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(13)

No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amicus Curiae the Prichard Committee will address the following question:

Whether a school district formerly under a federal desegregation decree and with a history of *de jure* segregation, substantial current residential segregation as a result of that *de jure* segregation, and a state constitutional mandate to provide an equal and adequate public primary and secondary education to every child, may continue to use a race-conscious element in its student assignment plan which was part of its desegregation plan before the district was declared unitary, and which it applies only as to schools which offer a standard curriculum and equal resources and facilities.

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BRIEF *AMICUS CURIAE* OF PRICHARD COMMITTEE FOR ACADEMIC EXCELLENCE

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Prichard Committee for Academic Excellence ("Prichard Committee") respectfully submits this brief *amicus curiae* in support of Respondents Jefferson County Board of Education and Stephen W. Daeschner, as Superintendent of Jefferson County Public Schools, pursuant to Supreme Court Rule 37.3.[1] The parties have lodged universal letters of consent with the Clerk of this Court for the filing of briefs *amicus curiae*.

The Prichard Committee is an independent, nonpartisan group of volunteers dedicated to improving public education in Kentucky at all levels for all Kentuckians, including primary and secondary public school education.

The Prichard Committee has participated in important litigation concerning the quality of education in Kentucky, most notably *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), in which the Kentucky Supreme Court declared the system of school funding in place at that time to be unconstitutional under the Kentucky Constitution. *Rose* lead to the passage in June 1990 of the Kentucky Education Reform Act ("KERA"), a landmark piece of

[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

legislation that instituted sweeping educational reforms in Kentucky public education that were admired and emulated throughout the nation. The Prichard Committee played a vital role in developing the consensus necessary to gain KERA's passage, and to maintain public support for KERA's reforms.

STATEMENT OF THE CASE

A. Pre-1970s Segregation in Louisville and Jefferson County.

Louisville and Jefferson County, Kentucky,[2] the metropolitan area with the largest population and largest African-American population in Kentucky, has an unfortunate history of racial segregation and prejudice paralleling that of other parts of the country. While Kentucky did not secede from the union nor officially join the Confederacy, Kentucky was a slave state[3] which enforced a slave code.[4] After the Civil War, Southern sympathy dominated Kentucky politics,

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[2] Louisville and Jefferson County merged their governments in 2002 and are now known as the Louisville/Jefferson County Metro Government.

[3] Thomas D. Clark, A HISTORY OF KENTUCKY (6th ed.), 319-58; Robert V. Remini, HENRY CLAY, 27-28, 347. *See also* Stuart Sprague, *Civil War,* in KENTUCKY ENCYCLOPEDIA 92-94 (John E. Kleber, ed., 1992); Harold D. Tallant, Jr., *Slavery,* in KENTUCKY ENCYCLOPEDIA 827-29 (John E. Kleber, ed., 1992).

[4] Don E. Fehrbacher, THE DRED SCOTT CASE, 59-67. In 1850, Kentucky convened a constitutional convention to enshrine the property rights of slaveholders in its constitution. Lowell H. Harrison and James C. Klotter, A NEW HISTORY OF KENTUCKY, 117-18.

and Kentucky was part of the Jim Crow South.[5] Kentucky generally enforced racial segregation after the end of the Civil War in housing, education and public accommodations.[6] Louisville unfortunately still bears the scars of that segregation.

1. Residential Segregation

Louisville and Jefferson County have long had segregated neighborhoods and racial housing patterns, vestiges of *de jure* segregation that are still evident today. These patterns date back to the time of legally mandated segregation in housing, and survived through state court enforcement of restrictive covenants. The City of Louisville enforced ordinances mandating segregated neighborhoods as late as 1915. *Harris v. City of Louisville*, 177 S.W. 472 (Ky. 1915). In *Harris*, the Kentucky Court of Appeals addressed an ordinance requiring that no person may sell a piece of property to a person whose race is in the minority in the neighborhood. *Id.* at 473-74. The court upheld this ordinance, saying:

> The enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty [of the Equal Protection Clause]; and if such separation should result in the members of the colored race being restricted to residences in the less desirable portion of the city, they may render those portions more desirable through their own efforts, as the white

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[5] James C. Klotter, KENTUCKY: DECADES OF DISCORD 1865-1900, 29-49.

[6] Harrison and Klotter, NEW HISTORY, 234-48. *See also* Klotter, DECADES OF DISCORD 90-94; Thomas Llewellyn, *Segregation,* in KENTUCKY ENCYCLOPEDIA 807-08 (John E. Kleber, ed., 1992).

race has done.

Id. at 476. This Court eventually struck down Louisville's ordinance as violative of the Fourteenth Amendment. *Buchanan v. Warley*, 245 U.S. 60 (1917).[7]

This Court's decision in *Buchanan* did not stop the white majority in the City of Louisville from attempting to maintain segregated neighborhoods, as whites turned to the use of restrictive covenants. The Kentucky Court of Appeals enforced restrictive covenants in a case originating in Jefferson County. *United Coop. Realty Co. v. Hawkins*, 108 S.W.2d 507 (1937). Restrictive covenants were enforced in Kentucky until this Court's decisions in *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that a court could not restrain a sale in violation of a restrictive covenant), and *Barrows v. Jackson*, 346 U.S. 249 (1953) (holding that a party cannot be held liable for damages for violating a restrictive covenant). Though restrictive covenants became unenforceable concurrently with *de jure* school segregation becoming unlawful in the 1950's, one cannot determine how long they were honored as "gentlemen's agreements" after *Shelley* and *Barrows*.

In 1954, Carl and Anne Braden were prosecuted for sedition after they bought a home in a white neighborhood with the intent of deeding it to an African-American family. When segregationists bombed the home, Carl and Anne Braden were charged with sedition on the theory that the mere purchase of the home on behalf of the Wades was sedition against the Commonwealth. Carl Braden was convicted and

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[7] *See also* Thomas Llewellyn, *Segregation*, in KENTUCKY ENCYCLOPEDIA 807-08 (John E. Kleber, ed., 1992).

sentenced to 15 years in prison. He served 8 months in prison, and was eventually released on bail until the sedition law under which he was convicted was invalidated by the Kentucky Supreme Court in 1956.[8]

The Louisville Board of Aldermen enacted an open housing ordinance in December 1967. Even with the passage of this ordinance in the late 1960s, however, there has been little integration of neighborhoods when judged by census data. *See, e.g.*, JA 99. The segregated neighborhoods of today are the direct by-product of the history of *de jure* segregation of housing in Louisville and Jefferson County.

2. Educational Segregation

Both the City of Louisville and Jefferson County school systems also enforced *de jure* segregation in the public schools until this Court's landmark opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954).[9] Prior to *Brown*, the City of Louisville school system maintained separate schools for both African-American and white students. The Jefferson County school system also enforced segregation, and paid to

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[8] Catherine Fosl, SUBVERSIVE SOUTHERNER: ANNE BRADEN AND THE STRUGGLE FOR RACIAL JUSTICE IN THE COLD WAR SOUTH, 135-74; *see also Com. v. Braden*, 291 S.W.2d 843 (Ky. 1956); *Braden v. Lady*, 276 S.W.2d 664 (Ky. 1954); Anthony Newberry, *Braden Affair,* in KENTUCKY ENCYCLOPEDIA 114 (John E. Kleber, ed., 1992).

[9] Kentucky's 1891 Constitution required segregated education. KY. CONST. § 187 (1891). *See also Berea College v. Kentucky*, 211 U.S. 45 (1908) (affirming enforcement of Kentucky statute mandating racially-segregated education). This provision was not repealed until 1996.

send African-American high schoolers to the Louisville all-black high school Central High School because the County system did not maintain a high school for African-American students. *Newburg Area Council, Inc. v. Board of Educ. of Jefferson Co.*, 489 F.2d 925, 927-28 (6th Cir. 1973). After *Brown*, both the City of Louisville and Jefferson County took some minor steps to desegregate, but the majority of the schools attended by African-American were still racially-identifiable as of the 1970s. *Id.* at 930.

B. Efforts to desegregate Louisville's schools—1970s to 1990s.

When parents brought class actions to force the Louisville and Jefferson County Boards of Education to fully integrate the public schools, the local federal district court judge, James F. Gordon, refused to order the schools to desegregate. It was not until the Sixth Circuit Court of Appeals reversed the findings of Judge Gordon, and held that the segregated schools were vestiges of prior *de jure* segregation, that the efforts to desegregate the schools began to bear fruit. The Louisville Board of Education voted to dissolve itself, putting the city schools under the control of the County Board of Education ("Board"), to ensure that any remedial decree would apply county-wide, removing the interdistrict remedy issue as a point of contention.[10]

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[10] The Kentucky State Board of Education approved of the dissolution in 1975. *See Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).

When the Sixth Circuit issued a writ of mandamus,[11] Judge Gordon desegregated the now-unified Louisville and Jefferson County schools, issuing a decree that involved massive busing of students based on the first letter of the students' last name—the so-called "alphabet" system. Busing appeared to be the only option for effective integration due to the stark residential segregation in Louisville and Jefferson County, particularly in light of the Sixth Circuit's finding that reliance on neighborhood schools were part of the problem: "[t]he attendance areas tracked neighborhood lines; the demographics of each neighborhood shaped the racial composition of the schools." *Hampton v. Jefferson County Board of Education*, 72 F.Supp.2d 753, 759 (W.D. Ky. 1999) ("*Hampton I*").

The "alphabet" system busing plan – one of the most extensive busing plans in the nation – engendered great public discord, and even violence. *See id.* at 755. Anti-busing protests surrounding the beginning of the 1975 school year erupted into riots. One riot in September 1975 involving over 10,000 people on Dixie Highway, one of Louisville's largest thoroughfares, resulted in fires, and rocks and bottles being thrown at police. Another riot occurred the same night on Preston Highway, another large thoroughfare. That riot led

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[11] Judge Gordon resisted the issuance of a desegregation decree even after the Sixth Circuit's opinion in *Newburg*. Judge Gordon stalled while the parties litigated over the issue of whether the Sixth Circuit could require an interdistrict remedy in light of *Milliken v. Bradley*, 418 U.S. 918 (1974), and the Sixth Circuit had to resort to a issuance of writ of mandamus ordering Judge Gordon to fashion a remedy for the 1975-1976 school year. *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578 (6th Cir. 1975).

to 35 school buses being damaged by fire and required the use of tear gas and nightsticks to disperse the crowd.[12]

Judge Gordon's decree remained largely intact until 1984, though Judge Gordon ended active oversight of the decree in 1978. *Hampton I*, 72 F. Supp.2d at 765. In 1984, the Board sought to amend the decree in order to gain greater support for the public schools among parents and taxpayers. Specifically, the Board sought a mechanism by which it could maintain desegregation without as much reliance on busing. The Board developed a "managed choice" student assignment plan, allowing some parental choice while maintaining desegregation through the introduction of the 15-50 low and high percentages for African-American enrollment per school. The Board sought to make these changes due to minor demographic changes and the continued lack of community support for desegregation. The original plaintiffs from the 1970s opposed the transition to this plan, and sought to maintain the "alphabet" busing plan. The Board sought a declaration from the federal court that it had been declared "unitary" so that it could implement the new "managed choice" plan. The federal court ruled that Judge Gordon's withdrawal of active oversight in 1978 gave the Board the authority to amend the assignment plan. *Id.* at 766-67.

The institution of the "managed choice" plan has led over time to greater public satisfaction and acceptance of public school desegregation in Louisville and Jefferson County. While the great majority of Louisvillians opposed

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[12] *Abstracts of Television Coverage of Louisville Desegregation, Walter J. Brown Media Archives & Peabody Awards Collection,* available at http://www/libs.uga.edu/media/events/oldsite/bhm/bhm2004/kentucky.html (last visited October 5, 2006).

desegregation in 1975, the vast majority of parents polled in 2000 – 77% – supported the use of race in student assignment, and 82% of parents believed that students benefited from a racially diverse school environment. JA 107.

C. Enactment of Kentucky Education Reform Act.

The Board was faced with an additional mandate with the passage of the Kentucky Education Reform Act ("KERA"), 1990 Ky. Acts Ch. 476, enacted in the wake of the Kentucky Supreme Court's opinion in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). In *Rose*, the Kentucky Supreme Court (1) declared the system of school funding in place at the time to be unconstitutional under the Kentucky Constitution's requirement that the Kentucky General Assembly provide for an "efficient system of common schools," KY. CONST. § 183; and (2) held that students in Kentucky had a constitutional right to an adequate public primary and secondary education, and that funding disparities between rich and poor areas would not be allowed:

> The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.

Id. at 211.

In reaching its ruling in *Rose*, the Kentucky Supreme Court called on the words of this Court in *Brown*:

> Education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Id. at 191 (quoting *Brown*, 347 U.S. at 483).

KERA represented a radical departure in state educational theory. It established new organizational structures in addition to setting new educational standards. KERA instituted six goals and academic expectations, including a goal that students should become "self-sufficient individuals," a goal that students should "develop their abilities to become responsible members of a family, work group, and community, including demonstrating effectiveness in community service," and a goal that students should "develop their abilities to think and solve problems in school situations and in a variety of situations they will encounter in life." Ky. Rev. Stat. § 158.6451(1)(b); *see also* JA 31. All of these goals stretch beyond the normal conception of school of imparting "book learning"—the goal of KERA is to educate students to reach the goals quoted from *Brown*: good citizenship, awakening to shared cultural values, and adjustment to the social environment.

Because public education is a state constitutional mandate in Kentucky, taxpayer support for the public educational system as a whole – the kind achieved in Louisville for the

"managed choice" plan since 1984 – is vital to maintaining the funding necessary for an "efficient system of common schools" that provides an equal and adequate education for each and every child.

D. Unitary declaration and the 2001 Assignment Plan

The Board continued to use the 1984 Assignment Plan essentially unamended until 2000, when the Federal District Court for the Western District of Kentucky determined that the Board had achieved unitary status. *Hampton v. Jefferson County Board of Education*, 102 F. Supp.2d 358 (W.D. Ky. 2000) ("*Hampton II*"). Notably, the unitary declaration was made over the objection of the Board, in contrast to the Board's arguments in 1984 when it introduced the 15-50 racial percentages to minimize busing. *Id.* at 359.

Having declared the Jefferson County Public Schools unitary, the District Court held that the Board could not apply the 15-50 racial percentage to schools offering special curricula such as magnet schools and magnet programs. *Id.* at 380-81. However, the court specifically found that, in contrast to magnet schools and magnet programs, schools offering the basic standardized curriculum – called "resides" schools in the terminology of the 1984 Assignment Plan – are essentially "fungible," and that there is no individual right to attend a specific school in those circumstances. *Id.* at 380. That factual finding was not challenged on appeal.

The Board developed a modified assignment plan in light of the holding in *Hampton II*. The 2001 Assignment Plan maintains the "managed choice" plan introduced in 1984, and the 15-50 racial percentages, only as to "resides" schools, and only after all the "managed choice" aspects are exhausted. Primary schools are grouped into clusters in the same manner

as first presented in 1984, and each student is assigned a "resides" school, the "fungible" schools in the terminology of the District Court. Students may then transfer between cluster "resides" schools based on parental preference, or apply for admission to one of the magnet schools available at the primary level. JA 37-39. At the secondary school level, students are also assigned a "resides" school, just like in the 1984 Assignment Plan. If a student does not wish to attend the "resides" school, he or she may apply for a transfer to any other "resides" school in the county or apply to magnet schools and magnet programs. JA 41-43. Transfers may be requested and granted based on day care arrangements, medical issues, adjustment problems, general hardship, or any other valid reason. JA 43. Only after these options for achieving student assignment does race affect student assignment, and only with respect to the "resides" schools. JA 37-43.

When evaluating the 2001 Assignment Plan in the context of this litigation, the District Court (affirmed by the Sixth Circuit) again determined that there was no right to attend a particular "resides" school because they offered comparable curricula, and affirmed the use of the 15-50 percentages as they applied to the "resides" schools. The District Court invalidated the 15-50 percentages with respect to schools offering the "traditional" program, a unique program not offered at other schools.[13] *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 856-863 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2006), *cert. granted*, 126

[13] The traditional schools were not addressed in *Hampton II*. The District Court applied the same rationale to the traditional schools in this case as it did to the magnet schools and magnet programs in *Hampton II* because of their uniqueness.

S. Ct. 2351 (2006). The District Court's ruling with respect to the "traditional" schools is not before this Court.

In sum, the 15-50 percentages do not apply to magnet schools, magnet programs, or traditional schools. The percentages only apply to the "resides" schools, and there has been no challenge to the District Court's factual determination that the "resides" schools offer equal educational opportunities in curricula, facilities and resources.

SUMMARY OF ARGUMENT

The 2001 Assignment Plan represents the culmination of a long, unique history of attempting to provide an adequate and equal public education within Jefferson County. Because of the requirements of Kentucky's constitution, and the sometimes tumultuous background of desegregation efforts in Jefferson County's history, the Board created a system that balanced its compelling interest in fostering diversity with the requirement to use racial considerations in a narrowly tailored manner. In order to achieve this goal, the Board created a plan that used race only as a last resort to be considered at the end of the assignment process in limited cases so as to effectuate the goals of a diverse learning environment. Unlike the other cases that this Court has considered concerning the interest in diversity, the Jefferson County school district contains "fungible" schools, thus ensuring that race is not used to award any "prize" to a particular student, but is simply a placement method for allocating substantially similar resources. The use of racial considerations is substantially limited so that school districts have a wide range of racial makeups (from 15-50% African-American students) and nothing resembling a "quota" is in place. The Board engages in individual review as much as is feasible considering the age of the students, and student choice is

given substantial weight in the final assignment of a particular child. The use of race is as limited as it can be considering the practicalities of elementary and secondary school education. Thus, a decision that this narrowly-tailored system is unconstitutional would have the effect of holding that there is simply no way to achieve the compelling interest of diversity at the pre-university level.

ARGUMENT

I. A diverse school population is a necessary component of a modern public education.

In today's modern and diverse world, any individual who expects to succeed must have the ability to interact with a wide range of individuals from a variety of different types of backgrounds. For the vast majority of children, their first interaction with people with different social, economic and ethnic backgrounds is through the public educational system. For the reasons this Court recognized in *Grutter v. Bollinger,* a school district has a compelling interest in obtaining "the educational benefits of a diverse student body." 539 U.S. 306, 328 (2003). In *Grutter*, the court accorded deference to the University of Michigan Law School's determination that "diversity is essential to its educational mission."[14] *Id.* Like

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[14] It is important to note that more than five justices agreed that deference should be given to education bodies' "considered judgment that racial diversity among students can further its educational task." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). While there was a dispute as to whether, and how much, deference should be, or was given, to the university in the implementation of that goal, the notion that deference is due to a local school district's decision that deference integral is a "compelling interest" is one that has broader support.

the law school, the Board has long recognized the benefits of having a diverse student body, and through the course of time, so have the citizens of Jefferson County. At this point, 77% of the citizens of Jefferson County believe that the use of race in student assignment is helpful and 82% believe that students benefit from these racially diverse environments. JA 107. In order for Jefferson County to be able to continue to provide its students with the popularly-supported reality of racially-diverse school environments, the Court must uphold the current student assignment plan.

A. In the Commonwealth of Kentucky, one of the stated purposes of the educational system is to prepare future citizens to be members of a diverse society.

As much as any other governmental function, education of children in the United States has been a matter of local control. This can be seen in a number of different ways, none more obvious than the fact that this Court has continually endorsed the important role of locally-elected school boards in determining the crucial educational policies for their communities. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992); *Wash v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 482 (1982); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Allowing local school districts to maintain the primary control over the curriculum and makeup of their schools increases the involvement of those in the community, but also makes the crucial connection between parents and their children's schools, a connection that is integral to both the success of the individual student and the district as a whole. Thus to whatever extent deference was deemed to be significant for institutions of higher learning, that importance is only magnified on the primary and secondary school level,

where local control is a foundational hallmark of successful school systems.

In order to put the 2001 Assignment Plan in the proper context, it is important to consider the context of not only the history of Jefferson County but the goals of the Kentucky educational system as a whole. As this Court pointed out in *Grutter*, "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S. at 327.

In the specific context of Jefferson County, the creation of school districts that foster the values necessary to become good citizens is at the heart of the educational system. When the Kentucky Supreme Court declared the state system of school funding unconstitutional in 1989, it did so because the system did not allow each student in the Commonwealth to be provided with an equal and adequate education. *Rose,* 790 S.W. 2d. at 211. The Kentucky General Assembly was thus charged with carrying out its constitutional mandate and providing for an "efficient system of common schools." *Id.* As part of this mandate, it was recognized that education "is the foundation of good citizenship. It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment." *Id.* at 191. This theory became the basis for the legislative effort to seek a broader educational scheme in order to transform the Kentucky educational system.

The Kentucky General Assembly then created what at the time was a radical new experiment in state educational theory

with KERA. KERA recognized that, in Kentucky, education meant more than simply memorizing theorems or reading great literature. Educational goals should also include the creation of "self-sufficient individuals." Emphasis was placed on helping students develop their abilities to "become responsible members of a family, work group, and community" and "think and solve problems in school situations and in a variety of situations they will encounter in life." Ky. Rev. Stat. § 158.6451(1)(b). The 2001 Assignment Plan was constructed based in part on the mandates of KERA, and as part of this Plan, a new emphasis was made on helping students become more valuable members of their community and better citizens, able to succeed in a diverse world.

B. The history of race relations and school desegregation in Jefferson County also makes diversity a particularly compelling interest in the local system.

In addition to the various features of KERA, the Board also considered the specific history of Jefferson County and the various racial problems that have plagued the city over the years. As recounted above, segregation in Louisville was difficult to overcome. Despite the difficulties, the Board continues to attempt to remedy the past effects of segregation. Over the course of the last 30 years, the idea of educational equality and the benefit of an integrated learning environment has become ingrained in the community and has gained widespread acceptance.

This unique background showcases the importance of granting local school districts deference in determining what educational goals should be priorities for their local area. There may be school districts in the country that do not

possess the historical racial difficulties that have occurred in Jefferson County or that do not operate under a state educational system with such wide-ranging educational mandates. In these localities, diversity may not be one of the most important values that the local school board seeks to implement. However, creating a diverse school environment has become an ingrained part of the educational mission in Jefferson County and is one that has not only bettered the local school system, but also maintained the support of taxpayers and voters that is essential to maintaining equal opportunity for all students. Unique local characteristics matter, and the Board "is convinced that integrated schools provide a better educational setting for all its students; [and] that concentrations of poverty which may arise in neighborhood schools are much more likely to adversely affect black students than whites." *Hampton II*, 102 F.Supp. 2d. at 371 n.30. This is a conclusion made based upon the unique circumstances of Louisville and Jefferson County and is one that should be given the appropriate deference.

The finding of unitary status by the District Court in *Hampton II* finally turned the school system fully over to the Board's control. Prior to that time, the federal courts substituted their judgment concerning local educational policy for that of the Board. This Court has repeatedly stated that it is not ideal to maintain the federal court's involvement in local educational policy indefinitely, and has supported the concept of allowing local school boards set policy within constitutional bounds. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'"); *see also id.* at 506 (Scalia, J., concurring) ("We envisioned it as temporary partly because 'no single tradition in public education is more deeply rooted that local control over operation of the schools.'") (quoting *Milliken v. Bradley*, 418

U.S. 717, 741 (1974)). This Court has also cautioned, however, that local school boards must keep a watchful eye out for racial discrimination even after a declaration of unitary status:

> Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school system. Where control lies, so too does responsibility.

Id. at 490. It would be illogical to hold that the Board must maintain desegregated schools for 25 years using a race-conscious plan imposed by federal court order, but once the order is dissolved, to forbid the Board from using its discretion to retain the race-conscious plan to protect against resegregation. The Board, in attempting to provide an equal and adequate public education to all students, exercised its hard-earned discretion to enact a race-conscious plan to ensure that the desegregation victories of the past 25 years would not be lost. There can be no doubt that the Board has a compelling interest in support of its student assignment plan, and this Court should give deference to the board in making the determination that it is necessary to maintain a race-conscious plan.

II. The Board, in exercising its discretion to maintain desegregated schools, fashioned a narrowly tailored plan using race only to the extent necessary to achieve the goal.

Even when attempting to achieve a compelling purpose such as diversity, the Board may admittedly only use race in a manner "specifically and narrowly framed to accomplish that purpose." *Grutter*, 593 U.S. at 333. In order to meet this requirement, the Board's use of race must "fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The 2001 Assignment Plan thus must be carefully "calibrated to fit the distinct issues raised by the use of race" in Jefferson County, taking into account the special needs of the county and its unique history and situation. *Grutter*, 593 U.S. at 334. Thus, in determining whether the Jefferson County assignment plan has been narrowly tailored and is the proper "fit," it is important to consider the specifics of the Plan as compared to the plans approved by the Court in *Grutter* and struck down in *Gratz*.

A. A public primary and secondary school system is fundamentally different from higher education.

All of the cases in which this Court has considered the use of race in promoting the compelling interest of diversity in education have been in the context of higher education. *See Grutter v. Bollinger*, 593 U.S. 306 (2003); *Gratz v. Bollinger*, 593 U.S. 244 (2003); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1977). In all of these cases, the Court was reviewing the constitutionality of systems designed to determine which students would be denied admission to a special educational opportunity. The

UC Davis Medical School in *Bakke*, the Michigan undergraduate program in *Gratz*, and the Michigan law school in *Grutter* are all systems in which the admissions process is one of exclusion. Boards of Admissions in each case used various factors to determine who will be admitted, with those who do not meet the criteria rejected. These systems of exclusion make admission into the particular institution essentially a "prize"; thus the factors utilized in determining the winners of that "prize" are of significant importance. *See also Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (invalidating the use of race in the awarding of the "prize" of a governmental contract); *J.A. Croson Co.*, 488 U.S. at 493 (invalidating the use of race in the awarding of the "prize" of municipal contracts).

In this case, however, the Board is under a state constitutional and statutory obligation to provide an adequate and equal education to all students within its jurisdiction. *See Rose, supra*. Unlike the other higher education admissions policies in *Bakke*, *Grutter* and *Gratz*, the Board is not excluding any students. It is merely determining where it will place students under its regular assignment policy. Jefferson County will educate all of its students at some school within its jurisdiction. The only question is which school a particular student will attend. Thus, the concern expressed by some members of this Court in *Grutter*, *i.e.* that a part of the interest being upheld was the University of Michigan Law School's interest in remaining an elite institution with high academic admittance standards, is not relevant here. *See Grutter*, 539 U.S. 306, 351 (Thomas, J., dissenting in part). The Board is obliged to educate all of its students, and its stated goal of achieving diversity is not for the benefit of the school district itself. The goal is solely designed to benefit the students.

With this in mind, it is important to remember that, under the District Court's various judgments in *Hampton II* and this case, the 15-50 guideline is inapplicable to magnet schools, magnet programs, and traditional schools. The limited use of race in the 2001 Assignment Plan occurs solely as a final factor in determining whether a student who has requested a transfer to a particular school outside of his or her "cluster." A choice to seek admission to a particular school within the district does not equate to the "prize" of admission to an elite college. The "resides" schools within Jefferson County have been found as a fact to be "fungible" by the District Court, a finding made at the same time the school district was declared unitary. *Hampton II*, 102 F.Supp. 2d. at 371 n.30. Thus from a legal perspective, all the "resident" schools in Jefferson County at issue in this case offer equal educational opportunities in terms of curriculum, resources and facilities. It is surely the case that a variety of attributes may make a particular school more appealing to a particular student or parent. Parents may prefer the school closest to their workplace or to their residence. But such individualistic preferences are distinctly different from the opportunity to attend an elite institution of higher learning. No court has ever held that a particular student has the right to attend a particular school based upon their own individualized criteria, when from a legal perspective the schools offer equal educational opportunities.

B. In the context of primary and secondary public education, the Board's criteria are narrowly tailored.

While it is clear that the requirement that the 2001 Assignment Plan must be narrowly tailored in order to survive strict scrutiny, it is equally true that the inquiry must "be calibrated to fit the distinct issues raised by the use of race"

in the particular case, issues that produce distinct challenges in the context of a mandatory primary and secondary school system. The District Court identified a number of factors that this Court considered in *Grutter* in making its determination that the Michigan Law School Plan was sufficiently narrowly tailored to satisfy strict scrutiny. *McFarland*, 330 F. Supp. 2d at 856. When considered in this context, the 2001 Assignment Plan satisfies all of these criteria.

As the District Court noted, the most important issue with respect to narrow tailoring is whether the Board's Plan operates as a quota. *Id.* This Court has held that a quota is "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496). It is not the case, however, that any use of numbers by a school district immediately dooms the Assignment Plan. Rather, as this Court noted in *Grutter*, "[s]ome attention to numbers, without more, does not transform a flexible admission system into a rigid quota." *Id.* at 336. In fact, if school districts are to able to fully reach their compelling interest in diversity, numbers must be considered, as it would be impossible for a district to accurately gauge to what extent diversity is being attained without some consulting of racial numerical data.

The numerical data are used in the most flexible way possible in the 2001 Assignment Plan. The Board has a goal of achieving between 15 and 50 percent African-American students at each school in the district. This range is so widely dispersed that calling it a "quota" would deprive the word of any meaning. In fact, when compared with the ranges accepted by this Court in *Grutter*, the Jefferson County range is substantially more variant. Justice O'Connor in her majority opinion found that the range of minority students at

Michigan Law School varied between 13.5% and 20.1%, "a range inconsistent with a quota." *Id.* While Justice Kennedy, writing in dissent, took issue with the exact range being used by Michigan Law School, he cited approvingly the range of minority applicants accepted at Amherst College, a range that varied between 8.5% and 13.2%. *Id.* at 389 (Kennedy, J., dissenting).

In this case, not only is the range much wider than those approved by both the majority and members of the dissent in *Grutter,* but the disparity between individual schools in Jefferson County proves that the broad target range is flexible. The District Court found that 62 of the 87 elementary schools, 17 of the 23 middle schools and 15 of the 20 high schools have over 40% or under 30% African-American students. *McFarland*, 330 F. Supp. 2d at 856. Only 30% of all schools have an African-American population within five percent of the system-wide average. *Id.* The Board has determined that, due to the many factors that make up a diverse school environment, true diversity can be reached within a wide range of racial demographic populations. In so doing, the Board has shown a commitment to diversity as a compelling interest, rather than simply a static attempt at racial quotas. It is constitutionally permissible to set broad racial goals in student assignment so long as a good-faith effort is made "to come within a range demarcated by the goal itself." *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 495 (1986). The Board has enacted such a range here and, in so doing, has far exceeded the range of plans already approved of by this Court and done so in a way that has gained the approval of the community as a whole.

In addition to the prohibition on the use of racial quotas, the Court's opinion in *Grutter* made clear that, in the context

of higher education, a "highly individualized, holistic review" of applications is required in order 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." *Grutter*, 539 U.S. at 337. While it is clear that individualized decisions must be made by schools and race can only be considered as one of many factors in making student assignments, it is important to remember that the Board's Plan is instituted in a context very different from the elite law school in *Grutter*. Unlike a university or graduate program, the Board's goal is not to exclude applicants or to weigh criteria in a competitive manner, but rather to create equal educational opportunities for all its students. The particularized individual review in this context has a completely different purpose. Rather than rewarding those who have already achieved, the Board is attempting to foster greater achievement by all students in a broad range of areas, *see* Ky. Rev. Stat. § 158.6451(1)(b), and thus its individualized attention should be considered with that goal in my mind.

Even with this distinct goal, the Board's assignment process focuses a great deal of attention on the individualized characteristics of the student's application. Factors such as place of residence and student choice represent the initial criteria in student assignment, and the vast majority of placement decisions derive from this criteria. In a very few instances, when requests for student transfers would bring the diversity of a particular school outside the range deemed ideal for the Board to achieve its compelling interest, race can be used as a "tipping factor" in accepting or denying the application. JA 44-45. This factor is not used to grant a special educational benefit or an academic or career "prize." Rather, because it has already been held that the "resides" schools in Jefferson County are fungible and provide the exact

same educational opportunity, this use of race does nothing except potentially deny a student from a preference for attendance at a particular school, a benefit that amounts to nothing more than personal preference, not a constitutional right. *See Johnson v. Bd of Educ. Of Chi.*, 604 F.2d 504, 515 (7th Cir. 1979).

Various *amici* have criticized the Jefferson County Plan for its use of race in even this limited capacity and have argued that the Board does not consider the wider range of potential diverse qualities that were utilized by the University of Michigan Law School. While this is true, this argument seeks to remove this case from its proper context. The Board is responsible for the education of all students in Jefferson County, including students as young as five years old. The law school in *Grutter* utilized criteria such as potential foreign travel, knowledge of several languages, overcoming personal adversity, potential family hardship, leadership qualities, extensive community service and careers in other fields. *Grutter*, 539 U.S. at 338. While these criteria certainly are applicable in helping create a diverse student body for individuals who are at least 21 years old and have experienced a variety of activities, those criteria have virtually no corollary in the primary and secondary school context. The factors that can be utilized to ensure diversity are strictly demographic. The Board has chosen to do this by creating diversity through the "resides" areas, while allowing for the opportunity for the free-flow of students to schools away from their home area and in very few cases, the potential use of race as a "tipping point."

In *Grutter*, this Court noted that entities ranging from the United States Armed Forces to various corporations have made clear that diversity, including racial diversity, is of a benefit in educating individuals for success in the real world.

Id. at 334; Ky. Rev. Stat. § 158.6451(1)(b). When dealing with students of primary and secondary school age, other important components of diversity, such as interests, beliefs and experiences, have yet to develop in any meaningful way. Thus the "individual, holistic review" presented in *Grutter* would be impossible as applied to children of a much younger age. To the extent that individualistic review is possible for these young students, the Board engages in such a review. This review ensures that, in the context of primary and secondary education, its plan is narrowly tailored.

The 2001 Assignment Plan is also sufficiently narrowly tailored so as to not "unduly harm members of a racial group." *Id* at 341. This criterion also must be considered in the context of primary and secondary education. As Justice Powell first noted in *Bakke*, there is a distinct difference between denial of admission to a selective graduate school and the assignment of a student to an alternative, but functionally equivalent public school. *Bakke*, 438 U.S. at 300 n.39. As noted above, a student does not have a right to attend whatever public school s/he chooses. *Johnson*, 604 F.2d at 515. So long as a school district is providing the equivalent educational opportunity to all its students, a finding made when the 1975 decree was dissolved, it cannot be said that a particular student has been "unduly harmed" by a decision to deny a transfer. There are no zero-sum decisions where one student is accepted and receives the "prize" of higher education while the other is excluded. Rather, all students receive the benefit of a fungible education, and the system in place simply guides the Board's permissible discretion in determining the particular student's placement.

Finally, the evidence suggests that the Board more than met its obligation to undertake "serious, good faith consideration of workable race-neutral alternatives that will

achieve" its goals. *Id.* 539 U.S. at 339. The vast majority of students in Jefferson County never have their race taken into account at any point during the process. A significant number of the students are enrolled in the traditional programs or magnet schools and magnet programs, and these programs have no racial component to their admissions policies. In addition, the vast majority of the students are assigned using school geographic boundaries which help create the "resides" schools, albeit boundaries that integrate a variety of neighborhoods. The fact that these criteria are used to assign the vast majority of Jefferson County students illustrates that the board's motives in creating this system are legitimate. It seeks to increase diversity in the school system while utilizing race in the most limited way necessary to achieve the goal. After over thirty years of experience attempting to desegregate the schools in the County and achieve workable solutions to increasing diversity within the system, the 2001 Assignment Plan reflects the Board's reasoned judgment as to the best method of accomplishing these goals in the most narrowly tailored way possible.

CONCLUSION

Beginning in the mid-1970s, nearly twenty years after *Brown v. Board of Education*, a federal desegregation order was entered in Jefferson County in order to reach the goal of what is now in place: an integrated school system with community-wide support that produced a diverse learning environment for the betterment of all of the county's students. The litigation, political conflicts and social turmoil of the last few decades has amazingly produced a system that, while not perfect, is substantially closer to the mandates of *Brown* and its progeny than many would have ever believed. The Respondents and supporting *amici* simply ask for the ability

to keep that system in place and continue to provide its benefits for students in the future.

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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