noting that student preferences are granted unless assignment to a preferred school "would contribute to the school's racial imbalance"); *see also* Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *2 (E.D. Va. Feb. 25, 2022), *appeal docketed*, No. 22-1280 (4th Cir. Mar. 15, 2022) (noting the need for a change in policy after the school discovered the lack of diversity in its student body under the former admissions rules).
[44] *Coal. for TJ*, 2022 WL 579809, at *11 (noting the "proper remedy for a legal provision enacted with discrimination intent is invalidation").
[45] 438 U.S. 265 (1978).
[46] *Id.* at 272.

university's medical school and, after being rejected twice, sued the university and challenged the school's policy of setting aside 16 of 100 seats for minority applicants.[47] The Court could not reach a consensus on the proper basis for resolving the case, but four of the nine Justices agreed that the school's policy violated Title VI of the Civil Rights Act of 1964, which provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[48] Justice Powell cast the fifth vote to invalidate the medical school's policy, citing the constitutional guarantee of equal protection under the Fourteenth Amendment and noting that "[w]hether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," that cannot stand.[49] The "fatal flaw" of the program, according to Powell, was "its disregard of individual rights."[50] As Powell stated unequivocally: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[51]

Notably, however, while holding that reserving seats for minority students violates the guarantees of equal protection, the *Bakke* Court recognized that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[52] That interest, according to Justice Powell, writing for a plurality of the Court, is "the interest in the educational benefits that flow from a diverse student body."[53] Twenty-five years later, in *Grutter v. Bollinger*, the Court again recognized that, "student body diversity is a compelling state interest that can justify the use of race in university admissions."[54] In 2016, the Court reiterated its endorsement of a race- conscious admissions program in light of the importance of student body diversity, stating that, "enrolling a diverse student body promotes

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[47] *Id.* at 276-78.
[48] *Id.* at 412 (Stevens, J., concurring in part, joined by Chief Justice Burger and Justices Stewart and Rehnquist) (relying on Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*).
[49] *Id.* at 289 (plurality opinion).
[50] *Id.* at 320 (plurality opinion).
[51] *Id.* at 307.
[52] *Id.* at 320, *quoted in* Grutter v. Bollinger, 539 U.S. 306, 322-23 (2003).
[53] *Id.* at 311-12, *quoted in* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013).
[54] *Grutter*, 539 U.S. at 325.

cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."[55]

Thus, since *Bakke,* it has been clear that race can be considered as long as it is "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[56] To illustrate an admissions program that considered race in this way, Justice Powell highlighted Harvard College's program as an "illuminating example" of a constitutionally acceptable admissions program, even though race was one factor in Harvard's admissions decisions.[57] Pursuant to its program, Harvard considered all aspects of the applicants, as Powell noted, including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."[58]

As noted by Justice O'Connor twenty-five years after *Bakke*, Powell's guidance in that case for analyzing a race-conscious admissions plan under both the statutory and constitutional guarantees of equal protection has "served as the touchstone for constitutional analysis of race-conscious admissions policies."[59] More importantly, from a practical standpoint, colleges and universities, both public and private, "have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies,"[60] and, before adopting their admissions programs, have "reviewed their admissions procedures in light of Justice Powell's opinion . . . and set sail accordingly."[61]

In both cases where the Court has reviewed and validated race-conscious admissions programs, it has based its decisions on the importance of considering race as only one factor of many in a

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[55] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381 (2016) (quoting *Grutter*, 539 U.S. at 330) (internal quotation marks and alteration omitted).
[56] *Regents of Univ. of Cal*., 438 U.S. at 314.
[57] *Id.* at 316.
[58] *Id.* at 317.
[59] *Grutter*, 539 U.S. at 323.
[60] *Id.*; *see also* Brown Amicus Brief, *supra* note 6, at 1 (noting that "*Amici* have longstanding admissions policies similar to those that the Supreme Court upheld in *Grutter v. Bollinger*").
[61] *Grutter*, 539 U.S. at 323 (internal quotation omitted).

comprehensive review of each applicant's traits and characteristics.[62] First, in *Grutter v. Bollinger*, decided in 2003, the Court upheld the admissions policies used by the University of Michigan Law School.[63] In that case, the Court noted that the law school engaged "in a highly individualized, holistic review of each applicant's file."[64] Although it did consider the race of its applicants, the school did not reserve a specified number of seats for minority candidates, as the medical school in *Bakke* did.[65] Instead, the law school considered "all pertinent elements of diversity in light of the particular qualifications of each applicant" to decide whom to admit.[66]

On the same day that it issued its decision upholding the University of Michigan Law School's admissions program, the Court in *Gratz v. Bollinger* invalidated the university's undergraduate admission policies.[67] In contrast to the law school's policy of considering many facets of an applicant's qualifications, which included race, the undergraduate institution automatically assigned twenty points to any applicant who was a member of "an underrepresented racial or ethnic minority group."[68] This, according to the Court, allowed race to be "decisive" for "virtually every minimally qualified underrepresented minority applicant."[69] By precluding the "individualized consideration" of each applicant, the undergraduate admissions program violated both the statutory and constitutional guarantees of equal protection.[70] As emphasized by the Court in *Grutter*, an admissions program may consider race but it is the "individualized consideration in the context of a race-conscious admissions program" that is "paramount."[71]

The Court reinforced its *Grutter* holding in 2016 in *Fisher v. University of Texas at Austin*, when it upheld the undergraduate institution's admissions program at the University of Texas.[72] In contrast to the admissions program the Court invalidated in *Gratz*, where race

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[62] *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016); *see also Grutter*, 539 U.S. 306.
[63] *Grutter*, 539 U.S. at 306.
[64] *Id.* at 337.
[65] *Id.*
[66] *Id.*
[67] Gratz v. Bollinger, 539 U.S. 244, 251 (2003).
[68] *Id.* at 255.
[69] *Id.* at 272.
[70] *Id.* at 275-76.
[71] Grutter v. Bollinger, 539 U.S. 306, 337 (2003).
[72] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 388 (2016).

was decisive, the University of Texas considered race, but only as a "factor of a factor of a factor in the holistic-review calculus" of each individual applicant.[73] In Texas, at the time the plaintiff applied for admission, the university was required by statute to admit any Texas high school student graduating within the top ten percent of his or her high school class who might apply for admission.[74] Although there was some argument in that case that this avenue for admission was "race neutral," the Court noted that percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage."[75] In fact, according to the Court, it "is race consciousness, not blindness to race, that drives such plans."[76]

Whether or not the Top Ten Percent Plan ("Percentage Plan") was race neutral raises interesting issues, but it did not drive the Court's decision since there was no question that the university considered the race of the applicants who did not gain admission through the Percentage Plan.[77] The university's consideration of race did not, however, "operate as a mechanical plus factor for underrepresented minorities."[78] Instead, the university reviewed "letters of recommendation, resumes, an additional optional essay, writing samples, artwork," and evaluated the applicant's ability to contribute to the university's student body "based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other 'special circumstance.'"[79] All of these factors were considered independent of the race of the applicants, and the "special circumstances" to which the Court referred also did not include race.[80] Rather, as noted by the Court, these circumstances included:

> [T]he socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT

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[73] *Id.* at 375 (quoting Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013)).
[74] *Id.* at 372 (citing TEX. EDUC. CODE ANN. § 51.803(a) (West 2020)).
[75] *Id.* at 386 (quoting *Fisher*, 570 U.S. at 335 (Ginsburg, J., dissenting)).
[76] *Id.* (quoting 570 U.S. at 335 (Ginsburg, J., dissenting)).
[77] *Id.* at 373 (noting that the university adopted "an approach similar to the one in *Grutt*er for the remaining 25 percent or so of the incoming class").
[78] *Id.* at 375.
[79] *Id.* at 373-74 (internal citations omitted).
[80] *Id.* at 374.

> score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race.[81]

Finding that race was "but a 'factor of a factor of a factor' in the holistic-review calculus,"[82] the Court upheld the university's plan.[83]

Since *Regents of University of California v. Bakke*, the Court has consistently recognized that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[84] However, any program that considers race "must be analyzed by a reviewing court under strict scrutiny"[85] and, to satisfy that, it is the school's burden to prove that it's program is "narrowly tailored."[86] To prove this, as explained by the *Fisher* Court, the school must prove "that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan."[87] After a careful review of the efforts the University of Texas has made to achieve student body diversity without considering race in its admissions process, the *Fisher* Court concluded that none of the alternatives "could have met its educational goals."[88] As explained in *Grutter*, narrow tailoring does not require that a school exhaust "every conceivable race-neutral alternative" or force it to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[89] Rather, a narrowly tailored plan that satisfies the Court's strict scrutiny and is, therefore, valid under the statutory and constitutional guarantee of equal protection, assesses "each particular applicant as *an individual*, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."[90]

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[81] *Id.*
[82] *Id.* at 375 (internal citation omitted).
[83] *Id.* at 388.
[84] Grutter v. Bollinger, 539 U.S. 306, 322–23 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (plurality opinion)). *Accord* Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 381 (2016).
[85] *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995)).
[86] *Id.* at 326.
[87] *Fisher*, 579 U.S. at 383.
[88] *Id.* at 387.
[89] *Grutter*, 539 U.S. at 339.
[90] Gratz v. Bollinger, 539 U.S. 244, 271 (2003) (emphasis added).

Despite the Court's reference to the "unique setting of higher education" quoted above, the principles established and reiterated in each of its decisions upholding and invalidating race-conscious plans apply with equal force to elementary, middle, and high schools. The challenge to the plan adopted by the Fairfax County School Board for admission into TJ currently pending in federal court offers the opportunity to make this clear and is discussed in the following section.

IV. TJ'S ADMISSION PROGRAM AND THE DISTRICT COURT'S INVALIDATION OF IT

Thomas Jefferson High School for Science and Technology is a magnet school in Fairfax, Virginia, drawing students who apply for admission from Fairfax County and four surrounding districts.[91] It is operated by the Fairfax County School Board ("Board" or "School Board"), which is made up of twelve elected members.[92] Admission into TJ is highly competitive, admitting 486 students into its Class of 2024, out of an applicant pool of 2,539 applicants,[93] and 550 students out of an applicant pool of 3,470 applicants into its Class of 2025.[94] Consistently ranked at the top of US News Rankings for public high schools,[95] its admissions program is of great interest to hopeful applicants and has garnered national and now judicial notice.[96]

In March 2021, a group of more than 200 parents of Asian American children hoping to gain admission into TJ sued the School Board to challenge the changes it made to its admissions policy and sought declaratory and injunctive relief to prevent TJ from admitting students under the new policy.[97] The School Board made the challenged changes after the Virginia General Assembly required all public schools like TJ to develop "diversity goals" and submit a report that described the demographics of each school's student body and the

[91] In addition to admitting students from Fairfax County, TJ also admits students from Arlington, Loudoun, and Prince William Counties, as well as the city of Falls Church. THOMAS JEFFERSON HIGH SCH. SCI. & TECH., *supra* note 18.
[92] Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *2 (E.D. Va. Feb. 25, 2022), *appeal docketed*, No. 22-1280 (4th Cir. Mar. 15, 2022).
[93] THOMAS JEFFERSON HIGH SCH. SCI. & TECH., *supra* note 18.
[94] *Coal. for TJ*, 2022 WL 579809, at *2.
[95] *Thomas Jefferson High School for Science and Technology*, *supra* note 17 (ranking TJ number one in the nation in 2022).
[96] *Coal. for TJ*, 2022 WL 579809, at *1.
[97] *Id.*

plans for achieving student body diversity in each school.[98] Responding to that demand and examining the school's demographics, TJ was forced to admit that the number of Black students enrolled at the school was "too small to report"[99] even though, according to the data produced by Fairfax County Public Schools, Black students make up 10% of all students in the county.[100]

To remedy this problem, the School Board agreed to make certain changes in the admissions program, including removing the requirements that students pay a $100 application fee and take standardized tests, and, for the first time, guaranteeing seats for 1.5% of the students from each participating middle school, which would fill all but 100 seats available in each entering class.[101] For those 100 open seats, the school then conducts a "holistic review" of each student that considers "GPA, a Student Portrait Sheet, a Problem Solving Essay, and certain 'Experience Factors,' which include an applicant's (a) attendance at a middle school deemed historically underrepresented at TJ; (b) eligibility for free and reduced price meals; (c) status as an English language learner; and (d) status as a special education student."[102] The people employed to conduct this evaluation "are not told the race, ethnicity, gender, or even names of applicants."[103]

TJ used the revised plan to admit students for the Class of 2025 and saw an immediate change in the demographics of the school, especially in the number of Asian American students admitted, which led

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[98] *Id.* at *2 (noting that TJ had to describe "the status of the school's diversity goals, including a description of admission processes in place or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students").

[99] *Id.*

[100] *About Us*, FAIRFAX CNTY. PUB. SCH., https://www.fcps.edu/about-fcps (last visited Sept. 11, 2022); *see also Coal. for TJ*, 2022 WL 579809, at *1.

[101] *See Coal. for TJ*, 2022 WL 579809, at *2. Without explaining how those middle school students will be evaluated, TJ's website simply states: "Applicants attending public school will be first evaluated against other applicants from the same school, and students with the strongest evaluated applications from that school will be offered admission." *TJHSST Freshman Application Process*, FAIRFAX CNTY. PUB. SCHS., https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman (last visited Sept. 16, 2022).

[102] *Coal. for TJ*, 2022 WL 579809, at *2.

[103] Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *2 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring).

to the lawsuit now pending in federal court.[104] Even though the class size increased by 64 students, as noted by the district court, the number of Asian American students admitted decreased by 56 students, and the percentage of Asian American students making up the class dropped from 73% to 54%.[105] The court did not contrast this decrease with the increase in the admission rate of Black or other diverse students, but TJ's website indicates that TJ's Class of 2026 is "diverse by every measure."[106] As noted, all middle schools in Fairfax County are represented and of the 550 offers of admission, 5.82% were extended to Black students, 8.18% to Hispanic students, 21.27% to White students, and 59.82% to Asian students.[107] Focusing only on the decrease in the number of Asian American students admitted under the new plan, the district court concluded that the "Board's overhaul of TJ admissions has had, and will have, a substantial disparate impact on Asian-American applicants to TJ."[108]

In addition to its concern over this impact, the court raised concerns about the way the changes were made and the reasons for making those changes, noting that the "evidence shows the process was rushed, not transparent, and more concerned with simply doing something to alter the racial balance at TJ than with public engagement."[109] Examining statements made by the principal and superintendent of the school and the members of the School Board while it was considering changes to the current policy, the court concluded that, "at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup to TJ to the detriment of Asian-Americans."[110] Specifically, the court noted the principal's statement shared with the entire school community that TJ "does not reflect the racial composition in FCPS" and, in particular, "the number of Black and Hispanic students TJ would have if it truly reflected FCPS."[111] The court also noted a statement by a member of the School Board recognizing "the

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[104] *Coal. for TJ*, 2022 WL 579809, at *5 (noting that "Asian Americans received far fewer offers to TJ after the Board's admissions policy overhaul").
[105] *Id.* at *2.
[106] *Thomas Jefferson High School Continues to Increase Access for All*, FAIRFAX CNTY. PUB. SCHS. (June 30, 2022), https://www.fcps.edu/news/thomas-jefferson-high-school-continues-increase-access-all.
[107] *Id.*
[108] *Coal. for TJ*, 2022 WL 579809, at *5.
[109] *Id.* at *9.
[110] *Id.*
[111] *Id.* at *7 (internal quotation marks omitted).

unacceptable numbers of African Americans that have been accepted to TJ."[112] Another member of the Board emailed a constituent to explain that she was "urging the superintendent to modify his plan to take into account geographic diversity as well as students on free and reduced lunch, which should result in greater diversity in the demographics."[113] Examining the record as a whole, the court decided that the "discussion of TJ admissions changes was infected with talk of racial balancing from its inception."[114]

Based on these facts, the court concluded that the Board's "decision to overhaul the TJ admissions process was racially motivated."[115] To support its conclusion, the court focused not on the intent of the members of the Board but rather on the impact on Asian Americans that the new policy had.[116] As the court stated, "[i]t is clear that Asian-American students are disproportionately harmed by the Board's decision to overhaul TJ admissions."[117] Moreover, "the Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ."[118] This, according to the court, was enough to trigger strict scrutiny, which the Board could not satisfy and failed even to argue that it could.[119]

Thus, the court concluded that the facts left "no material dispute that, at least in part, the purpose of the Board's admissions overhaul was to change the racial makeup to TJ to the detriment of Asian-Americans" and granted summary judgment in favor of the parents challenging the plan.[120] At the very least, according to the court, it was "clear that Asian-American students are disproportionately harmed by the Board's decision to overhaul TJ admissions."[121] Based on its conclusions, the court invalidated the policy and enjoined the School Board from using it to admit students into the Class of 2026.[122] It also refused to stay the decision pending appeal, despite the fact that the

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[112] *Id.* (internal quotation marks omitted).
[113] *Id.* at *10 (internal quotation marks omitted).
[114] *Id.* at *9.
[115] *Id.* at *6.
[116] *Id.*
[117] *Id.*
[118] *Id.* at *10.
[119] *Id.*
[120] *Id.* at *9, 11.
[121] *Id.* at *6.
[122] *Id.* at *11.

admissions cycle for the upcoming year was already underway.[123] The School Board appealed the district court's refusal to stay its decision, and the United States Court of Appeals for the Fourth Circuit granted the stay, allowing the School Board to continue admitting students under that policy during the pendency of the appeal.[124]

Taking the unusual step of writing an opinion on the merits of the case while considering the School Board's request for a stay, two of the appellate judges have made clear how they will decide the case.[125] In agreeing that the stay was warranted, Judge Heytens expressed concern that there was "no way" to return to the previous admissions policy, in part because two of the three standardized tests that were required under the former policy were "no longer . . . available."[126] In addition, the Judge noted that 2,540 students applied under the new policy and were awaiting TJ's decision whether or not to admit them, so "[i]f the district court's order is not stayed, thousands of students and their families will be thrown into disarray for the next several months."[127]

Judge Heytens also expressed his "grave doubts about the district court's conclusions regarding both disparate impact and discriminatory purpose . . . ."[128] Although he did not ignore the decrease in the number of Asian American students admitted under the new plan, Judge Heytens put that decrease into context, noting that "[j]ust under half of applicants (48.9%) self-identified as Asian American and well over half of offers (54.36%) went to such students."[129] He also noted that the court used the "wrong comparator" to conclude that the new plan had an impermissible impact on Asian American students.[130] Instead of comparing the percentage of Asian American applicants offered admission under the new plan with the number offered admission under the old plan, as the court did, Heytens opined that the proper comparison should be made between "the percentage of applicants versus the percentage of offers."[131] Under this metric, according to

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[123] *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *2 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring).
[124] *Id.* at *1.
[125] *Id.* (Heytens, J., concurring); *id.* at *6 (Rushing, J., dissenting).
[126] *Id.* at *5 (Heytens, J., concurring).
[127] *Id.* at *6.
[128] *Id.* at *1.
[129] *Id.* at *2 (internal citations to the trial record omitted).
[130] *Id.* at *3.
[131] *Id.*

Heytens, there is no evidence of "any disparate impact whatsoever."[132] To the contrary, as proven by the evidence on the record, after the first year of admitting students under the challenged policy, "Asian American applicants made up a *higher* percentage of students offered a spot at TJ (54.36%) than of total applicants (48.69%).[133]

In addition to seeing no disparate impact, Heytens noted that "it is undisputed that the challenged admissions policy is *race neutral*—indeed, evaluators are not told the race or even the name of any given applicant."[134] Citing the Supreme Court's decision in *Fisher v. University of Texas at Austin*, Judge Heytens pointed out that "it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means."[135] In fact, as the Judge stated, the Supreme Court "has *required* public officials to consider such measures before turning to race conscious alternatives."[136] Indeed, the Supreme Court in *Grutter v. Bollinger* established that before considering race of its applicants, a school must engage in a "good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[137] The Court repeated this in *Fisher*, emphasizing that a "university . . . bears the burden of proving a 'nonracial approach' would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense."[138]

Without addressing the possibility that TJ's new admissions policy is race blind, as suggested by Judge Heytens, the district court applied the Supreme Court's strict scrutiny analysis defined in *Fisher*.[139] Regarding TJ's plan as if it were race-conscious, the court blamed the School Board for failing to exhaust other avenues to achieve student body diversity before adopting the plan in question.[140] Specifically citing *Bakke* and *Fisher*, the court noted that the School Board could have increased the size of TJ or offered free test

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[132] *Id.*
[133] *Id.* (citations to the record omitted) (emphasis in original).
[134] *Id.* at *1 (emphasis in original).
[135] *Id.* at *4 (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 312 (2013)).
[136] *See id.*
[137] Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
[138] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 377 (2016) (quoting *Fisher,* 570 U.S at 312).
[139] Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21CV296, 2022 WL 579809, at *10-11 (E.D. Va. Feb. 25, 2022), *appeal docketed*, No. 22-1280 (4th Cir. Mar. 15, 2022).
[140] *Id.* at *11.

preparation instead of removing the testing requirement before the Board "defaulted to a system that treats applicants unequally in hopes of engineering a particular racial outcome."[141] This heightened scrutiny was, according to Heytens, a "judicial bait-and-switch" that was wrongly applied to the schools "*race blind* policy."[142]

Judge Rushing, dissenting from the Fourth Circuit's stay of the district court's decision, agreed with the district court that the School Board had not made "a sufficiently 'strong showing'" of likely success on the merits and that by granting a stay or validating the plan, the court "would perpetuate the denial of Asian Americans' constitutional rights."[143] Although the Fourth Circuit has yet to decide the merits of the case, it is likely that the case against TJ will ultimately be decided by the United States Supreme Court, given the opinion already expressed by Justices Thomas, Alito, and Gorsuch in the Court's memorandum decision denying the plaintiff's petition to vacate the stay.[144] There, the three Justices dissented on the record, indicating their belief that the plan is unconstitutional and should be immediately invalidated.[145]

Justice Thomas has consistently opined that race-conscious admissions plans violate the constitutional guarantee of equal protection.[146] As he stated in no uncertain terms in *Fisher*, "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[147] Justice Alito has not gone as far as Justice Thomas to reject any consideration of race in admissions, but he has stated that "racial classifications are permitted only 'as a last resort,' when all else has failed."[148] Chief Justice Roberts agreed with Justice Alito and joined his dissent in the *Fisher* case.[149] The only Justice currently on the Court who has considered and upheld a race-

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[141] *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).
[142] Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *4 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring).
[143] *Id.* at *7 (Rushing, J., dissenting) (internal quotation marks omitted).
[144] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022).
[145] *Id.*
[146] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 389 (2016) (Thomas, J., dissenting) (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 315 (2013) (Thomas, J., concurring)).
[147] *Id.* (internal quotation marks omitted).
[148] *Id.* at 400 (Alito, J., dissenting) (joined by Chief Justice Roberts and Justice Thomas).
[149] *Id.*

conscious admissions plan is Justice Sotomayor,[150] so it is not clear how the other Justices or the Court as a whole will rule when it decides the TJ case or the Harvard and UNC cases currently pending before it.[151] However, regardless of how the Court will decide this issue, schools at all levels will continue to strive to achieve student body diversity and they will do it transparently, if they are allowed, or through "winks, nods, and disguises," as Justice Ginsburg warned, if the Court prohibits any consideration of race in admissions.[152]

V. APPLYING SUPREME COURT PRECEDENT TO UPHOLD TJ'S ADMISSIONS PROGRAMS AND OTHERS LIKE IT AT THE HIGH SCHOOL, MIDDLE SCHOOL, AND ELEMENTARY SCHOOL LEVEL

As TJ currently defends its admissions program, Harvard College and the University of North Carolina are also defending their race-conscious admissions programs based on the same principles.[153] As the United States Court of Appeals for the First Circuit noted in the *Harvard* case, student body diversity is important to achieve the goals of: "(1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping its graduates and itself to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks."[154] As important as student body diversity is in colleges and universities, it may be even more important at the elementary, middle school, and high school levels because, as Justice Kennedy observed in *Parents Involved v. Seattle School District No. 1*, "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures

[150] *Id.* at 368 (showing that Justice Sotomayor joined Justice Kennedy's opinion of the court).
[151] *See* Zisk, *supra* note 5, at 86-92 (examining the opinions of current Supreme Court Justices on the use of race in admissions programs).
[152] Gratz v. Bollinger, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting).
[153] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 173–74 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); Students for Fair Admissions, Inc. v. Univ. of N. Carolina, No. 1:14CV954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019), *cert. granted*, 142 S.Ct. 896 (2022).
[154] *Students for Fair Admissions, Inc*., 980 F.3d at 173-74.

equal opportunity for *all* of its children."[155] Despite this observation, the *Parents Involved* Court suggested that the cases before it challenging the admissions programs of elementary and high schools should be judged by different rules than those that are applied to universities, stating that they "are not governed by *Grutter*."[156] Specifically, the Court noted that *Grutter* "relied upon considerations unique to institutions of higher education . . . ."[157] Those considerations, according to the Court, are grounded in "the expansive freedoms of speech and thought associated with the university environment"[158] and, therefore, that universities "occupy a special niche in our constitutional tradition."[159]

There is no reason, however, to limit the Court's holdings in these decisions to colleges and universities and, indeed, the Court in *Parents Involved* actually applied the *Grutter* and *Bakke* analysis to the admissions plans it was reviewing and invalidated them because they did not comport with the standards defined in those cases.[160] Specifically, the Court reviewed programs in two school districts that assigned students to particular schools, depending on their preferences and available seats in those schools.[161] One program, adopted by the Seattle, Washington school district, allowed students to rank their preferred schools.[162] Since many students preferred some schools over others, and those schools could not accommodate all of the students who wished to attend, the district was forced to employ a "series of 'tiebreakers' to determine who will fill the open slots at the oversubscribed school."[163] First, the district granted enrollment to students with siblings currently at the school.[164] Second, in an effort explicitly to preserve racial balance in each school, the district considered the race of the student wanting to attend a particular school and the racial

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[155] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (emphasis added).
[156] *Id.* at 725 (majority opinion).
[157] *Id.* at 724.
[158] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).
[159] *Id.*
[160] *See id.* at 722-25, 729-30, 735, 740-42.
[161] *Id.* at 709-10.
[162] *Id.* at 711 (allowing "incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference").
[163] *Id.*
[164] *Id.* at 711-12.

makeup of that school, granting admission to that student only if the assignment of that student to the school "will serve to bring the school into balance."[165]

The second program at issue in *Parents Involved* was operated by Jefferson County Public Schools for the school district in metropolitan Louisville, Kentucky.[166] It assigned students to particular schools according to their preferences but only if that assignment was consistent with the district's racial guidelines ensuring racial balance at each school.[167] Thus, in both of the cases before the Court, the admissions plans being challenged relied "upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole."[168]

Thus, the Court invalidated both programs, but, rather than ignoring the principles applied in *Grutter,* it held that both failed to satisfy the principles established in that case.[169] As noted by the Court, "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group."[170] In contrast, for both of the programs at issue in *Parents Involved*, race was "*the* factor" that determined each student's assignment.[171] Moreover, the admissions programs in both districts captured "only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and 'black' or 'other' in Jefferson County."[172] As the Court observed, both plans ignored the fact that "[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals."[173]

Finally, the Court explicitly contrasted the plans before it with the University of Michigan Law School's plan upheld in *Grutter* that considered the race of an applicant as part of a "highly individualized,

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[165] *Id.* at 712.
[166] *Id.* at 715-16.
[167] *Id.* at 716.
[168] *Id.* at 710.
[169] *Id.* at 722-23.
[170] *Id.* at 722.
[171] *Id.* at 723 (emphasis in original).
[172] *Id.*
[173] *Id.* at 723-24 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting)).

holistic review"[174] to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints."[175] Unlike the law school's admissions plan, the Court likened the plans before it to the University of Michigan's undergraduate plan struck down in *Gratz*, which relied on racial classifications in a "nonindividualized, mechanical" way.[176] Thus, it is clear that the Court has applied its precedent to elementary and high school plans and it should continue to do so, because achieving student body diversity is just as important in these schools as it is in colleges and universities to ensure "equal opportunity for *all* of [our] children."[177]

VI. CONCLUSION

To best protect the interest in "the educational benefits that flow from an ethnically diverse student body" that Justice Powell first articulated in *Bakke*, schools at all levels of education should have the freedom to consider the race of its applicants as one factor of many in their admissions programs.[178] The principles now well established by the Supreme Court in *Grutter* and *Fisher* should not be limited to colleges and universities but should apply with equal force to elementary, middle school, and high school admissions programs. If these principles are not applied or if the Supreme Court invalidates any consideration of race in admissions programs, then Justice Ginsburg's warning will come to pass: schools will not stop considering every characteristic of applicants, including race, to achieve student body diversity but will instead resort to "winks, nods, and disguises" to achieve that goal.[179] If the principles are applied to schools at every level of education, then "our children [may] begin to learn together" and then "live together" as Justice Marshall observed,[180] and the *Brown v. Board of*

[174] *Id.* at 722-23 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).
[175] *Id.* at 723 (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).
[176] *Id.* (quoting Gratz v. Bollinger, 529 U.S. 244, 280 (2003) (O'Connor, J., concurring)).
[177] *Id.* at 797 (Kennedy, J., concurring) (emphasis added).
[178] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306, 311-13 (1978) (plurality opinion).
[179] Gratz v. Bollinger, 539 U.S. 244, 304-05 (2003) (Ginsburg, J., dissenting).
[180] Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

Education legacy will endure.[181] Thus, the program adopted by the Fairfax County School Board for making admissions decisions at schools like TJ must be considered in light of these principles and may be upheld. Considering every characteristic and trait of every applicant will best reflect what schools across the country, across all grade levels, are currently doing to achieve student body diversity and will encourage an open dialogue about what works best to achieve that goal.

[181] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954), *supplemented*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (making it clear that "in the field of public education the doctrine of 'separate but equal' has no place").