

A SINGLE SCORE NO MORE: RETHINKING THE ADMISSIONS SYSTEM FOR NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS TO PRESERVE ACADEMIC EXCELLENCE AND PROMOTE STUDENT DIVERSITY

PRISCILLA A. CONSOLO*

Despite decades of litigation and court case rulings, pursuing the goal of diverse student populations in schools, including through affirmative action policies, remains a controversial subject. In the present day, discrimination on the basis of race or ethnicity by educational institutions is still a divisive issue in the United States. In our nation's most populous municipality, this contentious subject has been debated as a result of the lack of diversity at New York City's eight "testing" Specialized High Schools (SHSs). Due to the disproportionately low number of Black and Hispanic/Latino students admitted, the prestigious SHSs have not been spared from allegations of racial and ethnic discrimination occurring in their admissions process. Over the past decade, critics have claimed that the admissions system for the SHSs, renowned for their rigorous, career-based academic curricula and ability to produce successful alumni, is discriminatory. Relatedly, there has been a renewed focus on promoting student body diversity in these elite schools, including a plan announced by Mayor Bill de Blasio in June 2018 to increase the number of Black and Hispanic/Latino students admitted. This Note explores the flaws of the Mayor's proposal and presents an alternative plan for reforming the SHSs' admissions system—a timely and controversial topic—that fits within the Supreme Court's doctrine on affirmative action in educational contexts.

This Note begins by providing background information on the SHSs and their current admissions process. Then, this Note discusses the schools' lack of student body diversity and past efforts aimed to address this issue, including de Blasio's

* Copyright © 2019 by Priscilla A. Consolo. J.D., 2019, New York University School of Law; B.A., 2016, Fordham University, Fordham College at Lincoln Center. First and foremost, I must give thanks to God, for through Him all things are possible. Also, I am extremely appreciative of my family, especially my parents, Marylou and Peter, and my sister Gabriella for their sacrifices and all they have done to contribute to my success. I am also deeply grateful for my fiancé, Adam, for motivating me and loving me unconditionally, and for my longtime mentors who have always believed in me, Rev. Thomas F. Leach, Dr. Roger Panetta, and Dr. Chris Toulouse—all of whom have provided encouragement and advice over many years. Moreover, I want to acknowledge Sejal Sanghvi, Anthony & Beatrice Welters, and the AnBryce Scholarship Program for all of their guidance during my legal education and support of my career goals. Furthermore, I am indebted to the many people who helped this Note come to fruition with their instrumental contributions: Professors Troy McKenzie, Hilary Meltzer, Christine Billy, and Jessica Bulman-Pozen, as well as my former clinical supervisor Andrea Fastenberg. Lastly, thank you to the editors of the *New York University Law Review* for all their tireless work and commitment, especially Evan Gilbert, Andy Kim, Chloe Lewis, Jenny Lotova, Eric Wang, and Juan Bedoya, as well as my dedicated editing team, Joy Kim, Hannah Miles, Erica Ma, and Melodi Dincer.

recent plan. Next, this Note proposes a novel admissions process for these eight schools, which was created based on the Supreme Court’s precedent on educational affirmative action and the guidance of several experts in this field of law. Under this proposal, a semi-holistic, multi-factor process involving four measures of academic performance—SHSAT score, GPA, rank in eighth grade graduating class, and rank among eighth graders citywide—would be used to evaluate applicants, as well as an explicit fifth factor of diversity. This plan would allow the City’s Department of Education to admit a critical mass of underrepresented minority students, similar to the approach used by institutions of higher-education. By analyzing the Court’s recent affirmative action jurisprudence in the educational context, this Note argues that despite the legal challenges imposed by the Fourteenth Amendment, this plan would allow the City to preserve these schools’ standards of high scholastic achievement, as well as admit increased numbers of Black and Hispanic/Latino students to these elite public high schools in a constitutionally-permissible way.

INTRODUCTION 1245

I. NEW YORK CITY’S SPECIALIZED HIGH SCHOOLS 1249

 A. *The Elite Eight—Prestigious Public Institutions of Secondary Education*..... 1249

 B. *Lack of Student Body Diversity and Past Efforts to Address It*..... 1251

 C. *Mayor Bill de Blasio’s Proposal for Reforming Admissions to Increase Diversity* 1254

II. PROPOSAL FOR REFORMING THE SPECIALIZED HIGH SCHOOLS ADMISSIONS SYSTEM..... 1259

III. POTENTIAL CONSTITUTIONAL CHALLENGES TO THIS ALTERNATIVE PLAN 1269

 A. *First Element—The Compelling Government Interest of Diversity in the Secondary School Setting* 1271

 B. *Second Element—Narrow Tailoring: Racial Balancing or Critical Mass?* 1278

CONCLUSION 1283

INTRODUCTION

Diversity in the educational context is still a fiercely-debated topic which has been the subject of many legal challenges in the present day as well as the recent past. Sixty-five years ago, the Supreme Court decided the landmark case *Brown v. Board of Education*,¹ starting decades of rulings aimed at addressing racial discrimination in the educational context based on the Fourteenth Amendment’s guarantee of equal protection under law. Today, classifications on the basis of race or ethnicity by educational institutions remain a hotly con-

¹ 347 U.S. 483 (1954) (holding that racial discrimination in public education is unconstitutional, violating the Fourteenth Amendment).

tested issue.² Due to the disproportionately low number of Black and Hispanic/Latino students admitted to its elite public high schools, the City of New York,³ the most populous municipality in the United States,⁴ has been subject to allegations of racial and ethnic discrimination in the admission process of its Specialized High Schools (SHSs).⁵ Over the past decade, there have been questions of whether the admissions process for New York City's eight "testing" SHSs, renowned for their highly-accomplished alumni and demanding academic programs, is inherently discriminatory.⁶

Relatedly, there has been a renewed focus on promoting student body diversity in these schools.⁷ One recent plan to increase the

² Currently, Harvard is defending a lawsuit in which Asian-American plaintiffs have alleged that the university unlawfully set a restrictive quota against them in the undergraduate admissions process. See Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html>. Similarly, the Department of Justice brought its own investigation and suit against Yale University, claiming the school's admissions policies disadvantages Asian-American students. See Katie Benner & Erica L. Green, *U.S. Investigating Yale over Complaint of Bias Against Asian-American Applicants*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html>.

³ See Christina Veiga, *By the Numbers: New York City's Specialized High School Offers*, CHALKBEAT (Mar. 19, 2019), <https://www.chalkbeat.org/posts/ny/2019/03/19/by-the-numbers-new-york-citys-specialized-high-school-offers>.

⁴ See PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010: 2010 CENSUS BRIEFS 11 tbl.5 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> (listing New York City as the most populous city in the United States in 2010 with a population of nearly 8.2 million residents).

⁵ See Mara Silvers, *The Roots of the Diversity Crisis at NYC's Elite High Schools*, WNYC NEWS (Mar. 20, 2018), <https://www.wnyc.org/story/black-and-latino-students-remain-underrepresented-elite-nyc-high-schools> ("New York City officials are facing renewed criticism over the lack of diversity in specialized academic schools."); Kate Taylor, *Elite Schools Make Few Offers to Black and Latino Students*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/nyregion/admissions-specialized-high-schools-new-york.html> (stating that the demographics of students admitted to the Specialized High Schools "has been essentially unchanged for years").

⁶ See Katrina Shakarian, *The History of New York City's Special High Schools*, GOTHAM GAZETTE, <http://www.gothamgazette.com/government/5392-the-history-of-new-york-citys-special-high-schools-timeline> (last visited Apr. 1, 2019) (noting allegations of discrimination made against the current SHSs' admissions process in the past ten years).

⁷ See *id.* (noting that there have been efforts in the recent past to increase the number of diverse students admitted to the SHSs, including in 2007 and 2012–2014). Some of these efforts included bills introduced in the New York State Legislature to change the formal admissions criteria for these eight elite schools, none of which ever advanced past the committee stage. See *id.* Due to the lack of political traction these proposals have gained, this Note will not address past proposals to reform the admissions system of the SHSs. In addition, this Note differs from other legal scholarship discussing the SHSAT. See, e.g., Nicole Tortoriello, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High Schools Admissions Process*, 49 COLUM.

number of Black and Hispanic/Latino students within the SHSs was announced in June 2018 by New York City Mayor Bill de Blasio.⁸ In response to the lack of diversity that currently exists in these eight high schools, the Mayor and the City's Department of Education designed this plan to increase the number of underrepresented minorities at these elite schools.⁹ However, this proposal is flawed for a number of reasons,¹⁰ and was ultimately blocked in the state legislature in June 2019.¹¹ This Note will present an alternative proposal for reforming the admissions process for the SHSs.

Given the disproportionately low number of Black and Hispanic/Latino students in the Specialized High Schools, there is a crisis happening in New York City's public education system. The present admissions process has been described as a "barrier" that prevents Black and Hispanic/Latino students "from gaining access to the resources at these coveted schools: outstanding faculty and specialized curriculums"¹² As this Note will argue, these elite public schools should reform their admissions process to increase the number of Blacks and Hispanics/Latinos who are admitted. Accordingly, this

J.L. & SOC. PROBS. 417 (2006) (arguing that the SHSAT violates statutory law under the Civil Rights Act and that the use of the exam causes a disparate impact). In contrast, this Note proposes an alternative admissions process for SHSs and focuses on the constitutionality of this process under the Supreme Court's affirmative action jurisprudence.

⁸ See *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools*, N.Y.C. OFF. MAYOR (June 3, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high> (describing Mayor de Blasio's plan).

⁹ See *id.*; *Specialized High Schools Proposal: Making Admissions to the Specialized High Schools More Equitable for All Students*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/docs/default-source/default-document-library/specialized-high-schools-proposal> (last visited June 19, 2019). De Blasio's proposal was set forth in legislation introduced in the New York State Assembly. See *An Act to Amend the Education Law, in Relation to Admission to the Specialized High Schools in the City of New York*, Assemb. B. A10427, 2018 Legis. Sess. (N.Y. 2018), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10427&term=2017&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y&LFIN=Y.

¹⁰ Mayor de Blasio's proposal eliminated the SHSAT, although it is a reliable predictor of students' high school academic success. Also, de Blasio's plan did not consider students' diverse backgrounds, such as race and ethnicity, as an explicit factor in the evaluation of applicants. For additional flaws of de Blasio's proposal, see *infra* Section I.C.

¹¹ Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor's Plan to Scrap Elite School Exam Fails*, N.Y. TIMES (June 24, 2019), <https://www.nytimes.com/2019/06/24/nyregion/specialized-schools-nyc-deblasio.html>.

¹² See *Why the NYC Specialized High School Exam Is Discriminatory and Must Be Terminated*, BLACK YOUTH PROJECT (Aug. 19, 2018), <http://blackyouthproject.com/why-the-nyc-specialized-high-school-exam-is-discriminatory-and-must-be-terminated> (arguing for the abolition of the SHSAT).

Note will present a proposal to reform the New York City SHSs' admissions process and argue for the plan's constitutionality.

This Note proposes changing the formal admissions process for these eight public high schools to a multi-factor system that uses five criteria to review each applicant: (1) Specialized High School Admissions Test (SHSAT) score;¹³ (2) grade point average (GPA); (3) rank in eighth grade graduating class; (4) rank among eighth graders citywide; and (5) diversity. This alternative plan, which uses four measures of scholastic achievement and preserves the SHSAT but diminishes its role, is superior to both de Blasio's proposal and the current admissions process at identifying academically talented students, allowing the traditions of high scholastic achievement at these eight schools to be maintained. This admissions system would also fit within the Supreme Court's doctrine on affirmative action in education.¹⁴ While this Note will not explore every aspect of reforming the SHSs' admissions process, it aims to provide a valuable contribution to this ongoing debate. This alternative admissions process, by allowing the City to balance multiple factors, would allow New York City's SHSs to promote student body diversity and preserve their extraordinary academic excellence in a constitutionally-permissible way.

This Note will proceed in three parts. Part I will offer background information on New York City's SHSs, including a brief summary of these institutions. It will also describe the lack of student diversity which presently exists in these schools, previous efforts that attempted to address this issue, and Mayor de Blasio's recent proposal to reform the admissions system. Part II will present a proposal for reforming the admissions process for the SHSs by changing the formal admissions system to a multi-factor, semi-holistic¹⁵ review of each applicant, where various measures of academic performance and diversity are

¹³ As this Note will demonstrate, the lack of student diversity at the SHSs does not seem to stem from the SHSAT itself but rather the City's policy of using it as the sole admissions criterion for these SHSs. Given that there is now evidence of the SHSAT's validity, this Note advocates its continued use. However, this proposal adds three other measures of scholastic achievement in order to create a multi-factored approach since having a single criterion of the SHSAT disadvantages Black and Hispanic/Latino students. See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ This proposal is described as semi-holistic, not completely holistic, because it limits the number of factors evaluated for each applicant to only five. A completely holistic admissions system would consider applicants' letters of recommendation, grade trends, quality of high school program, courses taken, extracurricular activities, and other factors. See, e.g., *Holistic Admissions*, AM. ASS'N CS. NURSING, <https://www.aacnursing.org/Diversity-Inclusion/Holistic-Admissions> (last visited June 19, 2019) ("Holistic review is a university admissions strategy that assesses an applicant's unique experiences alongside traditional measures of academic achievement such as grades and test scores. It is designed to help [] consider a broad range of factors reflecting the applicant's academic readiness,

considered. Next, Part III will explore the constitutionality of this Note's proposal by analyzing it under the Supreme Court's doctrine on affirmative action in educational settings and argue that this proposal fits within the Court's jurisprudence on this issue.

I

NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS

Section I.A will provide a summary of the Specialized High Schools and their current admissions system. This Section will also discuss the Hecht-Calandra Act, the New York State statute governing the admissions process at these schools. Next, Section I.B will discuss the lack of diversity that currently exists in these elite schools, including by examining past efforts aimed at increasing enrollment of Black and Hispanic/Latino students. Lastly, Section I.C will examine Mayor Bill de Blasio's recent proposal to increase student diversity and explore a number of flaws in this plan.

A. *The Elite Eight—Prestigious Public Institutions of Secondary Education*

The New York City Department of Education established its nine Specialized High Schools to “support[] the educational needs of students who excel academically and/or artistically”¹⁶ These selective public schools operate under a separate, opt-in admissions process for New York City students.¹⁷ Eight of these institutions are described as “testing” SHSs.¹⁸ These eight testing SHSs¹⁹ are Stuyvesant High School, Brooklyn Technical High School (Brooklyn Tech), The Bronx High School of Science (Bronx Science), High School of American Studies at Lehman College, High School for Mathematics, Science and Engineering at City College of New York, Queens High School for the Sciences at York College, The Brooklyn Latin School, and Staten Island Technical High School.²⁰ With histo-

contribution to the incoming class, and potential for success”). Part II, *infra*, explains the reasons this set of criteria was chosen and limited to only five factors.

¹⁶ *Specialized High Schools*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/specialized-high-schools> (last visited June 19, 2019).

¹⁷ The ninth SHS in the City is Fiorello H. LaGuardia High School of Music & Art and Performing Arts. To be admitted to LaGuardia High School, applicants need not take the SHSAT and instead must submit a portfolio and audition in a talent area for up to six different fields of study, including Fine & Visual Art, Vocal Music, Instrumental Music, Dance, Drama, and Technical Theater. *See id.*

¹⁸ *See id.*

¹⁹ This Note will focus on the eight testing SHSs, not Fiorello H. LaGuardia High School. *See supra* note 17.

²⁰ *See Specialized High Schools, supra* note 16.

ries of educational excellence, the SHSs rank amongst the best ten high schools in New York State according to the *U.S. News & World Report*.²¹

In order to attend one of these eight exceptional high schools, an eighth-grade applicant must take the Specialized High Schools Admission Test (SHSAT), described as a “competitive, objective and scholastic achievement examination”²² taken by nearly 30,000 students each year.²³ Fewer than twenty percent of students who take this exam are accepted to one of these eight schools.²⁴ For the SHSs, applicants’ SHSAT scores are the only admission factor.²⁵ Although it employs a seemingly objective merit-based standard that traces its roots back to Stuyvesant’s first use of an entrance exam in 1934,²⁶ the process of evaluating applicants based on a single standardized test is considered by some to be a “horrible embarrassment” due to the lack of student diversity achieved under this policy.²⁷ The Hecht-Calandra Act was passed by the State Legislature in 1972²⁸ and which requires that the SHSAT serve as the sole criterion for admission to the SHSs.²⁹

²¹ *Best High Schools Rankings: New York High Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/new-york/rankings> (last visited June 19, 2019).

²² N.Y. EDUC. LAW § 2590-g(12)(b) (1997). Language has replaced this text that incorporates it by reference. See *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 264–65 n.6 (S.D.N.Y. 2019) (citing N.Y. EDUC. LAW § 2590-h(1)(b) (“[A]dmissions to the special schools shall be conducted in accordance with the law in effect on the date preceding the effective date of this section.”)).

²³ See Shakarian, *supra* note 6.

²⁴ *What Is the SHSAT?*, KAPLAN, <https://www.kaptest.com/shsat/what-is-the-shsat> (last visited June 19, 2019) (describing the SHSAT statistics for 2016).

²⁵ See *Specialized High Schools in NYC*, PRINCETON REV., <https://www.princetonreview.com/k12/specialized-high-schools-shsat> (last visited June 19, 2019).

²⁶ See Shakarian, *supra* note 6.

²⁷ See Heather Mac Donald, *How Gotham’s Elite High Schools Escaped the Leveller’s Ax*, CITY J. MAG. (Spring 1999), <https://www.city-journal.org/html/how-gotham%E2%80%99s-elite-high-schools-escaped-leveller%E2%80%99s-ax-12276.html>.

²⁸ See Shakarian, *supra* note 6.

²⁹ N.Y. EDUC. LAW § 2590-g(12)(b) (1997). The Act deems the SHSAT the sole factor for admission for any “such similar further special high schools which may be established.” *Id.* This statute granted the City’s Board of Education “the power . . . to designate and undesignate additional schools as specialized and subject to the Calandra-Hecht test-only provision of NY State’s education law.” *Id.* The City has only used this power to designate new specialized schools in three instances: first in 2002 when it founded three new SHSs; later in 2005 when it granted Staten Island Technical High School “specialized” status; and lastly when it established the Brooklyn Latin School in 2006. See *id.*

B. *Lack of Student Body Diversity and Past Efforts to Address It*

The admissions process for the Specialized High Schools is so competitive because attending these institutions is “considered one of the only ways to access an elite education that virtually guarantees a pathway to college” outside of private schools.³⁰ However, the number of Black and Hispanic/Latino students admitted to these eight SHSs is disproportionately low. Of the 28,333 students who took the SHSAT in 2018,³¹ only 5067 applicants received offers at one of the eight schools, including 207 Black students, 320 Hispanic/Latino students, 1344 White students, and 2620 Asian students.³² Though 67% of New York City’s public school students are Black or Hispanic/Latino, a mere 10% of offers to attend the SHSs went to Black and/or Hispanic/Latino students.³³ Meanwhile, 52% of offers to these eight schools went to Asian students in 2018 and 27% of offers went to White students,³⁴ though they comprise 16% and 15% of the City school system, respectively.³⁵

Some alumni of the SHSs have expressed concerns about their lack of diversity. Numerous Black and Hispanic/Latino students who attended these schools have stated that the low number of under-represented minorities led them to feel uncomfortable and “recall[ed] painful memories of having heard racist comments behind their backs at school.”³⁶ Dante de Blasio, a 2015 graduate of Brooklyn Tech and

³⁰ Lauren Camera, *New York City’s Most Selective High Schools Also Most Segregated*, U.S. NEWS (Mar. 19, 2019), <https://www.usnews.com/news/education-news/articles/2019-03-19/race-divides-elite-new-york-city-high-schools>; see also Editorial, *It’s Time to Integrate New York’s Best Schools*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/interactive/2018/06/24/opinion/editorials/new-york-specialized-school.html> (discussing how the SHSs have “for generations[] set those lucky enough to attend on paths to success[,]” are segregated by race).

³¹ Veiga, *supra* note 3; see also Pedro Noguera, Opinion, *Reform Elite High Schools, but the Real Equity Fight Is Much Broader*, N.Y. DAILY NEWS (June 22, 2018, 2:00 PM), <https://www.nydailynews.com/opinion/ny-oped-selective-high-school-myopia-20180621-story.html>.

³² Veiga, *supra* note 3. In addition, 576 students who were admitted to these eight SHSs either identified as multiracial or did not identify their race or ethnicity. *Id.*

³³ Alex Zimmerman, *New York City Released its Study of the SHSAT. Here’s Why It Won’t End the Admissions Debate.*, CHALKBEAT (Aug. 3, 2018), <https://chalkbeat.org/posts/ny/2018/08/03/new-york-city-released-its-study-of-the-shsat-heres-why-it-wont-end-the-admissions-debate>. In 2018, only ten Black students were offered admission to the famed Stuyvesant High School, “the most sought-after of the schools,” out of a total of 902 offers extended. Editorial, *supra* note 30.

³⁴ See Veiga, *supra* note 3.

³⁵ DOE Data at a Glance, NYC DEP’T OF EDUC., <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> (last accessed Sept. 27, 2019).

³⁶ Eliza Shapiro, *How the Few Black and Hispanic Students at Stuyvesant High School Feel*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/nyregion/stuyvesant-high-school-black-students.html>.

Mayor de Blasio's son, recalls being the sole Black student in many of his courses, concluding that the "toxic nature of race relations" in the school's community resulted from so few people of color being offered admission.³⁷ He claimed that the lack of diversity led to a culture of prevalent discrimination and prejudice, including instances in which they were subject to "racial slurs and slights that included a teacher laughing at a [B]lack student who said she wanted to be a doctor."³⁸ Even as recently as January 2019, the principal of Brooklyn Tech addressed instances of racist imagery in a bathroom and derogatory language in an email sent to a staff member.³⁹

To address the lack of diversity in the SHSs, the City has undertaken various measures to increase the number of Black and Hispanic/Latino students admitted to these institutions. One of these initiatives, which the City has administered since 1995, is the Specialized High Schools Institute (SHSI), also known as the D.R.E.A.M. (Determination, Resiliency, Enthusiasm, Ambition, and Motivation) program.⁴⁰ The SHSI prepares economically disadvantaged seventh-graders enrolled in public or charter schools who have reached specific scores on their English and math state standardized tests for the SHSAT.⁴¹ While this free "preparatory program [has been] open to applicants of any race" since its establishment, the SHSI has explicitly aimed at increasing the number of Blacks and Hispanics/Latinos who take the SHSAT and are offered admission to a SHS.⁴²

Another initiative the City has administered is the Discovery Program, first created in the 1960s and later codified in the Hecht-Calandra Act.⁴³ This summer enrichment program grants "disadvantaged students of demonstrated high potential" the chance to attend one of these elite eight schools.⁴⁴ Rising ninth grade students who take the SHSAT and score right below the cutoff needed for admis-

³⁷ Dante de Blasio, Opinion, *Mayor de Blasio's Son Dante Says the SHSAT, the Elite High School Admissions Test, Fostered Racism at Brooklyn Tech*, N.Y. DAILY NEWS (June 14, 2018, 3:35 PM), <https://www.nydailynews.com/opinion/ny-oped-my-problem-with-shsat-20180614-story.html>.

³⁸ *Id.*

³⁹ Leslie Brody, *Racist and Anti-Semitic Imagery Scrawled in Elite New York City School's Bathrooms*, WALL ST. J. (Jan. 31, 2019, 2:39 PM), <https://www.wsj.com/articles/racist-and-anti-semitic-imagery-scrawled-in-elite-new-york-city-schools-bathrooms-11548960964>.

⁴⁰ Shakarian, *supra* note 6; see also *DREAM Program*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/about-us/programs/dream-program> (last visited June 23, 2019).

⁴¹ *DREAM Program*, *supra* note 40.

⁴² See Shakarian, *supra* note 6.

⁴³ N.Y. EDUC. LAW § 2590-g(12)(d) (1997).

⁴⁴ *Id.*

sion are eligible to participate in this program.⁴⁵ A participating student must also attend a high-poverty school and also meet at least one of the following criteria aimed at promoting diverse students: belong to a low-income household, live in temporary housing, or be an English Language Learner who has moved to New York City within the past four years.⁴⁶ Upon completion of this summer program, students are admitted to a SHS.⁴⁷ However, both of these programs have been largely unsuccessful in substantially increasing the number of Blacks and Hispanics/Latinos attending these schools, evidenced in the current low number of underrepresented minorities admitted to New York City's eight prestigious high schools.⁴⁸ In fact, while "three decades ago, there were sizable numbers of [B]lack and Latino students at Stuyvesant, Bronx Science, and Brooklyn Tech," the number of Black and Hispanic/Latino students admitted each year to SHSs has steadily decreased in recent decades.⁴⁹

⁴⁵ *Diversity in Admissions: Specialized High Schools*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/enrollment/enrollment-help/meeting-student-needs/diversity-in-admissions> (last visited June 23, 2019).

⁴⁶ *Id.* A school is defined as high-poverty if it has an Economic Need Index of at least sixty percent. *Id.*

⁴⁷ *Id.* The program is expanding, and the Department of Education promises that "[b]y the summer of 2020, 20% of seats at each specialized high school will be reserved for participants of the Discovery program." *Id.*

⁴⁸ See Eliza Shapiro, *De Blasio Has Means, If Not Will, to Reform Specialized School Admissions*, POLITICO (Mar. 15, 2018, 7:13 PM), <https://www.politico.com/states/new-york/albany/story/2018/03/15/de-blasio-has-means-if-not-will-to-reform-specialized-school-admissions-317675> (stating that "recent data show" that the City's efforts to increase diversity at the SHSs that do not include changing admissions "have had little to no impact in diversifying the schools"). Although the Discovery Program is aimed to further student diversity at the SHSs, in 2019, this program was poised only to slightly increase Black and Hispanic enrollment. See Alex Zimmerman, *Asian Students Continue to Benefit Most from Program Meant to Integrate NYC's Specialized High Schools*, CHALKBEAT (Apr. 10, 2019), <https://www.chalkbeat.org/posts/ny/2019/04/10/discovery-program-specialized-schools-integration>. The Discovery program is dominated by Asian students, who benefitted from the most gains despite already constituting the majority of students admitted to these eight schools. *Id.* Plus, it is "also unclear which students will accept offers through this program." *Id.* The shortcomings of this initiative continue even though the City changed the criteria of the Program, expanding it and ensuring that only students from high-poverty schools were eligible. *Id.* Yet, under the City's projections, the Discovery program "will only boost [B]lack and Hispanic enrollment to 16 percent, up from 9 percent now," demonstrating that this program is failing to substantially increase the number of underrepresented minorities admitted to the SHSs. *Id.*

⁴⁹ Syed Ali & Margaret M. Chin, *What's Going On with New York's Elite Public High Schools?*, ATLANTIC (June 14, 2018), <https://www.theatlantic.com/education/archive/2018/06/new-york-high-schools-stuyvesant-brooklyn-bronx/562772> (illustrating the steady decrease of Black and Hispanic/Latino students at the SHSs over the past thirty years through the use of line graphs); see also Tyler Blint-Welsh, *One Elite High School Was Diverse. Then It Got Discovered*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/nyregion/brooklyn-latin-diversity-specialized-schools.html> (noting a "steady decline" in the number of Black and Hispanic/Latino students admitted to the Brooklyn

C. Mayor Bill de Blasio's Proposal for Reforming Admissions to Increase Diversity

In response to the disproportionately low number of Black and Hispanics/Latino students at these Specialized High Schools, Mayor Bill de Blasio announced a plan in June 2018 to increase student diversity at these schools by granting automatic admission to the SHSs for students who rank within the top seven percent of their middle school graduating class and the top twenty-five percent of eighth graders citywide.⁵⁰ This percentage plan⁵¹ was proposed as legislation in the New York State Assembly in April 2018 and ultimately failed to be passed during the 2019 Legislative Session.⁵² De Blasio's plan would have eliminated the use of the SHSAT, phasing it out over a period of three years,⁵³ and would have instead "reserve[d] seats for top performers at each New York City middle school."⁵⁴ A public school student's ranking in his or her school's eighth grade class "would be made based on a set of criteria determined by the Chancellor of the New York City Department of Education[.]" including, but not limited to, academic course grades and standardized test scores.⁵⁵ Applicants would be assigned a composite score based on such criteria.⁵⁶ Based on applicants' school preferences and available seats, applicants "would be arranged in rank order of their composite scores and would be offered admission . . . in such order."⁵⁷ In the third year of this phaseout and in the following years, any

Latin School, which "for years[] was the most diverse of the [C]ity's Specialized High Schools").

⁵⁰ See N.Y.C. OFF. MAYOR, *supra* note 8; *Specialized High Schools Proposal*, *supra* note 9, at 6 ("Students would receive ranks based on (1) their 7th grade New York State Math and ELA exam scores and (2) their 7th grade English, math, social studies, and science course grades compared to other students in their school.").

⁵¹ A percentage plan is a policy that guarantees admittance to educational institutions to applicants who rank within a fixed top percentile, "intended to replace race-conscious admissions systems while still achieving the goal of racial diversity in the student body." *Reasons Why "Percent Plans" Won't Work for College Admissions Nationwide*, U. MICH. (Jan. 28, 2003), <http://ns.umich.edu/Releases/2003/Jan03/r012903.html> (discussing percent plans in the context of college admissions).

⁵² See An Act to Amend the Education Law, in Relation to Admission to the Specialized High Schools in the City of New York, Assemb. B. A10427, 2018 Legis. Sess. (N.Y. 2018); see also Shapiro & Wang, *supra* note 11.

⁵³ *Specialized High Schools Proposal*, *supra* note 9, at 6. During the phaseout of the SHSAT, some seats in the SHSs would be offered to public school students who rank in a top percentile of their eighth-grade graduating class, whereas other seats would be offered to eighth graders with SHSAT scores that meet a City-set threshold. Assemb. B. A10427.

⁵⁴ See N.Y.C. OFF. MAYOR, *supra* note 8.

⁵⁵ Assemb. B. A10427; see also *Diversity in Admissions: Specialized High Schools*, *supra* note 45 (describing the City's proposed ranking system).

⁵⁶ Assemb. B. A10427.

⁵⁷ *Id.*

remaining seats (approximately ten percent) in the SHSs would be filled by eighth grade students from both public and private schools who have a GPA of at least 3.7 through a random lottery.⁵⁸

Although Mayor de Blasio's percentage plan to transform the SHS admissions process represented a step in the right direction to improve diversity while maintaining rigorous academic standards, his proposal was flawed for a number of reasons.⁵⁹ First, de Blasio's proposal would eliminate the SHSAT,⁶⁰ despite evidence that this exam is a reliable predictor of students' high school academic success.⁶¹ Also, the Mayor's percentage plan may detrimentally impact Blacks and Hispanics/Latinos as it can promote gentrification, as families with the financial means to relocate would be able to move into neighborhoods with less competitive, underperforming middle schools in order to take advantage of the Mayor's geographically-based plan and further displace lower-income people of color in New York City.⁶² An admis-

⁵⁸ *Specialized High Schools Proposal*, *supra* note 9, at 7 (deeming those eligible for the lottery to be “[n]on-public students, students new to New York City, and any other student interested in applying to the SHS with a minimum course grade average of 93% (A-)”).

⁵⁹ Mayor de Blasio's plan did not consider students' diverse backgrounds, such as race and ethnicity, as an explicit factor in the evaluation of applicants in order increase the numbers of underrepresented minorities admitted to these eight elite schools, although the City could constitutionally aim to do this by using the critical mass method. *See* N.Y.C. OFF. MAYOR, *supra* note 8; *see also infra* Parts II, III (describing how critical mass can be used to constitutionally promote student body diversity, such as in this Note's proposal).

⁶⁰ N.Y.C. OFF. MAYOR, *supra* note 8.

⁶¹ *See infra* note 89 (discussing a City Department of Education study conducted in 2013 showing a strong correlation between SHSAT scores and academic performance in high school).

⁶² *See* Ali & Chin, *supra* note 49 (noting that de Blasio's plan may have an “impact on diversifying the city's middle schools, in that it could incentivize parents to choose ‘worse’ schools for their kids, where those kids might have a better shot at finishing at the top of their class and thus gain entry to a specialized high school”). Gentrifiers move into minority, low-income neighborhoods and tend to be more affluent than the current residents of these communities. Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 URB. L. 31, 31 (1982); *see also* Allison Roda et al., *We Study School Choice and Gentrification. Here's How New York City Should Prepare for Amazon*, CHALKBEAT (Jan. 17, 2019), <https://chalkbeat.org/posts/ny/2019/01/17/we-study-school-choice-and-gentrification-heres-how-new-york-city-should-prepare-for-amazon> (explaining how gentrification has affected schools in New York City). As a result, “[g]entrification in previously underserved neighborhoods . . . squeeze[es] low-income families out of their own neighborhoods by raising the cost of living and pushing communities away from their local schools.” Michelle Chen, *New York's Separate and Unequal Schools*, NATION (Feb. 20, 2018), <https://www.thenation.com/article/new-yorks-separate-and-unequal-schools>. Since de Blasio's proposal would admit students in the top seven percent of their eighth grade class to the SHSs, without consideration of race or ethnicity, this may lead to higher-income non-Black and non-Hispanic/Latino families with children to move into low-income neighborhoods. In these poorer communities, Black and Hispanic/Latino students typically receive lower-quality schooling from the start of their educations and do not perform as well on standardized exams as White and Asian students. *See* Leanna Stiefel, Amy Ellen Schwartz & Ingrid Gould Ellen, *Disentangling the Racial Test Score Gap*:

sions policy that relies exclusively on the class ranking of students is problematic because it can create perverse incentives for applicants since percentage plans can “encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.”⁶³

Moreover, de Blasio’s percentage plan also failed to address the systematic problems impacting elementary and middle schools that primarily serve low-income Blacks and Hispanics/Latinos. When such students are admitted under this plan, it is uncertain whether they would be adequately prepared for the rigorous programs at the SHSs, since many have not received high-quality education before entering the secondary school level.⁶⁴ Most concerning is that de Blasio’s percentage plan would lead to lower average state standardized exam scores for the students admitted to these eight public high schools—a fact that the City has admitted.⁶⁵ The Department of Education claims that under the Mayor’s plan, students admitted to these elite schools would have average state exam scores of 3.9 in math and English, which is lower than the 4.1 average of admitted students under the current system.⁶⁶ While the City claims these averages are “nearly the same,” the reality is that “individual scores . . . suggest a wider disparity.”⁶⁷ Modeling shows that if de Blasio’s plan was implemented

Probing the Evidence in a Large Urban School District, 26 J. POL’Y ANALYSIS & MGMT. 7, 11, 26 (2006) (finding “significant disparities between the test scores” of White, Hispanic/Latino, and Black students in New York City, explained in large part by “quality differences in the schools attended by students of different races”). Essentially, these more privileged parents may believe—perhaps rightly so, given the significant achievement gap that students of color face—that their children will be able to outperform and outrank lower-income Black and Hispanic/Latino students in these low-income neighborhoods. In contrast to de Blasio’s plan, this Note’s proposal does not grant automatic admittances to the SHSs based on the middle schools that students attend, nor is it geographically-focused, in order to avoid this unintended consequence.

⁶³ *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016) (*Fisher II*) (citing *Gratz v. Bollinger*, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting)).

⁶⁴ See Leonie Haimson, *Missing Pieces of the Discussion Around Specialized High Schools and City Education*, GOTHAM GAZETTE (June 22, 2018), <http://www.gothamgazette.com/opinion/7760-missing-pieces-of-the-discussion-around-specialized-high-schools-and-city-education> (discussing systematic problems impacting the quality of education for low-income students of color in New York City public schools).

⁶⁵ See *Specialized High Schools Proposal*, *supra* note 9, at 9–10 (comparing the academic profiles of students who currently receive offers with the top seven percent of middle schoolers who would receive offers under de Blasio’s proposal).

⁶⁶ *Id.*

⁶⁷ See Leslie Brody, *Stuyvesant, Other Elite New York Public High Schools Could Admit Students Who Didn’t Pass State Tests*, WALL ST. J. (Oct. 18, 2018, 5:30 AM), <https://www.wsj.com/articles/stuyvesant-other-elite-new-york-public-high-schools-could-admit-students-who-didnt-pass-state-tests-1539855001> (“Mayor Bill de Blasio’s proposal . . . could

for the 2018–2019 school year, the City would have offered admission to the SHSs to more than three hundred students who failed to earn proficient scores on their seventh grade state exams.⁶⁸ This suggests that the Mayor’s proposal would enroll students who are not adequately prepared for the challenging academics of the SHSs.⁶⁹ If applicants who earned below-proficient scores on state exams decide to attend these elite schools, they would need to receive “intensive remedial help,” or the City would risk enrolling students who are unable to succeed in the SHSs.⁷⁰

In addition, although the Supreme Court upheld the use of a percentage plan in *Fisher II*,⁷¹ the decision also indicates that the Court would likely be critical of Mayor de Blasio’s proposal to reform the SHSs. While the Court analyzes affirmative action policies which classify applicants based on race or ethnicity under the standard of strict scrutiny, the Court’s language in *Fisher I* indicates that even percentage plans which do not employ such categorizations may still be evaluated using this standard of review because they are race-sensitive.⁷² Hence, even though de Blasio’s percentage plan appeared to be race-neutral on its face, it is in fact driven by race-consciousness, like the percentage plan examined in *Fisher II*, where the Court also applied strict scrutiny.⁷³ Further supporting this point is the fact that de Blasio’s plan “cannot be understood apart from its basic purpose,

lead to students with markedly lower state test scores getting into these competitive schools, according to a review of New York City data.”).

⁶⁸ *Id.* Under the current admissions system, “for [the fall 2018] freshman class at [the S]pecialized [H]igh [S]chools, only two students admitted failed to get an average of 3 or better in math and English” However, “[u]nder the [M]ayor’s plan, 318 students scoring below 3 on that measure would have gotten seats.” *Id.* Likewise, the City would have accepted about a thousand fewer students to the SHSs who performed exceptionally well on the SHSAT under de Blasio’s proposal. *See id.*

⁶⁹ *See id.*

⁷⁰ *Id.*

⁷¹ In *Fisher II*, the Court upheld the state’s use of a percentage plan to boost enrollment of students from underrepresented minority backgrounds. 136 S. Ct. 2198 (2016). However, the percentage plan was not the sole means of increasing the number of admitted underrepresented minorities; the educational institution at issue also utilized the critical mass method in its admissions process for this purpose. *Id.* at 2216. This distinguishes the facts of *Fisher II* from Mayor de Blasio’s proposal, which would solely rely on a percentage plan to increase the number of Blacks and Hispanics/Latinos at the SHSs. *See id.* at 2214 (“Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.”).

⁷² *Fisher v. Univ. of Tex.*, 570 U.S. 297, 307 (2013) (*Fisher I*) (“It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny”).

⁷³ *See id.*

which is to boost minority enrollment”⁷⁴ in the SHSs. Thus, although the Mayor’s proposal did not explicitly consider the race or ethnicity of applicants, percentage plans like de Blasio’s are designed and implemented when educational institutions are lacking student body diversity. Given that the motivation for de Blasio’s plan was increasing the number of Black and Hispanic/Latino students admitted to the City’s SHSs,⁷⁵ *Fisher II* strongly suggests that the Court would subject the proposal to strict scrutiny, the most rigorous form of review, to determine whether it is constitutional.⁷⁶

Had de Blasio’s percentage plan passed in the state legislature, it may not have survived scrutiny in the courts, particularly under the element of narrow tailoring, due to its rather inflexible design wherein students are not evaluated individually or qualitatively.⁷⁷ Unlike in *Fisher II*, de Blasio’s policy would use a percentage plan as the sole means to boost the numbers of admitted underrepresented minorities in the SHSs, without supplementing this mechanism with other approaches to increasing student body diversity such as using a critical mass method.⁷⁸ Because de Blasio’s percentage plan does not engage in a flexible, qualitative review of applicants, it “may preclude [schools] from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but also diverse along all the qualities valued by the [institutions].”⁷⁹ The Court would also likely take issue with the lottery component of de Blasio’s proposal, for it has stated that “a lottery would make . . . nuanced judgment impossible.”⁸⁰ Likewise, percentage plans fail to consider students outside the requisite percentile who may have “excelled in unique ways that would enrich the diversity of [the institution’s] educational experience,” causing “a gap in an admissions process seeking to create the multi-dimensional diversity [] envision[ed]” by the Court’s framework in *Bakke*.⁸¹

⁷⁴ *Fisher II*, 136 S. Ct. at 2213.

⁷⁵ See N.Y.C. OFF. MAYOR, *supra* note 8.

⁷⁶ *Fisher II*, 136 S. Ct. at 2207–08 (describing the “principles relevant to assessing the constitutionality of a public university’s affirmative-action program” (citing *Fisher I*, 570 U.S. at 308–09; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

⁷⁷ See *infra* Section III.B (explaining the requirements of narrow tailoring).

⁷⁸ See *supra* note 71 (distinguishing the facts of *Fisher II* from Mayor de Blasio’s plan).

⁷⁹ *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

⁸⁰ *Id.* The Court would also likely disagree with those who contend that the City should “simply lower admissions standards for all students” applying to the SHSs, criticizing such “a drastic remedy that would require [these elite public high schools] to become [] much different institution[s] and sacrifice a vital component of [their] educational mission.” *Id.*

⁸¹ *Fisher II*, 136 S. Ct. 2198, 2214 (2016) (internal quotations and citations omitted); see also *infra* notes 141–43 and accompanying text.

Furthermore, the Court has stated that in some situations, a percentage plan, without more, is a problematic affirmative action policy because it “is a blunt instrument that may well compromise” the student diversity which it seeks.⁸² Given that de Blasio’s plan had the potential to create perverse incentives, this proposal may in fact lead to even less student diversity in the SHSs.⁸³ In particular, the Court in *Fisher II* seemed to take issue with the fact that the percentage plan in dispute only evaluated applicants based on one admissions factor (class rank), stating that when reviewing applicants, favoring one criterion or characteristic above all others does not create a diverse student body.⁸⁴ Rather, the Court was concerned that such a process may in fact lead to less diversity, for “like any single metric, [class rank] will capture certain types of people and miss others.”⁸⁵ However, de Blasio’s plan may be distinguished here, since the percentage plan reviewed in *Fisher II* only considered a single factor—class rank within an applicant’s graduating class—and not also rank among all graduates in a municipality or locality like de Blasio’s proposal, which technically evaluates applicants under two different factors.⁸⁶ Nevertheless, the Court declared that although in certain circumstances a percentage plan “may provide a path out of poverty for those who excel at schools lacking in resources,” the “exclusive use” of such a plan “cannot serve as the admissions solution” to advance student body diversity where it is lacking.⁸⁷

II

PROPOSAL FOR REFORMING THE SPECIALIZED HIGH SCHOOLS ADMISSIONS SYSTEM

This Part will present a proposal to reform the admissions system for New York City’s Specialized High Schools to increase student body diversity and maintain high standards of academic excellence. This plan offers to change the formal admissions process for these

⁸² *Fisher II*, 136 S. Ct. at 2213–14 (“[T]o compel [educational institutions] to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it.”).

⁸³ See *supra* note 64 and accompanying text; see also *id.* at 2214 (warning that the percentage plan proposed by Texas “may well compromise the University’s own definition of the diversity it seeks”).

⁸⁴ *Fisher II*, 136 S. Ct. at 2213–14.

⁸⁵ *Id.* at 2213. The Court was concerned that a percentage plan based on class rank “would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students.” *Id.*

⁸⁶ See *Specialized High Schools Proposal*, *supra* note 9.

⁸⁷ *Fisher II*, 136 S. Ct. at 2214 (“Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.”).

eight prestigious public high schools by creating a multi-factor, semi-holistic admissions system. As previously discussed, Mayor de Blasio's percentage plan to reform these schools was flawed for a number of reasons.⁸⁸

Unlike Mayor de Blasio's plan, this Note's proposal would preserve the SHSAT, for evidence shows that it accurately and strongly predicts academic success in high school.⁸⁹ However, unlike the present system which relies solely on the exam for admission,⁹⁰ my proposal would evaluate students based on four factors measuring academic performance: (1) SHSAT score; (2) GPA; (3) rank in eighth grade graduating class; and (4) rank among eighth graders citywide. In contrast to de Blasio's plan and the current admissions system, this proposal would also consider diversity as an explicit fifth "plus" factor. For this diversity factor, applicants would submit a short essay describing how they would uniquely contribute to the SHSs based on their characteristics, backgrounds, skills, talents, and experiences. Evaluating applicants based on different measures of scholastic achievement, in addition to SHSAT score, would help balance the admissions system, so that the academic integrity of the SHSs is maintained. Because using the SHSAT as the sole admissions criterion has disadvantaged Black and Hispanic/Latino students, this multi-factor plan promotes student diversity in the SHSs, as it allows students with different strengths, abilities, and contributions to be evaluated and weighed against each other.⁹¹

This Note's plan is a hybrid of de Blasio's recent proposal, the current admissions system for these schools, and the admissions processes used by institutions of higher education. As discussed ear-

⁸⁸ See *supra* Section I.C (discussing Mayor de Blasio's proposal and its various weaknesses).

⁸⁹ METIS ASSOCIATES, *THE SPECIALIZED HIGH SCHOOL ADMISSION TEST AND HIGH SCHOOL ACADEMIC ACHIEVEMENT* 4 (2013), <https://int.nyt.com/data/documenthelper/132-metis-study/6859861348a3d12d9368/optimized/full.pdf> (concluding that "[S]pecialized [H]igh [S]chools (i.e., those who scored at or above the cut-point on the SHSAT) fared better than the students who were not accepted," because students offered admittance to the SHSs had higher average GPAs and Regents exam scores, regardless of whether or not they actually attended one of these schools).

⁹⁰ See *Specialized High Schools*, *supra* note 16 (stating that students can apply to the eight "testing" specialized high schools by taking the SHSAT).

⁹¹ Under this proposal, all students would be evaluated on an individualized basis as part of a single applicant pool. Based on these five criteria, students would be ranked and then be assigned to one of the eight high schools based on their preferences and available seats. This method is similar to the one currently used in the admissions process for the SHSs. Hecht-Calandra Act of 1971, N.Y. EDUC. LAW § 2590-h; see also Letter from NAACP Legal Def. Fund et al. to Off. for Civ. Rights, U.S. Dep't of Educ. (Sept. 27, 2012) [hereinafter NAACP Letter], <https://www.naacpldf.org/wp-content/uploads/Specialized-High-Schools-Complaint.pdf>.

lier, the Mayor's percentage plan took a step in the right direction to address the disproportionately low number of Black and Hispanic/Latino students being admitted to the SHSs, even though it had some deficiencies. While de Blasio's plan fell short in numerous ways, the components of that policy that had some merit were included in this Note's proposal. The second, third, and fourth factors of this Note's proposal (GPA, rank in eighth grade graduating class, and rank among eighth graders citywide), stemmed from their inclusion in de Blasio's percentage plan. However, unlike de Blasio's plan, only students' state exam scores would be used to determine a student's rank among eighth graders citywide, whereas GPA would only be used to rank students among their school-wide graduating classes.⁹² In addition, GPA and class rankings are commonly used by many colleges in their admissions systems. The SHSAT is preserved as an admissions criterion because it is currently used in the admissions process for these eight schools, providing some stability during the overhaul of the SHS admissions process. Additionally, other standardized exam scores, like the SAT or the ACT, are typically used by institutions of higher education in the evaluation of applicants.

However, while this Note's proposed admissions process draws on the current admissions system and de Blasio's percentage plan, neither the present admissions process nor de Blasio's plan explicitly consider the factor of diversity in the review of applicants for the SHSs. Because of the underrepresentation of Blacks and Hispanics/Latinos among students admitted to these schools, this plan would require the City to consider a fifth factor of diversity in order to address this demographic disparity. Specifically, in terms of diversity, the City's Department of Education would consider a student's race, ethnicity, gender, socioeconomic status, family educational history, and other characteristics in the review process. In this way, it "considers race [and ethnicity] as one factor among many," as part of an "effort to assemble a student body that is diverse in ways broader than race" or ethnicity, as permissible under *Grutter*.⁹³ However, racial/ethnic diversity would be the primary focus under this factor.⁹⁴ Appli-

⁹² In contrast to de Blasio's percentage plan, this Note's proposal would not automatically admit students or guarantee admission. The combination of the four measures of scholastic achievement in this proposal allows the City to evaluate applicants using varying measures of academic performance. GPA and rank within one's eighth grade graduating class aim to measure a student's academic performance in one's own school. Conversely, rank among all eighth graders citywide and SHSAT score aim to measure a student's abilities across all of one's peers, regardless of the school one attends.

⁹³ *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

⁹⁴ The aim of this factor would be to increase the number of Blacks and Hispanics/Latinos being admitted to these elite schools.

cants would be evaluated for their potential to contribute to a diverse student body within each of the eight SHSs, in a system similar to the current admissions policies of many colleges and universities.⁹⁵ Race or ethnicity would be used as a plus factor that could benefit students of diverse backgrounds, which has been affirmed by the Supreme Court as constitutional.⁹⁶

Unlike de Blasio's proposal, this plan would also allow the Department of Education to enroll a critical mass⁹⁷ of underrepresented minority students in each of the eight SHSs to ensure that there are a sufficient number of Black and Hispanic/Latino students⁹⁸ who have the ability to make unique contributions to these schools,⁹⁹ as permitted in the higher education context.¹⁰⁰ This method would be qualitative, not quantitative, meaning that no set number or percentage of Blacks and Hispanics/Latinos would need to be admitted to these schools. In order to be constitutionally permissible, a critical

⁹⁵ See Sara Harberson, Opinion, *The Truth About 'Holistic' College Admissions*, L.A. TIMES (June 9, 2015), <https://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> (explaining that holistic college admissions policies are "based on the idea that a test score or GPA does not completely reflect who a student is and what he or she can bring to a college community" and "allow[] a [school] to factor in a student's background, challenges overcome, . . . [and] can include race among the characteristics they consider, as long as they don't apply racial quotas"); see also NAACP Letter, *supra* note 91 (noting that the "well-established model for college admissions" involves the "consider[ation of] multiple measures" in addition to standardized exam scores, including "grades, teacher recommendations, leadership, community service, other aspects of applicants' own backgrounds and experiences").

⁹⁶ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file [as long as] it does not insulate the individual from comparison with all other candidates for the available seats.").

⁹⁷ See *Grutter*, 539 U.S. at 318 (defining "critical mass" as "meaningful representation" of underrepresented minorities, so that such students "participate in the classroom and [do] not feel isolated," in order to "realize the educational benefits of a diverse student body").

⁹⁸ As noted above, the Department of Education (DOE) would be allowed to generally consider numerous characteristics under the fifth factor of diversity, including gender and socioeconomic status. Of course, there are other ways to measure diversity outside of race and ethnicity, such as sexual orientation and ideology. However, this fifth factor would focus on race and ethnicity, as this plan is in direct response to the disproportionately low number of Black and Hispanic/Latino students admitted to the SHSs.

⁹⁹ Under this Note's proposal, the DOE Chancellor would appoint educational experts to a special committee to oversee the SHS admissions system. These experts would determine how to classify critical mass, the weight of each factor (if any), and other specifics needed to implement the proposed plan.

¹⁰⁰ See *Grutter*, 539 U.S. 306 (holding that the University of Michigan could constitutionally attain its goal of student body diversity by enrolling a critical mass of underrepresented minorities through a highly individualized, flexible, and holistic review of each applicant where multiple factors were considered).

mass must be utilized as a qualitative and flexible¹⁰¹ approach, not in a mechanical or rigid way.¹⁰² Thus, the City would aim to admit an adequate number of Blacks and Hispanics/Latinos to provide meaningful representation, so that students do not feel like token minorities or spokespeople for their race or ethnicity.¹⁰³ A critical mass of Black and Hispanic/Latino students allows these minorities the ability to disprove and weaken categorizations of students of color,¹⁰⁴ for it “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races.”¹⁰⁵ This component of the plan will basically ensure that some students of underrepresented backgrounds will be admitted into these schools without unconstitutional racial balancing.¹⁰⁶

¹⁰¹ In order to promote transparency and public confidence in this process where discretion will need to be exercised, there will need to be certain safeguards built into the admissions process, such as reporting and open data. Specifically, changing SHS admissions remains a divisive issue along racial and ethnic lines. See Shapiro & Wang, *supra* note 11. Thus, the City should be both transparent and inclusive in its efforts to change the admissions criteria for the SHSs. See Corey Johnson, *NYC Council Speaker Corey Johnson: The Time to Act is Now on Specialized High Schools*, CHALKBEAT (Mar. 28, 2019), <https://www.chalkbeat.org/posts/ny/2019/03/28/corey-johnson-nyc-specialized-high-schools> (“Stakeholder input is key, and we will engage all communities as we move forward in reimagining access to [New York City’s] top [high] schools.”). For example, the City should form a working group of educational experts, policymakers, parents, high school students, and other stakeholders to oversee the reform and help inform notions of diversity as used in the fifth factor of this Note’s proposal. This can be achieved through the creation of core principles to provide guidance on the definition of diversity (and how it should be used in admissions) and to curb any potential for abuse. Such measures would hold the Department of Education and other city officials publicly accountable. Additionally, to further promote transparency, the Department of Education should make the admissions process for the SHSs, including information about the SHSAT, more accessible, in order to level the playing field for all applicants. “[R]acism, poverty, unequal access to resources, housing, and other realities facing” New York City students already produce disadvantages among applicants, so the Department of Education must work to counter these effects in order to create more equal opportunities for students. *Id.*

¹⁰² See *Grutter*, 539 U.S. at 335–37. By utilizing this flexible approach, enrolling a critical mass of Black and Hispanic/Latino students would enable the City to increase diversity in the SHSs constitutionally (unlike establishing, in advance, fixed quotas of minority students, which would constitute unlawful racial balancing).

¹⁰³ *Id.* at 329–30 (holding that enrolling a critical mass of underrepresented minority students would allow these students to be represented in the student body).

¹⁰⁴ *Id.* at 320 (“[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”).

¹⁰⁵ *Id.* at 330 (internal citations and quotation marks omitted).

¹⁰⁶ See *infra* Section III.B (exploring the Court’s reasoning that racial balancing violates the Fourteenth Amendment). The exact details of this guarantee will need to be weighed and determined by experts in this area of law. Also, there will need to be safeguards built into this Note’s proposal, potentially in the language of the law implementing this plan, in order to ensure that the critical mass component is properly utilized (and not abused or ignored). See *supra* notes 99, 101.

However, unlike entirely holistic admissions systems, this proposal for the SHSs would only consider a smaller, controlled number of factors, not including criteria such as letters of recommendations, grade trends, rigor of academic coursework, or extracurricular activities. This plan is limited to only five factors, most of which are quantitative, to impose a lesser administrative burden on the City and to allow the Department of Education to expeditiously handle the evaluation of applicants. There are administrative burdens associated with a holistic admissions process that would lead to an increased cost to taxpayers and difficulties in justifying the program as a policy matter. Hence, assuming that the City will have fewer personnel to evaluate applicants for the SHSs than institutions of higher education that use more holistic admissions procedures, using fewer criteria will help minimize the burden. Moreover, studies have found that completely holistic admissions policies typically favor more affluent, privileged applicants who can find ways to take advantage of factors such as extracurricular activities and letters of recommendation.¹⁰⁷ Thus, this proposal seeks to avoid a system that disadvantages less privileged families and increases the City's costs.

Also in contrast to Mayor de Blasio's proposal, this plan would maintain the SHSAT. Although the SHSAT has remained the sole factor for admission to the SHSs for decades, this criterion has been the subject of much controversy in recent years.¹⁰⁸ However, there is now compelling evidence that shows a strong correlation between a student's SHSAT score and high school academic performance.¹⁰⁹ A

¹⁰⁷ See MITCHELL L. STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* 242–64 (2007) (noting that the high cost of providing and involving children in extracurricular activities disadvantages schools and families of modest means); Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 *UCLA L. REV. DISCOURSE* 174, 218 (2016) (discussing the negative bias African-American students may face when requesting letters of recommendation from faculty); Jason England, *The Mess That Is Elite College Admissions, Explained by a Former Dean*, *Vox* (May 8, 2019, 9:10 AM), <https://www.vox.com/the-highlight/2019/5/1/18311548/college-admissions-secrets-myths> (detailing the disparities between “hyperbolic” letters of recommendation from small, private schools compared to letters from large, public schools).

¹⁰⁸ See Shakarian, *supra* note 6 (“Since the 1990s, consecutive mayoral administrations have grappled with how to reverse the steady decline of black and Latino students in the city's top schools . . .”).

¹⁰⁹ METIS ASSOCIATES, *supra* note 89. The report studied admitted students, not enrolled students. Also, the SHSAT has been the only admissions criterion used by the SHSs in the past fifty years. During this time, students and alumni have won prestigious awards and honors, earned admittance to top colleges and universities, and had successful professional careers. See Peter Jacobs, *The 10 Best Public High Schools in New York City*, *BUS. INSIDER* (Nov. 12, 2013, 4:45 PM), <https://www.businessinsider.com/best-public-high-schools-new-york-city-stuyvesant-2013-11> (noting that thirteen Stuyvesant students were semi-finalists in the 2012 Intel Science Competition and that eight Bronx Science alumni

2013 study commissioned by the New York City Department of Education showed a strong positive relationship between doing well on the SHSAT and high school academic performance, regardless of whether the student actually attended a SHS.¹¹⁰ Using metrics such as scores on the state Regents exams and GPAs, the study measured the performance of eighth graders who took the SHSAT, following them through their first two years of high school.¹¹¹ The study found that the mean first-year GPA for high schoolers who scored high enough on the SHSAT to be admitted to a SHS was 3.036, compared with 2.387 for those students who did not meet the minimum benchmark to be accepted.¹¹² Likewise, the average range of scores on state Regents exams over various subjects was 82.59 to 93.41 for students admitted to a SHS, compared to 68.69 to 79.16 for those not accepted.¹¹³

By continuing to use the SHSAT as one factor among many, this plan differs from both the current admissions system and de Blasio's proposal, affording it various strengths when compared to these other admissions processes. A multi-factor process allows the City to evaluate applicants based on numerous criteria, including an exam that

have won Nobel Prizes, which is the most of any secondary school in the United States in both categories); Post Staff Report, *The Elite Eight: Here Are the Top Schools in NYC*, N.Y. POST (Sept. 27, 2015), <https://nypost.com/2015/09/27/the-elite-eight-here-are-the-top-schools-in-nyc> (reporting that in the previous year, forty-eight Stuyvesant students won medals in the Scholastic Writing Awards Competition); Dennis Saffran, *The Plot Against Merit*, CITY J. MAG. (2014), <https://www.city-journal.org/html/plot-against-merit-13667.html> (stating that the SHSs “have produced 14 Nobel Laureates—more than most countries” and that Bronx Science graduates have won six Pulitzer Prizes); see also NAACP Letter, *supra* note 91 (stating that Stuyvesant's alumni include “Academy Award winning actors, Olympic medalists, CEOs of major corporations, Members of Congress [], [and] judges [],” among other notable figures); Daniel Friedman, *What New York's Public Schools Could Learn from Stuyvesant*, QUILLETTE (Apr. 3, 2019) <https://quillette.com/2019/04/03/what-new-yorks-public-schools-could-learn-from-stuyvesant> (“Nearly 40 percent of NYC's National Merit Semifinalists are Stuyvesant students, [who also] are routinely among the semifinalists and finalists in the prestigious Intel Science Competition . . . Stuyvesant also frequently fields national championship chess teams.”). One may view this as evidence of the SHSAT's ability to uncover unique skills and talents that will allow students to perform exceptionally in high school and throughout their lives. However, the use of the SHSAT as the sole admissions criterion is problematic because this standardized exam may overlook other students who have extraordinary abilities to succeed academically in the SHSs and beyond their high school educations. For these reasons, this Note's proposal preserves the SHSAT as one admissions factor but utilizes a number of other factors to evaluate applicants' capabilities to do well in the City's SHSs.

¹¹⁰ METIS ASSOCIATES, *supra* note 89.

¹¹¹ *Id.* at 2.

¹¹² *Id.* at 4.

¹¹³ *Id.* Notably, this study controlled for students who attended a SHS by comparing the SHSAT scores of students who were admitted and not admitted to these elite schools, instead of only utilizing the SHSAT scores of students who actually enrolled in these eight schools. This provides additional validity for the study's results as it helps control for the effect that the educational environmental at the SHS may have on a student. *Id.* at 3.

has shown to be a reliable predictor of student achievement.¹¹⁴ Like other standardized exams that aim to measure some academic skills, the SHSAT is also an objective measure of scholastic aptitude. Compared to other factors such as GPAs, state exam scores, and class rankings, the SHSAT, may be the “least subjective [criterion] of admission” among all of the factors in this proposal.¹¹⁵ In fact, rankings and state exam scores are “heavily influenced” by the quality of the schools that students attend, unlike an applicant’s SHSAT score.¹¹⁶

While standardized exams measure skills to some degree, there are other effective ways to evaluate applicants’ academic readiness and potential for success. The use of a standardized test as the only admissions factor does not allow schools to consider the other ways students may contribute to the school environment or possess valuable skills,¹¹⁷ which can be demonstrated through an applicant’s diverse background.¹¹⁸ For this reason, this Note’s proposal explicitly considers a student’s race or ethnicity, among other characteristics, in evaluating an applicant’s potential contribution to a school’s diversity and community.¹¹⁹ Additionally, the policy of evaluating candidates

¹¹⁴ See *supra* notes 89, 110–13 (discussing the validity of the SHSAT as a reliable predictor of academic success).

¹¹⁵ See Jasmine Kaur, *The SHSAT Is Fair – So Keep It, Argues Student at a Specialized High School*, N.Y. DAILY NEWS (June 26, 2018, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-the-shsat-is-fair-20180619-story.html>.

¹¹⁶ *Id.* Nevertheless, test prep courses and books for the SHSAT are commonly utilized by students to help prepare for the exam, especially among Asian Americans. The use of these resources has been shown to influence SHSAT scores. See generally Kyle Spencer, *For Asians, School Tests Are Vital Steppingstones*, N.Y. TIMES (Oct. 26, 2012), <https://www.nytimes.com/2012/10/27/education/a-grueling-admissions-test-highlights-a-racial-divide.html>; Alice Yin, *Asian Test-Prep Centers Offer Parents Exactly What They Want: ‘Results,’* N.Y. TIMES MAG.: NOTEBOOK (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/magazine/asian-test-prep-centers-offer-parents-exactly-what-they-want-results.html>. In this Note’s proposal, GPA and rankings (within each school’s eighth grade graduating class and among all eighth graders citywide) can serve as a check to SHSAT scores, and vice versa, in order to prevent students and their families from being too dependent on preparing for the SHSAT.

¹¹⁷ Janet Ewell, *Test-Takers, Not Students*, L.A. TIMES (May 26, 2007, 12:00 AM), <https://www.latimes.com/la-oe-ewell26may26-story.html>.

¹¹⁸ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (“[A student with a particular background] may . . . enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”); NAACP Letter, *supra* note 91 (explaining that using multiple factors “help[s] assess students’ achievements and capabilities in the context of the opportunities [that] they have received” and that “[a]t both the high school and college levels, admissions procedures that rely on multiple measures can yield classes that are both diverse *and* meet high standards of academic excellence”).

¹¹⁹ See *supra* notes 89–91 and accompanying text (presenting a proposal for changing the SHSs’ admissions process, in which applicants would be evaluated according to five factors, including diversity).

under several factors is supported by studies showing that not all students have equal abilities in taking exams, which is the reason that “education experts nationwide, as well as the well-established test development standards set forth by the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education” encourage the use of admissions policies that consider multiple factors, as opposed to a single exam.¹²⁰ The current SHS admissions system, by reviewing applicants based on a single standardized exam score, discounts other measures of academic performance, such as GPA. According to the City’s Independent Budget Office, “some studies—including one focused on performance at the specialized high schools—have found that grades provide a better predictor of future student success” than scores on standardized exams.¹²¹ In particular, researchers have found that “[f]or non-majority students . . . grades became stronger predictors and test scores became weaker predictors of academic achievement.”¹²² Notably, while the SHSAT is a valid predictor of academic performance, one study found that seventh grade GPA better predicts students’ success in high school than the SHSAT.¹²³

¹²⁰ NAACP Letter, *supra* note 91 (“Because there is a limit to what any single factor can predict about a person’s academic promise, let alone his or her potential to succeed and thrive in life, admissions decisions based solely on a high-stakes test have been roundly criticized by educational experts and social scientists.”); *see also* Sarah Sheffer, *Do ACT and SAT Scores Really Matter? New Study Says They Shouldn’t*, PBS NEWSHOUR (Feb. 18, 2014), <https://www.pbs.org/newshour/education/nail-biting-standardized-testing-may-miss-mark-college-students> (discussing the growth of test-optional admissions programs at colleges and universities).

¹²¹ N.Y.C. INDEP. BUDGET OFFICE, *ADMISSIONS OVERHAUL: SIMULATING THE OUTCOME UNDER THE MAYOR’S PLAN FOR ADMISSIONS TO THE CITY’S SPECIALIZED HIGH SCHOOLS 3* (2019); *see also* Sheffer, *supra* note 120.

¹²² John L. Hoffman & Katie E. Lowitzki, *Predicting College Success with High School Grades and Test Scores: Limitations for Minority Students*, 28 REV. HIGHER EDUC. 455, 468 (2005) (“For any institution wishing to diversify its student body[,] . . . the use of standardized tests may be counterproductive.”); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INST. (Mar. 1, 1998), <https://www.brookings.edu/articles/the-black-white-test-score-gap-why-it-persists-and-what-can-be-done> (describing new explanations for the disparity between the standardized exam scores of Black and Hispanic/Latinos and students of other ethnic or racial groups); Jennifer Senior, *A Simple Way to Boost Minority Test Scores*, N.Y. MAG. (Aug. 9, 2013), <http://nymag.com/intelligencer/2013/08/simple-way-to-boost-minority-test-scores.html> (“Since 1995, social psychologists have shown that among the many obstacles black and Latino students face in an academic setting is a psychological one, something they refer to as a ‘stereotype threat.’”).

¹²³ A study by educational researcher Jonathan Taylor used New York City Department of Education data and found that “seventh grade GPA predicts more than twice as much of the variance in high school grades (44%) when compared to the SHSAT, which predicted 20% in my study and 21% in the [DOE study].” Jonathan Taylor, *New Research Shows SHSAT Less Valuable Predictor than Middle School Grades*, GOTHAM GAZETTE (Aug. 16,

Furthermore, the study showing the SHSAT's validity does not "change the overall contention that using a single multiple choice test for admissions to these schools is bad educational policy and has a discriminatory result."¹²⁴ Indeed, the overwhelming majority of colleges and universities throughout the United States do not use a single exam score as the only factor in its evaluation of applicants in admissions.¹²⁵ In fact, the SHSs have the only system in the United States that evaluates applicants for admission based on a single exam.¹²⁶ Hence, the problem is not the SHSAT itself but rather the City's policy of using it as the sole admissions criterion. By having various factors, all of which are substantially different from one another, this Note's proposal allows students' strengths and weaknesses to be balanced against each other, so that the overall best prepared and qualified applicants for these elite schools are offered admission.

Moreover, this Note's proposal offers a valid compromise between supporters who want to see the SHSAT preserved, as in the current admissions system, and advocates of de Blasio's proposal, which would eliminate the exam.¹²⁷ Given that state law would have to be amended to reform the admissions system, a successful plan will require a strong political consensus and common ground.¹²⁸ In addi-

2018), <http://www.gothamgazette.com/opinion/7871-new-research-shows-shsat-less-valuable-predictor-than-middle-school-grades>.

¹²⁴ Tyler Pager, *SHSAT Predicts Whether Students Will Succeed in School, Study Finds*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/nyregion/admissions-test-shsat-high-school-study.html> (quoting Rachel Kleinman, a lawyer for the NAACP Legal Defense Fund, who has publicly challenged the test).

¹²⁵ David Bloomfield, *Failing the Stuyvesant Test*, CHALKBEAT (Jan. 11, 2013), <https://ny.chalkbeat.org/posts/ny/2013/01/11/failing-the-stuyvesant-test> ("[O]f hundreds of competitive high schools across the country, only New York City employs a system where a single test means everything. I know of no American college or university, no matter how selective, that uses such a system."); see also Al Baker, *Charges of Bias in Admission Test Policy at Eight Elite Public High Schools*, N.Y. TIMES (Sept. 27, 2012), <https://www.nytimes.com/2012/09/28/nyregion/specialized-high-school-admissions-test-is-racially-discriminatory-complaint-says.html> (noting that New York City's SHSs are the only secondary schools among 165 selective high schools nationwide which use one test as the sole admissions criterion).

¹²⁶ Editorial, *supra* note 30 ("Of all elite public high schools in the country, only New York [City]'s use a single exam for admission.").

¹²⁷ See, e.g., Andres O'Hara, *Battle Rages Over Plan Intended to Diversify NYC Specialized High Schools*, GOTHAMIST (June 6, 2018, 11:25 AM), http://gothamist.com/2018/06/06/shsat_test_nyc_high_schools.php (noting the arguments of those who oppose and support the use of the SHSAT as the sole admissions criterion).

¹²⁸ This compromise presents a viable option to each side of the debate, giving them the opportunity to come to an agreement. See Monica Disare, *Mayor Bill de Blasio's Specialized High School Proposal Clears One (Small) Hurdle*, CHALKBEAT (June 6, 2018), <https://chalkbeat.org/posts/ny/2018/06/06/mayor-bill-de-blosios-specialized-high-school-legislation-clears-one-small-hurdle> (explaining the political support needed to change SHS admissions).

tion, while this Note's proposed plan preserves the SHSAT, it only maintains it as one factor among five total, including four other, substantially different measures of academic ability. Most importantly, by using a diversity plus factor to ensure the City is enrolling a critical mass of underrepresented minority students at these eight prestigious high schools, the plan counters any potential discriminatory effect on Blacks and Hispanics/Latinos which may be caused by the continued use of the SHSAT.¹²⁹ The critical mass component provides the City the means to bolster the number of Blacks and Hispanics/Latinos admitted to these elite schools despite their SHSAT scores, which, as noted above, may be lower than the students of other ethnic/racial groups.¹³⁰

III POTENTIAL CONSTITUTIONAL CHALLENGES TO THIS ALTERNATIVE PLAN

Given that the plan presented in Part II to reform the Specialized High Schools explicitly considers race and ethnicity, it may be subject to challenges under the Fourteenth Amendment. This Part will focus on exploring the potential constitutional challenges facing this proposal under the Supreme Court's doctrine on educational affirmative action and will argue that the plan fits within the Court's jurisprudence on this issue. In analyzing the constitutionality of this Note's proposed alternative admissions process, this Part will focus on the Court's standard of strict scrutiny, including its two elements: (1) compelling government interest and (2) narrow tailoring.¹³¹ This Note will focus on examining three of the most significant Supreme Court cases on affirmative action in education.

The first major case to be decided as part of the Supreme Court's modern doctrine on affirmative action in education is *Bakke*, in which Justice Powell's controlling opinion set the foundation for decades of jurisprudence on the issue of diversity in schools. In this case, the Court held that racial and ethnic classifications, such as those used in

¹²⁹ In addition, preserving the SHSAT as one of five factors would also equalize the playing field for Asian-American students who have demonstrated that they can perform well on this exam. It would also help garner political support from the Asian-American community, which would be beneficial to making the proposal into law.

¹³⁰ See *supra* note 122 and accompanying text (noting that Black and Hispanic/Latino students tend to score lower on standardized exams than their peers in other racial and ethnic groups).

¹³¹ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (holding that two elements, compelling government interest and narrow tailoring, must be met for affirmative action policies which classify students based on race or ethnicity to be held constitutional under the Fourteenth Amendment).

affirmative action policies, can be constitutional to attain the benefits of diverse student bodies. Twenty-five years later, in *Grutter*, the Court reaffirmed much of Justice Powell's reasoning in *Bakke*, holding that a flexible, holistic review of applicants, where students are evaluated on an individual basis under many factors including diversity, suffices as constitutional. Here, the Court took a step further in holding that educational institutions can promote the goal of student body diversity by using a critical mass approach in which schools qualitatively admit meaningful numbers of underrepresented minorities. However, while pursuing the goal of diversity and avoiding racial isolation are compelling government interests, at least in the higher education setting, the Court developed this doctrine further in *Parents Involved*. Here, the Court held that racial or ethnic distinctions made in a non-individualized, mechanical way, where race or ethnicity is a decisive factor, is not a permissible method to attain student body diversity, but rather achieves unconstitutional racial balance, similar to the fixed racial quotas deemed unlawful under the Fourteenth Amendment in *Bakke*.¹³²

In Section III.A, this Note will discuss the admissions process of institutions in the secondary school context.¹³³ This Section will explore whether a diverse student body is in fact a constitutionally permissible compelling government interest in the non-college or university context—a question left largely unanswered by the Court¹³⁴—and will highlight the uniqueness of the SHSs and the similarities they share with colleges and universities. Given this analogy, this Section will argue that the lack of diversity in the SHSs is parallel to the facts at issue in *Bakke* and *Grutter*, where the Court determined how to maintain selective educational institutions while also promoting diverse student bodies. Hence, when examining the case of the SHSs, the Court would be able to adhere to precedent, even though it would be applying the doctrine in the secondary school, not college or uni-

¹³² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (holding that school districts violated the Fourteenth Amendment's Equal Protection Clause by explicitly using race to rigidly assign students to primary and secondary schools in order to achieve racial balance, which amounted to invalid fixed quotas).

¹³³ The vast majority of cases applying the Supreme Court's doctrine on affirmative action where applicants' race or ethnicity are considered involve educational institutions in the higher education context. However, the Court has ruled on race-sensitive diversity efforts in the non-higher education setting in a few exceptions, including *Parents Involved*.

¹³⁴ In *Parents Involved*, five Justices agreed that attaining diverse student bodies in the non-higher education setting is a compelling government interest, with the remaining Justices leaving it an open question. See *Parents Involved*, 551 U.S. at 726, 783, 854–55, 865 (asserting that student body diversity is a valid government interest in higher education but not explicitly holding whether such an interest is valid in primary or secondary schools).

versity, setting. Next, Section III.B will examine the Court's requirement of narrowly tailoring the means to attain student body diversity, including its ruling that race-neutral alternatives must have been attempted and failed in order to subsequently engage in racial or ethnic classifications of applicants.¹³⁵ Then, this Section will explore the Court's holding that the Constitution permits universities to seek meaningful student body diversity through the admission of a critical mass of underrepresented minority students, as opposed to unconstitutional racial balancing.¹³⁶ This Section will argue that this Note's proposal would meet these requirements, for it allows the City, by using a highly-individualized admissions process with multiple factors, to admit an increased number of Blacks and Hispanics/Latinos to the SHSs so that they are meaningfully represented, without requiring the City to meet rigid or fixed quotas.¹³⁷

A. *First Element—The Compelling Government Interest of Diversity in the Secondary School Setting*

Affirmative action policies that involve racial or ethnic classifications are reviewed under strict scrutiny, which is the most rigorous standard of review.¹³⁸ This Note's proposal to reform the Specialized High Schools' admissions system involves racial and ethnic classifications by making diversity an explicit factor in the process.¹³⁹ Under strict scrutiny review, affirmative action policies that consider applicants' race or ethnicity violate the Fourteenth Amendment unless they are narrowly tailored to meet a compelling government interest.¹⁴⁰ The first element of this standard is the government's interest in classifying based on race.¹⁴¹ In *Bakke*, the Court held that the attainment of a diverse student body is a legally permissible government interest¹⁴² because diverse students help foster enriched discussions and learning through the "robust exchange of ideas" in the classroom.¹⁴³ This Note's plan, since it is being employed for the sole purpose of

¹³⁵ See *id.* at 705–07 (finding the school district did not show it had attempted to utilize other race-neutral alternatives to achieve diversity within its schools).

¹³⁶ See *Grutter*, 539 U.S. at 328–30; *Bakke*, 438 U.S. at 315–17.

¹³⁷ See *Grutter*, 539 U.S. at 328–30 (recognizing a compelling interest in enrolling "a critical mass" of students from underrepresented, minority backgrounds, but not in racial balancing).

¹³⁸ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Bakke*, 438 U.S. at 298–99.

¹³⁹ See *supra* Part II (detailing this Note's proposal to change the formal admissions system for these eight elite schools).

¹⁴⁰ *Grutter*, 539 U.S. at 326; *Bakke*, 438 U.S. at 298–99.

¹⁴¹ *Bakke*, 438 U.S. at 305–06.

¹⁴² *Id.* at 311–12.

¹⁴³ *Id.* at 313.

increasing student body diversity in New York City's SHSs for precisely the interests identified as permissible in *Bakke*, should meet this element under strict scrutiny. Given that Black and Hispanic/Latino students are significantly underrepresented in New York City's SHSs,¹⁴⁴ the City likely would be able to meet its burden of demonstrating "that the reasons for any [racial or ethnic] classification [are] clearly identified and unquestionably legitimate"¹⁴⁵ and required for attaining the goal of furthering student body diversity in these eight prestigious institutions.

The Court is permitted to give some degree of deference to the school's decision that student diversity is vital to its educational mission¹⁴⁶ as long as diversity is not defined as "outright racial balancing"¹⁴⁷ or "some specified percentage of a particular group merely because of its race or ethnic origin."¹⁴⁸ The proposal set forth in this Note does not engage in racial balancing, because it does not have any rigid, predetermined quotas to reach fixed numbers or percentages of underrepresented minorities.¹⁴⁹ Therefore, the Court would likely defer to the City's determination that a diverse student body is a valid government goal. The Court has made clear that some, but not absolute, judicial deference is proper to an educational institution or school district's academic judgment "to pursue the educational benefits that flow from student body diversity."¹⁵⁰ Given that the number of Blacks and Hispanics/Latinos at the SHSs is disproportionately low,¹⁵¹ the City would almost certainly be able to show that there is a "reasoned, principled explanation"¹⁵² in considering students' race and ethnicity in SHS admissions, meeting the Court's standard for deference on this element.

The vast majority of Supreme Court decisions upholding affirmative action policies in admissions processes have been in the higher-education context—a significant challenge facing the constitutionality

¹⁴⁴ See *supra* Section I.B (discussing the disproportionately low number of Blacks and Hispanics/Latinos admitted to New York City's SHSs).

¹⁴⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (citation omitted).

¹⁴⁶ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹⁴⁷ *Id.* at 330.

¹⁴⁸ *Fisher II*, 136 S. Ct. 2198, 2208 (2016) (citation omitted).

¹⁴⁹ See *supra* Part II (presenting an alternative plan to change the admissions process of the SHSs).

¹⁵⁰ *Fisher II*, 136 S. Ct. at 2208 (citation omitted).

¹⁵¹ See *supra* Section I.B.

¹⁵² *Fisher I*, 570 U.S. 297, 310 (2013) (explaining that while an educational institution may determine that "diversity is essential to its educational mission," the Court must only apply partial deference to this decision because there must still be a logically sound reason for this determination).

of this Note's proposal.¹⁵³ In *Parents Involved*, however, the Court applied this doctrine to the secondary school setting.¹⁵⁴ Nevertheless, the precedent that this case established will pose a challenge, given that the Court invalidated a school district's system for admitting students to primary and secondary schools, distinguishing the case from the university context in which affirmative action policies have been upheld.¹⁵⁵ While the Court reaffirmed that seeking diverse student bodies is a compelling government interest for educational institutions to pursue in the college or university setting, the Court did not conclusively assert that this interest is also compelling beyond this context.¹⁵⁶ Nor did the Court completely resolve whether such diversity is a valid compelling government interest in the primary or secondary school setting, instead ambiguously acknowledging that "context matters in applying strict scrutiny."¹⁵⁷

While there was no majority opinion on this exact point,¹⁵⁸ five Justices largely agreed that attaining diversity in secondary schools is a compelling government interest, with the remaining four Justices leaving this an open question.¹⁵⁹ The five Justices who argued that the government can have a compelling government interest in student body diversity at the primary or secondary school level pointed out that such diversity allows students to avoid "racial isolation" and

¹⁵³ See, e.g., *Fisher II*, 136 S. Ct. at 2205–07 (upholding the holistic admissions process used by the University of Texas); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the University of Michigan's use of racial preferences in law school admissions); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 271 (1978) (holding unconstitutional the racial quota system used by the medical school at the University of California at Davis).

¹⁵⁴ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (plurality opinion) (holding unconstitutional secondary school student assignment plans aimed at achieving a racial balance).

¹⁵⁵ See *id.* at 724–25.

¹⁵⁶ See *id.*

¹⁵⁷ *Id.* at 725 (Kennedy, J., concurring) (internal citations and quotation marks omitted).

¹⁵⁸ *Parents Involved* was a 4-1-1 split decision. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito concluded that the school districts at issue did not sufficiently meet the element of narrow tailoring with their admissions systems, with which Justice Kennedy also agreed. See *id.* at 726 (plurality opinion); *id.* at 786–87 (Kennedy, J., concurring). In contrast, the dissenting Justices (Breyer, Stevens, Souter, and Ginsburg) argued that the school districts at issue had shown that there was a compelling government interest in attaining diverse student bodies for their schools in the primary and secondary setting. *Id.* at 838 (Breyer, J., dissenting). In a sole concurrence, Justice Kennedy noted that the school districts had compelling interests in "avoiding racial isolation" and "achiev[ing] a diverse student population," of which race is one factor, but concluded that the districts had not adopted programs narrowly tailored to these goals. *Id.* at 783–84, 797–98; see also *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 281–83 (S.D.N.Y. 2019) (applying *Parents Involved* to a case challenging the Discovery Program in the SHSs).

¹⁵⁹ See *Christa McAuliffe*, 364 F. Supp. 3d at 281–82 (citing *Parents Involved*, 551 U.S. at 726 (plurality opinion)); *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring).

experience “racial mixture” among their peers.¹⁶⁰ These goals would be applicable to the SHSs, especially given the accounts of discrimination and prejudice described by alumni of these schools.¹⁶¹ But Justice Kennedy’s concurrence, which determined the holding of the Court, expressed concerns about students being “forced to live under a state-mandated racial label” in the interest of pursuing diversity in schools.¹⁶² In particular, Kennedy was concerned with infringing on students’ rights as individuals and feared that overt racial classification in school admissions would “lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.”¹⁶³

Nevertheless, Kennedy affirmed that in at least two situations, diversity can exist as a compelling interest in the non-higher education setting: first, to avoid racial isolation and second, to achieve diverse student populations.¹⁶⁴ These interests suffice under strict scrutiny because the government has a “moral and ethical obligation . . . to creat[e] an integrated society that ensures equal opportunity for all of its children.”¹⁶⁵ However, Kennedy cautioned that race should only be used as one component in pursuing diversity among students, along with the consideration of “other demographic factors, plus special talents and needs.”¹⁶⁶ This Note’s proposal, which would consider numerous characteristics for the factor of diversity, meets this standard. Further, Kennedy warned that crude measures, such as rigid quotas where all students are classified based on race and assigned to schools according to those categorizations, are not allowed under the Constitution even in the secondary school context.¹⁶⁷ Again, given that this Note’s admissions plan does not utilize any fixed ethnic or racial quotas or numerical targets, its alternative admissions system sufficiently meets this rule. Nevertheless, the Court’s ambiguity and incongruity on student diversity in the primary and secondary school setting may be a significant legal hurdle if litigation ensues challenging this Note’s proposal, for there is a lack of clear and coherent guidance

¹⁶⁰ See *Parents Involved*, 551 U.S. at 838 (Breyer, J., dissenting); *id.* at 783 (Kennedy, J., concurring).

¹⁶¹ See *supra* notes 36–39 and accompanying text.

¹⁶² *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring).

¹⁶³ *Id.* at 796–98 (Kennedy, J., concurring).

¹⁶⁴ *Id.* at 797–99.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 789.

¹⁶⁷ *Id.* Additionally, Kennedy implied that a diverse student body may be a constitutionally permissible goal for primary and secondary schools in other circumstances if they “devise race-conscious measures to address [a lack of diversity] in a general way.” *Id.* at 788–89.

on this specific issue, as shown by the obscure and divergent language in *Parents Involved*.

While there are some relevant differences between high school and higher education, the Court's affirmative action doctrine should be applied beyond the university context, especially in the case of the SHSs. Whether in the secondary or higher education setting, a diverse student body remains a desirable goal for educational institutions because it allows students to avoid experiencing token representation or feeling like spokespeople for their racial or ethnic groups, promoting a more inclusive learning environment and fostering enriched dialogue. As stated in *Grutter*, "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society.'"¹⁶⁸ In many school integration and affirmative action cases, starting with *Brown*, the Court has recognized the supreme importance of education in preparing students to become productive citizens and workers, expressing that public education is key to "maintaining the fabric of society."¹⁶⁹ By providing diverse student bodies, including a critical mass of underrepresented minorities, all students benefit because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students [engaged] have the greatest possible variety of backgrounds."¹⁷⁰

The many benefits of diverse student bodies are supported by the fact that American employers have underscored that the skills necessary for success in today's increasingly global society "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," as acknowledged in *Grutter*.¹⁷¹ For these reasons, "the diffusion of knowledge and opportunity through public institutions," especially those like New York City's SHSs, which have a long history of cultivating successful professionals and leaders,¹⁷² "must be accessible to all individuals regardless of race or ethnicity."¹⁷³ Given their long-standing reputation for preparing students to become exceptionally accomplished trailblazers through their career-based,

¹⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing Brief for American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents).

¹⁶⁹ *Grutter*, 539 U.S. at 331 (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting the "importance of education to our democratic society").

¹⁷⁰ *Grutter*, 539 U.S. at 330 (internal quotation marks and citations omitted).

¹⁷¹ *Id.*

¹⁷² *Id.* at 331–32; Editorial, *supra* note 30 ("[The SHSs] have, for generations, set those lucky enough to attend on paths to success, to middle-class security, to rewarding careers and even to Nobel Prizes.").

¹⁷³ *Grutter*, 539 U.S. at 331.

challenging curricula, these schools are unique as institutions of public education. In fact, these eight high schools may resemble typical colleges and universities more than they resemble traditional secondary schools. Indeed, these selective, esteemed high schools even mirror the higher educational institutions at issue in *Grutter* and *Bakke*, where the Court found that diverse student populations can be sought even in the context of prominent schools with traditions of high standards, records of academic excellence, and established networks of successful alumni—all characteristics comparable to the SHSs. These similarities warrant the Court's finding that student diversity is a compelling government goal in the case of the eight SHSs.

Elite educational institutions such as the SHSs, like the public universities and law schools at issue in the majority of the Supreme Court's decisions on affirmative action in education, "represent the training ground for a large number of our Nation's leaders."¹⁷⁴ These institutions seek to provide exceptional opportunities for students to prepare for their future careers, which requires that those students be exposed to peers from diverse backgrounds. The SHSs are renowned in their ability to foster great achievement and highly accomplished alumni. Due to their rigorous academic curricula and extensive alumni networks, the SHSs are some of the best high schools in New York City and even the United States, for "[t]hey provide a pathway to opportunity for their graduates, many of whom go on to attend the country's best colleges and universities, and become leaders in our nation's economic, political, and civic life."¹⁷⁵

Since the SHSs aim to develop innovative pioneers in all fields,¹⁷⁶ they focus on preparing their students for their future professions through their rigorous, career-based academic curricula, much like colleges, universities, graduate, and professional schools. These schools offer many challenging courses at the college level, including Advanced Placement (AP) and International Baccalaureate (IB) programs, and unique electives that rival those commonly found in higher education.¹⁷⁷ In fact, some of these schools require students to take a certain number of AP courses, or even offer students the chance to

¹⁷⁴ See *id.* at 332 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)) (permitting race-conscious admissions at University of Michigan Law School).

¹⁷⁵ NAACP Letter, *supra* note 91.

¹⁷⁶ Awards and honors are common among the graduates of all the SHSs. For example, Bronx Science is "[w]orld-famous for eight Nobel Laureates and six Pulitzer Prize winners among alumni." Post Staff Report, *supra* note 109.

¹⁷⁷ Such elective courses include Differential Equations, Existentialism, Accounting, International Relations, Genetics, Women's Voices, Analytical Chemistry, Multivariable Calculus, Physics of Music, Intelligence & Security, and Computer Science. *Id.*

earn credit from actual college-accredited courses.¹⁷⁸ Additionally, these eight schools focus on preparing students for their future professions through exceptional professional opportunities and internships that compare to those found in higher education.¹⁷⁹ As these opportunities indicate, the SHSs are “proudly blurring the lines between high school, college, and career,”¹⁸⁰ making them resemble institutions commonly found in higher education and warranting the expansion of diversity as a compelling government goal for these eight elite high schools.

Moreover, given that benefits result from increasing student body diversity in higher education, there is “no logical reason why increasing racial [and ethnic] diversity in high schools would not benefit students to the same extent.”¹⁸¹ In fact, one could argue that promoting student body diversity in secondary schools is even more advantageous because younger students are more impressionable.¹⁸² In addition, high school students typically tend to spend more time in class and learn in smaller class sizes than those in colleges and universities.¹⁸³ This boosts student interaction in school, especially since these students are usually more limited in their course selections, and consequently are more likely than college students to learn amongst their same peers.¹⁸⁴ With this taken into consideration, it seems “more likely than not that achieving racially diverse classrooms will be shown to be a compelling government interest” in the high school setting.¹⁸⁵ If the Court was ever to find that using race-conscious programs to create diverse student bodies can be constitutionally permissible in the secondary school context, it should take the opportunity to do so with the SHSs.

¹⁷⁸ *Id.* The schools also offer many world language courses, including Russian, Greek, Hebrew, and Japanese. *Id.*

¹⁷⁹ Opportunities include shadowing scientists to perform lab research or observing patient rounds with physicians at local hospitals. Through special partnerships and programs, some students will study abroad for several weeks. Others utilize “state-of-the-art tools” in animation and robotics labs. Architecture students create 3D models using computer-generated designs to build multiple-story buildings. Engineering students have “design[ed] a collapsible wall to shield soldiers in combat,” and those interested in biology can conduct research projects at the Museum of Natural History. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 283 (S.D.N.Y. 2019).

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

B. *Second Element—Narrow Tailoring: Racial Balancing or Critical Mass?*

Once it is established that a school's interest in diversity is consistent with the first prong of strict scrutiny, the school must then show that the means it used to attain that diverse student body is narrowly tailored to meet its goal.¹⁸⁶ This Note's proposal meets this second prong, for it is "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," as *Grutter* requires.¹⁸⁷ Under this Note's plan, race or ethnic origin is not the sole or even the decisive factor in the evaluation of applicants but rather part of a "broader array of qualifications and characteristics of which racial or ethnic origin is . . . [an] important element."¹⁸⁸ These other factors are the four different measures of students' academic performance.

For a critical mass to be appropriately used in admissions, it must be measured qualitatively, not quantitatively, with the purpose of enabling underrepresented minorities to feel comfortable within an inclusive student body.¹⁸⁹ To be constitutional, the City would not be allowed to "quantify critical mass in terms of numbers or percentages,"¹⁹⁰ which this plan does not do. This Note's proposal does not employ a rigid quota system, which the Court has held would be unconstitutional in numerous cases, including *Bakke* and *Grutter*,¹⁹¹ nor does it set aside fixed numbers or percentages of seats for underrepresented minorities. Instead, it uses a multi-factored review of each applicant, where each student is evaluated on an individualized basis in a qualitative, flexible approach as permitted by the Constitution.¹⁹² This plan also does not separate applicants based on race or ethnic background. Instead, it permissibly requires the City to review and evaluate all applicants together as part of one pool so that students are not separated based on race or ethnicity into different tracks.¹⁹³

¹⁸⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

¹⁸⁷ *Id.* at 337.

¹⁸⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

¹⁸⁹ See *Grutter*, 539 U.S. at 318–20 (describing the University of Michigan's use of racial preferences in law school admissions).

¹⁹⁰ *Id.* at 319.

¹⁹¹ *Id.* at 334; *Bakke*, 438 U.S. at 315–17.

¹⁹² See *supra* Part II (presenting a plan for admissions reform that would aim to enroll a critical mass of Black and Hispanic/Latino students).

¹⁹³ See *Bakke*, 438 U.S. at 315–17 (stating that an educational institution may not engage in an affirmative action policy where it "insulat[es] the individual from comparison with all other candidates for the available seats").

Further, under this second element of narrow tailoring, the City would have to show that it is not engaging in any form of racial balancing, which the Court has held to be unconstitutional. In *Parents Involved*, the Court held that a school district's student assignment policy failed at narrow tailoring because it was not actually trying to achieve student diversity, even though the school district described the practice using the terms "racial diversity" and "racial integration."¹⁹⁴ Rather, the Court held that the school district was attempting to achieve "racial balance" or "mixing" with its student populations, which the Court has consistently held is not legitimate under strict scrutiny.¹⁹⁵ According to a plurality of the Court, "working backward to achieve a particular type of racial balance, rather than working forward" does not even promote the educational benefits of diversity.¹⁹⁶ While this Note's proposal does not call for racial balancing, the City would need to implement it in a way that clearly exhibits it is not unlawfully trying to balance the races or ethnicities of students being admitted to the SHSs, even if the City does not explicitly use the phrase "racial balancing" in employing this proposal.¹⁹⁷

Unlike the admissions system in *Parents Involved*, this Note's proposal for the SHSs should suffice as constitutional because it is not designed to engage in racial balancing, for it does not establish any predetermined quotas of Black and Hispanic/Latino students.¹⁹⁸ However, the City would need to ensure that it is not engaging in any sort of racial balance of admitted students, even if it claims otherwise, for a plurality of the Court has proclaimed that "[t]he principle that racial balancing is not permitted is one of substance, not semantics."¹⁹⁹ Using other terms or labels in an attempt to disguise set proportional quotas would therefore be insufficient.²⁰⁰ Specifically, in order to suffice as legitimate diversity and not unconstitutional racial balancing,

¹⁹⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007).

¹⁹⁵ *Id.* (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

¹⁹⁶ *Id.* at 729; *see also id.* at 726 ("The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.").

¹⁹⁷ One observer has stated that "[i]deally, the populations of the elite schools should mirror the demographics of the entire NYC school system." Basir Mchawi, *Lack of Diversity in Specialized High Schools Exemplifies Failure of Public Education in New York City*, OUR TIME PRESS (Feb. 2, 2018), <http://www.ourtimepress.com/lack-of-diversity-in-specialized-high-schools-exemplify-failure-of-public-education-in-new-york-city>. However, affirmatively aiming for this result would be unconstitutional racial balancing.

¹⁹⁸ *See supra* Part II (proposing a plan for admissions reform that does not use racial balancing or quotas).

¹⁹⁹ *Parents Involved*, 551 U.S. at 732.

²⁰⁰ *Id.* ("[R]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

the City would not be able to “impos[e] . . . racial proportionality” or “proportional [racial] representation” in the reformed admissions system for these eight schools, such as by tying admissions numbers or percentages to the demographics of the City’s population.²⁰¹

The Court in *Parents Involved* also found that the school district had failed on the element of narrow tailoring because the district did not show that it had attempted alternative race-neutral means to achieve diversity within its schools, further supporting the Court’s finding that the district was engaging in impermissible racial balancing.²⁰² Essentially, narrow tailoring requires that the school properly explain why it is “necessary” to use the consideration of race or ethnicity to achieve the educational benefits of diversity.²⁰³ However, “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”²⁰⁴ Rather, the City need only show that it seriously considered these other, “workable” race-neutral measures and found them insufficient in furthering the interest of student diversity.²⁰⁵ The City likely would be able to meet this narrow-tailoring requirement since it has employed other measures to increase student body diversity within the SHSs, which have been unsuccessful.²⁰⁶ In fact, a federal district court stated that the City has “shown that [it has] exhaustively attempted numerous other racially neutral efforts over many years to achieve greater diversity” in the SHSs, which “have [all] failed.”²⁰⁷ With this history, the City should be able to show that no workable race-neutral alternatives would produce the same benefits of diversity as racial/ethnic classifications in admissions.

Rather than engaging in illegal racial balancing, the proposal in Part II would allow the City to permissibly admit a critical mass of Blacks and Hispanics/Latinos to each of the SHSs, as held constitutional in *Grutter*.²⁰⁸ The critical mass method can be used when sufficient numbers of underrepresented minorities could not be previously

²⁰¹ See *id.* at 730–31.

²⁰² See *id.* at 735.

²⁰³ *Id.* at 744 (plurality opinion).

²⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

²⁰⁵ See *id.* at 340; see also *Fisher II*, 136 S. Ct. 2198, 2208 (2016).

²⁰⁶ See *supra* notes 40–49 and accompanying text (discussing the City’s previous efforts to increase student body diversity at these schools, including the Specialized High School Institute (SHSI) and Discovery Program); see also Shapiro, *supra* note 48; Alex Zimmerman, *New Data Show How Few Black and Hispanic Students Benefit from New York City’s Specialized High School Diversity Program*, CHALKBEAT (Aug. 14, 2018), <https://www.chalkbeat.org/posts/ny/2018/08/14/discovery-program-data-shsat> (stating that these efforts help “far more [W]hite and Asian students than [B]lack and Hispanic ones”).

²⁰⁷ *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 284 (S.D.N.Y. 2019).

²⁰⁸ *Grutter*, 539 U.S. at 335–40.

enrolled when the admissions process was “primarily” based on quantifiable, objective academic metrics, such as GPAs and standardized test scores.²⁰⁹ To justify this, the City can show that disproportionately low numbers of Blacks and Hispanics/Latinos have been admitted to the SHSs under the current admissions system of using only SHSAT scores.²¹⁰ The City could also argue that the lack of diversity in the SHSs has led some students to feel uncomfortable and isolated in these eight schools, steering the City, in response, to admit a “meaningful number[]”²¹¹ of Blacks and Hispanics/Latinos to these schools.²¹²

The admissions process at issue in *Grutter* resembles Part II’s proposal, as they both focus on applicants’ academic abilities (GPAs and standardized test scores) and engage in a flexible evaluation of the experiences, skills, and backgrounds of students through the reviews of essays describing how each applicant believes she or he will contribute to the school’s community and diversity. Similar to the plan held constitutional in *Grutter*, this Note’s proposal does not define diversity with regards to race or ethnicity alone, but instead considers these characteristics, along with other measures of diversity, as plus factors for applicants. In reviewing all of these diversity factors, the City would be required “to place them [all] on the same footing for consideration, although not necessarily according them the same weight.”²¹³ Thus, the City could focus primarily on promoting race and ethnic diversity, using a critical mass to increase the number of Blacks and Hispanics/Latinos being admitted to these prestigious high schools, and also consider all the other ways applicants may uniquely contribute to these elite schools as a result of their talents, backgrounds, and experiences.

Moreover, the City would need to take steps so that it does not grant any predetermined, mechanical diversity bonuses or “automatic acceptance or rejection based on any single ‘soft’ variable such as race or ethnicity.”²¹⁴ To show this, the City would have to perform a “highly individualized” holistic review of each applicant, including by thoughtfully considering all the ways that the student may contribute

²⁰⁹ See *id.* at 318; *supra* notes 92, 96–99 and accompanying text.

²¹⁰ See *supra* Section I.B.

²¹¹ See *id.*

²¹² See *supra* notes 37–38 and accompanying text (discussing how underrepresented minority students have felt isolated and uncomfortable).

²¹³ See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (citation omitted) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

²¹⁴ See *id.*

to a school's diversity.²¹⁵ Here, a challenge arises, since this Note's proposal does not allow the City to engage in completely holistic evaluations of applicants. However, since this proposal does create a semi-holistic review process through which applicants are evaluated on a "highly individualized" basis in a flexible admissions system, there is a strong argument for this plan's constitutionality, for it does meet all the other requirements the Court demands of a constitutional affirmative action policy. Plus, the Court may hold this semi-holistic process as legitimate given that there are valid justifications for not creating a completely holistic admissions system for these schools, since such a system, as studies have shown,²¹⁶ would not necessarily benefit the low-income Black and Hispanic/Latino students this proposal aims to admit and may be prohibitively costly to implement.

Undoubtedly, the City would face some criticism as a result of this Note's proposal, including from those who will argue that it actually engages in racial balancing. Critics may claim the City's "alleged goal of 'critical mass' is simply a sham," or "a naked effort" to conceal a scheme of racially proportionate admissions.²¹⁷ While admitting a critical mass of underrepresented minorities to meet rigid racial/ethnic quotas would be blatantly unconstitutional, of course "some relationship [exists] between numbers[,] achieving the benefits to be derived from a diverse student body, and . . . providing a reasonable environment for those students admitted."²¹⁸ However, "[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid [impermissible] quota."²¹⁹ Although this Note's admissions proposal allows the City to track the numbers of Blacks and Hispanics/Latinos admitted to the SHSs, this would only be used for its permitted purpose: to attain a critical mass of underrepresented

²¹⁵ See *id.* (stating that in permissible affirmative action policies, schools are required to give "serious consideration to all the ways an applicant might contribute to a diverse educational environment").

²¹⁶ See *supra* note 107 and accompanying text (noting that entirely holistic admissions systems favor the privileged).

²¹⁷ *Grutter*, 539 U.S. at 379, 383 (Rehnquist, C.J., dissenting). Some critics may even assert that "the concept of critical mass is a delusion used" by the City "to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." *Id.* at 389 (Kennedy, J., dissenting).

²¹⁸ *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.)).

²¹⁹ *Id.* (internal citation and quotation marks omitted). On the other hand, the fact that "a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration." *Id.* at 337. Instead, "When using race as a 'plus' factor in . . . admissions," individualized consideration in a highly flexible system is "paramount." *Id.* at 336-37 (citing *Bakke*, 438 U.S. at 318 n.52).

minorities at these schools²²⁰ in order to promote student body diversity in a qualitative and flexible way.

CONCLUSION

By preserving the SHSAT as a criterion, as well as by considering diversity and multiple measures of academic performance, this Note's proposal to reform the SHS admissions system is superior to both Mayor de Blasio's plan, which contains serious flaws, and the current admissions system, which has created significant roadblocks for Blacks and Hispanics/Latinos to gain admission to these schools. Under the present system, some ethnic and racial minorities are not receiving equal educational opportunities, as evidenced by the fact that such a disproportionately low number of Black and Hispanic/Latino students are admitted. If the current admissions process is not patently discriminatory, it is at least a public education failure on the part of the City of New York.²²¹ For these reasons, the City must act to change the admissions system for these elite schools. As the Court's doctrine on affirmative action shows, New York City's SHSs can increase the number of admitted underrepresented minorities and maintain their traditions of exceptional scholastic success, for the "Equal Protection Clause does not force" educational institutions "to choose between a diverse student body and a reputation for academic excellence."²²²

²²⁰ Even if the City's Department of Education tracked or monitored the demographics of admitted students to the SHSs on a daily basis, this would not, by itself, make this Note's plan unconstitutional. Moreover, the fact that "the number of underrepresented minority students who ultimately enroll" would likely vary "considerably for each group from year to year" supports that this is not racial balancing. *Id.* at 336.

²²¹ See Mchawi, *supra* note 197 ("[The] majority of students (Black and Latino) in New York City have little or no access to the best city [high] schools.").

²²² *Fisher II*, 136 S. Ct. 2198, 2213 (2016) (citing *Grutter*, 539 U.S. at 339 (internal quotation marks omitted)).