No. 05-908

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

HARRY J. F. KORRELL
Counsel of Record
DANIEL B. RITTER
ERIC B. MARTIN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150

Counsel for Petitioner

200495

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

U.S. SUPREME COURT RULES

II. INTRODUCTION

The Brief in Opposition argues in essence that review by this Court is unwarranted because the equal protection analysis of the court of appeals is correct and no appellate case has held to the contrary since the decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In so arguing, the Brief in Opposition ignores (and appears to welcome) the decision's radical departure from established tenets of equal protection jurisprudence, the widespread implications of the decision, and the obvious confusion among the lower courts about whether the Constitution allows racial balancing to promote mere racial diversity.

II. ANALYSIS

A. The Brief in Opposition Ignores the Court of Appeals' Departure From Prior Case Law.

The *en banc* majority opinion departs radically from established equal protection jurisprudence, including cases from this Court, other circuits, and earlier Ninth Circuit cases:

(1) The court of appeals held that Seattle School District No. 1 (the "District") had a compelling interest in *racial* diversity *per se* (as distinguished from the *genuine* diversity approved in Justice Powell's *Bakke* opinion and in *Grutter*).

(2) While describing its analysis as "strict scrutiny," the *en banc* majority effectively applied a rational basis test (which the concurring opinion advocated explicitly)

when it deferred to the judgment of local school officials on narrow tailoring issues (*e.g.*, whether diversity other than racial diversity matters, how much racial diversity is necessary, and whether the use of a race-based plan was necessary to accomplish the District's goals).

(3) The court of appeals held that the District's racial tiebreaker is narrowly tailored even though it relies on racial balancing, *i.e.*, school admission decisions based solely on race in an effort to maintain a desired ratio of white to nonwhite students in the popular schools.

(4) The court of appeals upheld the racial tiebreaker because it did not benefit one racial group to the detriment of another and thus treated equal protection rights as belonging to groups rather than individuals.

As detailed in the Petition, these departures from controlling authority on issues of fundamental importance warrant this Court's granting the Petition. Supreme Court Rule 10(c).

B. The Brief in Opposition Ignores the Widespread Implications of This Case.

The court of appeals used the *Grutter* Court's observation that "context matters" (539 U.S. at 326) as a loophole through which government can escape the restrictions on use of racial classifications developed by this Court beginning in *Regents*

of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and continuing to, and including, *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003). If the court of appeals decision stands, then in the Ninth Circuit and in other circuits where a similar reading of *Grutter* prevails, public schools will be free to adopt almost any racial balancing program so long as it is intended and has some tendency to further some form of racial diversity. This result likely will obtain not only for high school admissions, but also for primary school assignments, classroom assignments, club and team memberships, and the like. Moreover, the reasoning of the *en banc* majority is arguably applicable to employment policies of all federal, state, and local governmental bodies. *See, e.g., Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (reading *Grutter* to allow racial balancing in the hiring of police sergeants); *Lomack v. City of New Newark*, No. 04-6085, 2005 WL 2077479 (D. N.J. Aug. 25, 2005) (reading *Grutter* to allow racial balancing in the assignment of firefighters).

Whether the *en banc* majority correctly reads *Grutter* is an important question of federal law that should be settled by this Court, and the Petition should be granted for this reason as well. Supreme Court Rule 10(c).

C. Lower Courts Need Guidance, and This Case is an Excellent Vehicle for Providing It.

This Court has never decided whether a public school district may use race-based pupil assignments in the absence of past *de jure* segregation. It is beyond dispute that racial diversity is today an important concern throughout America. The federal judiciary are divided, and lower courts need guidance, on whether pre-*Grutter* restrictions on governmental use of racial classifications have survived

Grutter or, on the contrary, have been substantially
as the court of appeals here concluded.

Before *Grutter* was decided, most courts held that,
to remedy *de jure* segregation, racial balancing pl
school admissions and other government activities v
the Constitution. *See, e.g., Eisenberg v. Montgome*
Pub. Schs, 197 F.3d 123 (4th Cir. 1999), and the othe
cited at n.2 of the Petition. The Second Circuit, ho
held that racial balancing to address *de facto* segre
would not violate the Constitution. *Brewer v.*
Irondequoit Central Sch. Dist., 212 F.3d 738 (2000).

After *Grutter,* the courts are still divided over w
race-based admission plans are constitutional. *Co*
Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir.
(decided by a vote of three to two, holding that a t
policy designed to maintain racial balance in schoo
constitutional under *Grutter* and *Gratz* and reaching
different from that reached by the three-judge
cert. denied, 126 S. Ct. 798 (2005), *with Cavalier v.*
Parish Sch. Bd., 403 F.3d 246, 259 n.15, 260 (5th Cir.
(noting that "while student body diversity has been
compelling interest in the context of a law school,
[], it is by no means clear that it could be such at or
the high school level," and holding that a plan desig
maintain black enrollment at particular schools at b
35% and 65% was a quota and thus not narrowly tai
Tharp v. Board of Educ. of N.W. Local Sch.
No. 1:05CV550, 2005 WL 2086022 (S.D. Ohio A
2005) (addressing a challenge to a school district's t
policy designed to maintain minority enrollment
15 percentage points of its "overall percentage of m
students," the court granted a temporary restraining

because such racial balancing likely would not be narrowly tailored, citing *Grutter, Gratz,* and *Eisenberg*). In the case at bar, the three-judge panel held the District's plan unconstitutional by vote of two to one, but the *en banc* majority found in favor of the District by a vote of seven to four, with one concurring judge advocating rational basis scrutiny. If this Court does not grant the Petition and provide guidance, there will continue to be uncertainty regarding what the Constitution requires. Supreme Court Rule 10(a).

This case affords an excellent vehicle for providing that guidance and for safeguarding the equal protection rights of American schoolchildren. The relevant constitutional issues are squarely presented on an appeal from rulings on cross-motions for summary judgment. Contrary to the Brief in Opposition, there are no procedural obstacles: as an association of parents whose children have been or will be affected by the District's admissions plans and which advocates strong neighborhood-based schools, App. 141, 273; *http://www.piics.org* (visited April 3, 2006), the petitioner will benefit from a reversal of the court of appeals' decision; the District argued to the Ninth Circuit that it wanted to preserve its right to use race-based assignment plans, App. 141-43; and it is irrelevant whether the school board might decide to abandon its racial tiebreaker, *see, e.g., Buckhannon Bd. & Care Home v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 609 (2001).

III. CONCLUSION

Because this case offers an opportunity for the Court to provide needed guidance on an important question of federal law, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARRY J. F. KORRELL
Counsel of Record
DANIEL B. RITTER
ERIC B. MARTIN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150

Counsel for Petitioner