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Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

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

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,

Petitioner,

v.

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

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

ERWIN CHEMERINSKY
DUKE UNIVERSITY SCHOOL OF LAW
Science Drive and Towerview Rd.
Durham, NC 27708
(919) 613-7173

MARTIN E. KARLINSKY
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
(212) 940-8800

Attorneys for Amicus Curiae Anti-Defamation League

(Additional Counsel Listed on Inside Cover)

FREDERICK M. LAWRENCE
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H Street, N.W.
Washington, D.C. 20052
(202) 994-6288

JONATHAN K. BAUM
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661-3693
(312) 902-5200

STEVEN M. FREEMAN
MARVIN NATHAN
HOWARD W. GOLDSTEIN
STEVEN C. SHEINBERG
ROBYN BENNETT
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158-3560
(212) 490-2525

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INTEREST OF *AMICUS*[1]

The Anti-Defamation League ("ADL") is one of this Nation's leading civil rights organizations. Its mission, first enunciated in 1913, is "to stop . . . the defamation of the Jewish people[,] . . . to secure justice and fair treatment to all citizens alike[,] and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE CHARTER (1913). Consistent with this mission, ADL has long concerned itself with cases arising under the Equal Protection Clause of the Fourteenth Amendment, extending back to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), and has frequently participated as *amicus* in such cases before this Court. The cases before the Court today also compel ADL to file as *amicus*. But in these cases, unlike the unbroken line of cases in which ADL has *opposed* race-conscious government action,[2] ADL here finds no constitutional harm to any affected individual and no violation of the Equal Protection Clause. It accordingly supports the respondent school districts, and urges this Court to reject petitioners' challenges to their school assignment plans.

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[1] The parties have lodged letters with the Clerk of the Court consenting to the filing of *amicus* briefs. *Amicus* affirms that no party's counsel authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, contributed monetarily to its preparation or submission. SUP. CT. R. 37.3(a) and 37.6.

[2] *See* ADL briefs *amicus curiae* in *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

STATEMENT

The Seattle, Washington and Louisville, Kentucky school districts use race as a limited factor in assigning students among their elementary and secondary public schools. They do so in a manner wholly consistent with this Court's precedents permitting race-conscious government action. The Districts have each identified clearly compelling governmental interests to justify their assignment plans, and have narrowly tailored those plans to meet those legitimate interests.

A. Seattle School District No. 1. The Seattle District adopted a new plan for secondary school assignments in 1998. Its adoption of this plan followed lengthy efforts to remedy *de facto* segregation in Seattle's schools, efforts that had failed because school assignments were based on domicile and reflected segregated housing patterns. The new plan was designed in part to eliminate such segregation. Seattle justified the new plan by pointing to (1) the educational benefits that flow from racial diversity in the educational setting, (2) increased racial, cultural, and ethnic understanding, and (3) the desire to avoid racially isolated schools. *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1166-71 (9th Cir. 2005).

Under the plan, entering ninth grade students choose one of the ten high schools in the District, and are assigned to their first-choice school if possible. "Oversubscription" occurs when more students wish to attend a school than space permits, and in that case, the District assigns students based on a series of "tiebreakers." The first and second tiebreakers are most relevant here. As the first, students with siblings at their "choice" school are admitted. As the second, if the racial composition of the student body at the oversubscribed school would differ (plus or minus) by more than 15% from the racial composition of the District's public schools, then admission is

denied to a student whose race will place the school out of that broad range; the racial tiebreaker applies with equal force to minority students and to white students. *Id.*

In the 2001-2002 school year at issue, students assigned by sibling preference amounted to 15-20% of assignments, while students assigned by the racial tiebreaker accounted for about 10% of assignments. Seattle's racial composition was 40% minority and 60% white in 2001. The racial composition of the Seattle District was the inverse, with minorities constituting 60% of students. If assigning a non-minority student to an oversubscribed school resulted in the racial composition of that school exceeding 75% white, the racial tiebreaker was activated. If assigning a minority student to an oversubscribed school resulted in the racial composition failing to reach at least 45% white, the racial tiebreaker was activated as well.[3] *Id.*

B. Jefferson County Public Schools. The public schools of Jefferson County, Kentucky (Louisville) were officially segregated until a federal court decree issued in 1975. That decree was dissolved in 2000, and the district court ordered Louisville to cease using racial quotas at one of its high schools and complete the redesign of its school assignment plan before the 2002-2003 school year. In 2001, Louisville adopted a new

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[3] The Seattle District also employs a "thermostat" to assure that its use of the racial tiebreaker is limited to its goals. The thermostat thus permits such use only until the entering ninth grade class comes within the 15% variance; at that point race is no longer taken into account in assignment decisions. In 2001, the year at issue, the District used the racial tiebreaker in oversubscribed schools that were predominantly white only when the white student population exceeded 50%, and in oversubscribed schools where the minority population was predominant only when that population exceeded 70%. *Id.*

assignment plan for both its elementary and its secondary schools. The plan has "three basic organizing principles." These are "(1) management of broad racial guidelines, (2) creation of school boundaries or 'resides' areas and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers." *McFarland v. Jefferson Co. Pub. Schools*, 330 F. Supp.2d 834, 842-48 (W.D. Ky. 2004), *affirmed*, 416 F.3d 513 (6th Cir. 2005) (*per curiam*). Stated goals of the plan are to provide "substantially uniform educational resources to all students," and to teach basic and critical thinking skills "in a racially integrated environment." Louisville articulated the following interests underlying these goals: "(1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all [Louisville] schools." *Id.*

To accomplish these ends, the Louisville plan requires that each school seek a black student enrollment of at least 15% and no more than 50%. The percentages reflect "a broad range equally above and below Black student enrollment systemwide." *Id.* Race, however, is not the only or even a predominant factor in assignments. For most school assignments a student's race is considered only after other factors, "such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices" are taken into account. In most cases such other factors will have "a more significant effect on school assignment" than race. The guidelines of the plan provide school administrators with the authority to work together with principals and staff to maintain schools within the stated range. *Id.*

SUMMARY OF ARGUMENT

1. The Court reviews these race-conscious school assignment plans under its "strict scrutiny" equal protection jurisprudence. In order to pass constitutional muster, therefore, the plans must be motivated and supported by a "compelling governmental interest," and they must be "narrowly tailored" to achieve that interest. The Districts' plans meet both such requirements.

2. The Districts' plans are supported in the first instance by the compelling governmental interest in desegregation of the Nation's public elementary and secondary schools, and in the cross-racial and inter-ethnic appreciation that stems from integrated schooling. This compelling governmental interest derives directly from, and is congruent with, the Equal Protection Clause of the Fourteenth Amendment. It was enunciated as a constitutional imperative by this Court over fifty years ago in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is difficult to conceive today of a governmental interest that is of greater legitimacy. Our world is pervaded by racial and ethnic strife; the differences among us spur hatred, violence, and conflict and pose one of the major challenges of our time. Teaching children in their formative years to respect persons of other races and ethnic backgrounds, and to respect the differences among them, may in the long run prove the only means we have to overcome that serious challenge.

3. The Districts' plans are also justified by the compelling governmental interest in racial diversity in the educational setting. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court rejected the contention that only a remedial interest could serve as a compelling governmental interest, and embraced diversity as such a compelling governmental interest sufficient to justify race-conscious law school admissions policies. The interest in diversity in elementary and secondary schools, while not on all

fours with the interest in diversity in universities or graduate schools, is equally, if not more, important, and plainly qualifies as a compelling interest. The Court did not limit the *Grutter* diversity rationale to "viewpoint diversity." The effort to create a racially diverse student body, and to reduce or eliminate racial isolation, is easily encompassed by *Grutter*, whose holding extends to the consideration of race alone as a factor conducive to other types of diversity. *Grutter* approves of the use of race as a factor to assemble a diverse class of students, and that is precisely what the plans at issue here do.

4. The Districts' programs are narrowly tailored to accomplish their ends. The Constitution does not require that government use only color-blind means to achieve integration in schools. This Court has never held that there is such a principle. The factors that this Court typically considers in assessing whether a means are narrowly tailored justify sustaining the techniques used by the school systems here – there are no less restrictive or intrusive alternatives in desegregating schools than the use of race; these programs mandate the responsible school officials to consider many factors in assigning their students among schools, and thus race is only one factor among many in the programs; the programs are self-limiting, their use of race triggered only when racial concentration, whether majority or minority, reaches a point at which it becomes of concern. Finally, the use of race as a factor in assigning students within school systems does not violate the Constitution's requirement of "individualized assessment" for the reason that the race-conscious plans here perform no "assessment" function at all, and do not look to personal characteristics in a way such that race serves as a mere proxy for merit.

5. ADL does not arrive lightly at these positions. ADL has for years maintained a commitment to fighting both *de jure* and *de*

facto segregation, and strongly believes that the promise of *Brown v. Board of Education* remains unfulfilled. At the same time, ADL has for years staunchly opposed government racial preferences and quotas, and has frequently appeared as an *amicus* before this Court in opposition to such programs. The cases before the Court today, however, demonstrate that not all race-consciousness is equally problematic.

6. Race-conscious programs that *discriminate* by substituting race for relevant personal characteristics plainly raise issues of fairness and personal harm, but where race-conscious government action does not incur the risk of compromising individualized assessment and is otherwise necessary to fulfill compelling governmental interests such as the interests in desegregation and in racial diversity, it passes constitutional muster. These cases are not about the allocation of governmental benefits or political power by race, or the use of race as a proxy for relevant personal characteristics in selecting persons in an applications process. Instead, and in the last analysis, these cases are about the continuing, unfulfilled, and still critically important, duty to eliminate segregation in our Nation's public schools. Because the Districts' race-conscious plans are designed specifically to carry out that duty, and to further diversity and cross-racial understanding, and because they do not otherwise raise issues of unfairness or discrimination, they survive strict scrutiny and should be sustained.

* * *

ARGUMENT

I. The Governmental Interests Asserted By The Respondent School Districts Are Compelling

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Thus, at its core, the Clause seeks "to 'do away with all governmentally imposed discriminations based on race.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). The Court follows a familiar set of precepts in assessing the Districts' assignment plans for compliance with the Clause.

First, "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." *Miller v. Johnson*, 515 U.S. 900, 904 (1995), quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Opinion of Powell, J.). Hence, "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis added). *See Johnson v. California*, 543 U.S. 499, 505 (2005). Analyzed under strict scrutiny, a racial classification will not pass constitutional muster unless it is motivated by a compelling governmental interest. *Adarand*, 515 U.S. at 227 ("government may treat people differently because of their race only for the most compelling reasons").

Moreover, government is "constrained in how it may pursue [such an] end: the means chosen to accomplish the . . . asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted). The

Court's cases teach that "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003), quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)(plurality opinion).

Nevertheless, strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (internal quotation marks and citation omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter*, 539 U.S. at 326-27. At bottom, "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter*, 539 U.S. at 327.

Finally, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Ibid.* This is because "[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." *Ibid.* Thus, the Court takes "'relevant differences' into account." *Adarand*, 515 U.S. at 228.

A. School Districts Have A Compelling Governmental Interest In Achieving Desegregation.

In identifying the governmental interest at stake here, we start with this Court's seminal holding, its clear and unequivocal command that "in the field of public education the doctrine of 'separate but equal' has no place." *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). *Brown*, of course, is universally

understood to enunciate a core value of the Equal Protection Clause; it is difficult to imagine any value as congruent with the purposes of the Clause and as resonant with the history of its adoption. Thus, as this Court has described them, the *Brown* cases imposed the "affirmative duty on local school boards to see that 'racial discrimination would be eliminated root and branch.'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 305 (Marshall, J., dissenting), quoting *Green v. New-Kent County Sch. Bd.*, 391 U.S. 430, 437-38 (1968), citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955).

The promise of the *Brown* cases, however, stands unfulfilled. Full, even significant, racial integration in public schooling remains elusive. Indeed, the problem of school segregation grows. A recent study by Harvard Professor Gary Orfield found that "[f]rom 1988 to 1998, most of the progress of the previous two decades in increasing integration in the region was lost. The South is still more integrated than it was before the civil rights revolution, but it is moving backward at an accelerating rate." Gary Orfield, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2 (2001). Across the country, American public schools are increasingly racially segregated. *See* SCHOOL RESEGREGATION (John Charles Boger & Gary Orfield, eds.,) (University of North Carolina Press 2005); Charles J. Clotfelter, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION (Princeton University Press 2004). Thus, despite the duty imposed by *Brown*, segregation persists, and its effects continue to pervade our lives. While the goal may well be a color-blind society, our present society is one "in which race unfortunately still matters," *Grutter v. Bollinger*, 539 U.S. at 333 (O'Connor, J.), and that is largely because we have not succeeded in eliminating the last vestiges of slavery and segregation. *Brown* has been honored in its letter, but its spirit has been ignored and its core lesson often goes unheeded.

When government acts pursuant to an unfulfilled duty of this constitutional magnitude, it invokes a compelling interest. It is an individual interest of great importance, to be sure, but it is also a central societal interest. Judge Alex Kozinski, concurring in the judgment below in the Ninth Circuit, made this point cogently when he explained:

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. Whether one would call this a compelling interest or merely a highly rational one strikes me as little more than semantics. The reality is that the attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. *It is important for the individual student, to be sure, but it is also vitally important for us as a society.*

Parents Involved in Community Schools v. Seattle School Dist., No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring in result) (emphasis added).

In short, the duty to eliminate segregation "root and branch," to eliminate all vestiges of a pervasive unlawful system, implies a duty exceeding the obligation to eliminate *de jure* segregation, and permits, if not requires, government to take appropriate action to eliminate *all* forms of segregation. This is a duty that serves to correct a great historical wrong, one that seeks to implement the Fourteenth Amendment's key directives, and one that should eradicate forever the legacy that has burdened this Nation with decades of injustice, struggle, and violence. In the final analysis, it is a duty that provides the school authorities here with a compelling governmental interest and satisfies the first requirement of strict scrutiny.

B. The Governmental Interest In Racial Diversity, As This Court Recognized In *Grutter*, Is Compelling.

A mere three years ago, this Court reaffirmed the principle that race is not always an illegitimate concern of government. In *Grutter*, the Court reached beyond mere sloganeering and rhetoric to recognize that government may have interests beyond remedial ones that justify the use of race in limited ways. *Grutter* signaled an equal protection jurisprudence that, while not discarding the Court's carefully constructed tests for screening out illegitimate uses of race, nonetheless properly allowed government to advance compelling interests grounded in the real experience of what is necessary to advance our Nation's goals. Its embrace of diversity extends to this case.

1. *Grutter* Holds That Diversity In Education Is A Compelling Governmental Interest.

In *Grutter*, the Court held that the University of Michigan Law School had "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. At the same time, the Court rejected the contention that only a remedial purpose may serve as a "compelling" interest. *Ibid.* ("we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination"). Under *Grutter*, then, school authorities may make limited use of race, with the goal of creating a diverse learning environment. *Grutter*, 539 U.S. at 325. "Diversity" therefore, in the now-familiar *Grutter* formulation, is a compelling governmental interest. Furthermore, because the Court there rejected the contention that it had limited such interests to those that were "remedial," it is also clear that governmental interests fairly encompassed by the articulated "diversity" interest of *Grutter* may serve as compelling governmental interests. *Ibid.* The question here is whether the *Grutter* rationale applies to these cases.

In the first instance, to be sure, universities or law schools are not elementary or secondary schools and the "diversity" that was invoked in the university and law school context in *Grutter* is not on all fours with "diversity" in the context of elementary and secondary schools. In the former, the keystone of diversity is the diverse viewpoints that people of different racial and ethnic backgrounds bring to the educational experience. In the latter, in contrast, it is not necessarily diversity of viewpoint that matters, but rather racial diversity – exposure in the educational setting to persons of different races in order to prepare students to encounter a society (and a world) composed of persons of different race and ethnicity.

But for constitutional purposes, there is scant difference between the purposes approved of in *Grutter* and those underlying the Districts' plans here. Can any reasonable person doubt that the furtherance of cross-racial understanding, an interest that the Court approved as a compelling governmental interest in *Grutter*, applies with at least equal force in elementary and secondary schools? Or that it is not of critical importance, in a society and a world that are deeply troubled, often divided, by race and ethnicity, to teach our children how to empathize with and understand those of different races and ethnic backgrounds? Can it be any less important to educate schoolchildren about a diverse world by exposing them to persons of different race and ethnicity than it is to expose university or law students to those of diverse viewpoint arising from the experience of race and ethnicity? *See Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d at 1194 (Kozinski, J., concurring in result). If anything, diversity may be more compelling in lower education as it may eradicate incipient bias before it hardens into habit, and may form the foundation for a lifelong appreciation for and understanding of those of other races and ethnicities. For students who never advance to college or graduate school,

moreover, diversity must exist in schools at lower levels of education if its benefits are to be available at all. For all these reasons, the *Grutter* diversity rationale applies here.

Notwithstanding the close fit between the *Grutter* diversity rationale and the rationale advanced in these cases, however, petitioners and their *amici* argue that the Districts' plans are "not designed to assemble a *genuinely* diverse student body." *E.g.*, Brief for the United States as *Amicus Curiae* Supporting Petitioner in No. 05-908 at 6 ("U.S. Br.") (emphasis added). They contend, in short, that the *Grutter* diversity rationale is limited to "viewpoint" diversity. But this contention will not withstand scrutiny.

While the "educational benefits that flow from student body diversity," *Grutter*, 539 U.S. at 330, surely ranked high in the considerations that underlie the *Grutter* Court's approval of race-consciousness, the Court did not limit government, in its effort to assemble that diverse student body, to seeking individuals with diverse viewpoints alone – its holding is not limited to "viewpoint diversity." Rather, *Grutter* made plain that government may consider race standing alone as a factor *in* diversity. *Grutter* approves in this context of the use of *race* as a factor contributing to the assembly of a diverse class of students, and that is precisely what the Districts do here.

This reading of *Grutter* is demonstrated by the fact that the admissions policy approved in that case, while seeking to identify those who "may help achieve that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts," *id.* at 315, nonetheless described a "longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this

commitment might not be represented in our student body in meaningful numbers.'" *Id.* at 316. The Law School's policy in *Grutter*, therefore, viewed race and ethnicity as a factor conducive to diversity in viewpoint.

Moreover, this reading is confirmed by the Court's reliance on the arguments of retired officers and civilian leaders of the United States military. Those military leaders advised the Court that a "'highly qualified, *racially diverse* officer corps . . . is essential to the military's ability to fulfill its principle (sic) mission to provide national security,'" 539 U.S. at 331 (emphasis added), and they asserted that "'the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting admissions policies.'" *Ibid.* (emphasis in original). Thus, it is clear that *Grutter* did not exclude the use of racial diversity in any way, and that its ruling extends to the use of race here.[4]

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[4] Likewise, the use of race to promote diversity is not invalidated by the argument, frequently advanced by opponents of racial preferences, that consideration of race assumes race controls a person's point of view and thus reinforces odious stereotypes. The argument simply misses the mark. The contention "is not that a person's race controls his . . . viewpoint, but rather that a person's race may affect his . . . background and life experience and, in turn, his. . . perspective on certain issues." Scott R. Palmer, *A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education*, in DIVERSITY CHALLENGED, Ch. 2 at 54 (Gary Orfield & Michael Kurlaender, eds.) (2001).

2. The *Grutter* Diversity Rationale Is Well Suited To, And Especially Important In, The Context Of Elementary And Secondary Schools.

The Districts' opponents cannot credibly contend that the holding of *Grutter* should be limited to its factual setting in public professional or graduate schools. In this respect, the governmental interest in public education that underlies the *Grutter* diversity rationale carries identical weight here. The long-recognized special role of education in our Nation's constitutional history is the linchpin. For example, in *Grutter*, the Court said, "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." 539 U.S. at 331, citing *Plyer v. Doe*, 457 U.S. 202, 221 (1982).[5]

The central importance of education, and the essential role of local school authorities in formulating and implementing educational policy, are interests that form a critical part of the "context" to be considered in assessing the assignment plans here. While "[d]eference is antithetical to strict scrutiny, not consistent with it," *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting), we do not suggest deference but sober assessment

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[5] The cases to this effect are legion. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) ("[P]ublic schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'").

of these interests in the context in which they arise. It is one thing to demand that a school administrator's judgments resulting in a racial classification be subjected to searching scrutiny; it is quite another to start with the premise, as would petitioners and their *amici*, that those judgments are illegitimate or lacking in the importance that the Districts ascribe to them.

In short, in view of the core holding of *Grutter* recognizing diversity as a compelling interest, the fundamental importance both of public education and our society's commitment to its local control, and the Districts' determinations here that the prevention of racial isolation in their school systems is an important goal, it follows that the educational benefits of diversity are both concrete and necessary in the lower, middle, and high school context. Justice O'Connor's ultimate observation in *Grutter* is no less forceful in the context of these cases: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. If that is the goal, and surely it is, then diversity in education is a pervasive compelling governmental interest at all its levels, and policies, such as those here, that promote such diversity are necessary and proper for the accomplishment of that goal.

* * *

Amicus ADL has long opposed both *de jure* and *de facto* segregation in our schools – its history of *amicus* activity in this Court's school desegregation cases extends back to *Brown*, and its governing body has condemned *de facto* discrimination in the nation's schools repeatedly.[6] As a leading civil rights

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[6] *See* Brief on Behalf of Anti-Defamation League, *et al.*, as *Amicus Curiae* in

(Continued...)

organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is a pioneer in the promulgation of hate crime statutes; variations of its model hate crime statute have been adopted as law in over 45 states. ADL has fought to eradicate racial, ethnic, and religious bias in our Nation and to promote understanding among its disparate peoples for more than 90 years. It is a leader in educational materials and programs designed to fight hate, bias, and prejudice; its premiere educational program, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings children of all races together to learn the values of tolerance and diversity, bridging racial, ethnic, and religious differences, and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort both to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience demonstrates that efforts to further diversity bear educational fruit. In 2004, for example, working with parents' groups and the New York City Schools Chancellor, ADL's New York Regional Office was responsible for the formation of an innovative New York City public school, part of Mayor Bloomberg's efforts to address the crisis in the city schools. This school was founded on the

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Brown v. Bd. of Educ., 347 U.S. 483 (1954). It was in February 1966 that ADL's National Commission first adopted a resolution declaring that "[t]he Anti-Defamation League is opposed to *de facto* segregation in the public schools, and believes that public school authorities have the duty to end *de facto* segregation in their schools by whatever lawful means are appropriate."

Institute's principles of diversity, bias-reduction, and prejudice elimination. The resulting *Peace and Diversity Academy* has yielded impressive, concrete results. In three school years, its enrollment has tripled, from 100 to 300 students, its students have consistently exceeded average New York City attendance and promotion rates, and students' educational testing scores have far exceeded original goals. In short, ADL's experience is that diversity and prejudice reduction improves education, bearing out ADL's long-held belief that the embrace of diversity and the promotion of a fully integrated society is crucial not only to the struggle to defeat discrimination but also to the continued vitality of our Nation and our society.

ADL's staunch commitment to pluralism, however, has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, despite its commitment to diversity, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action programs, arguing that they *discriminate* on the basis of impermissible characteristics and thus violate this core value of equal protection. *See* ADL *amicus* filings cited in fn. 2, *supra*. *See also* ADL brief *amicus curiae* in *Miller v. Johnson*, 515 U.S. 900 (1995). ADL has long maintained that when government uses race as a decisive factor in allocating opportunity or benefits, it ignores merit and improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

Yet as the cases before this Court today demonstrate, not all race-consciousness is equally problematic. ADL agrees with Justice Stevens that, "in our present society, race is not always irrelevant to sound government decision-making." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 314 (Stevens, J., dissenting). Of

course, programs that "risk[] compromising individual assessment," *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting), strike at a core value of equal protection, and will not withstand strict scrutiny, but there are instances where race-conscious government action does not incur this risk, and is otherwise necessary to fulfill a compelling governmental interest. These cases, in which the Districts have identified just such an interest, fall into the latter category.

II. The School Districts' Plans Satisfy The Narrow Tailoring Requirement

Identifying a compelling governmental interest is, of course, only the first step in the inquiry; under strict scrutiny; government is constrained not only in *why* it seeks to accomplish its purpose, but also in *how*. Thus, once the purpose of a race-conscious classification is identified, the Court must still inquire whether "the means chosen to accomplish the State's asserted purpose [are] specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). We must accordingly analyze whether the "narrow tailoring" requirement of the Equal Protection Clause is satisfied here.

The starting point in this analysis is that school desegregation simply cannot be achieved without taking race into account. For example, in one of its most important desegregation cases, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), this Court identified a variety of techniques that can be used, consistent with the Equal Protection Clause, to achieve school desegregation and compliance with the *Brown* cases. The list includes racial balances or quotas (*id.* at 22-26), redrawing student attendance zones (*id.* at 27-29), shutting one-race schools and constructing new, attractive schools facilities to attract desegregated student bodies (*id.* at 25-27), the use of busing (*id.* at 29-31), and majority to minority transfer (*id.* at 26-

27). All of these, of course, look to students' race to achieve desegregation. In short, when the problem to be dealt with is *racial segregation* of students - whether *de jure* or *de facto* - the solution obviously must include consideration of the race of the students.

This Court's decision in *Grutter* is equally instructive as to the important interests that must be weighed and considered in the narrow tailoring analysis. There, the Court found that the University of Michigan's use of race as a factor in assessing and admitting students to its law school was constitutional because "the Law School's admissions program bears the hallmarks of a narrowly tailored plan." *Id.* at 334. The Court stressed that its conclusion was based on "complex educational judgments in an area that lies primarily within the expertise of the university," and noted that "[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328.

Respect for local school districts' acknowledged expertise, "within constitutionally prescribed limits" of course, is particularly important as to the means to be used for achieving school desegregation. The design and implementation of policies to assign students among their public schools is necessarily and naturally entrusted to local authorities. Local government units know their local populations and their local public schools best and of course have the greatest feel for what techniques can successfully achieve or maintain desegregation in those schools. They are the most sensitive to the varying concerns of all of their constituents, from students, to teachers, to parents, and best able to gauge not only the effectiveness of their policies but also whether and to what degree their policies may burden some of those constituents. Our very government structures, and the Federalism concerns attendant to them,

therefore dictate a degree of respect for decisions of local governments in determining what means to use to achieve desegregation of their schools. As this Court has explained: "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy long has been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974).

Based on the foregoing, therefore, in evaluating the means used by the Districts in these cases, we make three key points. *First*, the Constitution does not require that the government use only color-blind means. *Second*, the factors this Court considers in assessing whether a means are narrowly tailored all justify sustaining the techniques used by the school systems here. *Third*, the use of race as a factor in assigning students within a school system does not even implicate, much less violate, the Constitution's requirement of "individualized assessment."

A. The Constitution Does Not Require That Government Be Color-Blind When Achieving Desegregation.

Petitioners' and their *amici* contend that this Court's desegregation cases impose an absolute prohibition on the use of race in the Nation's schools. For example, the United States argues that in *Brown I* (*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) the Court held that "intentionally classifying students on the basis of race violates the Equal Protection Clause," and it asserts that the core holding of *Brown II* (*Brown v. Bd. of Educ.*, 349 U.S. 294, 300-310 (1955)) was the directive to "'achiev[e] a system of determining admission to the public schools on a nonracial basis.'" U.S. Br. at 6, quoting *Brown II*, *id.* The *Brown* cases, however, established no such principle of color-blindness.

For starters, the *Brown* cases arose in the context of *de jure* segregation that had persisted in this Nation since its founding despite the bloody conflict of the Civil War and despite the adoption of the Fourteenth Amendment. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court acted in *Brown I* to abolish systems of official segregation that had continued to perpetuate the legacy of slavery and that had ineradicably undermined the dignity of millions of citizens. As the Court there observed, the separation of children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 691.

Wholly unlike the instant cases and their limited use of race as a factor to promote integration, *de jure* segregation meant that people of one skin color were excluded from *facilities* open to those of another skin color. The system *discriminated* against those excluded because, even assuming equal facilities, it relegated them to a status as strangers in the contemplation of the law. Unequal, discriminatory treatment was and is the touchstone. But it is one thing to prohibit a system that "intentionally classif[ies] students on the basis of race," and thus excludes them from full participation in society, as did official segregation, and quite another to argue that the Court thereby barred race-conscious government action in all circumstances.

Indeed, had the Court in fact established such a principle in the *Brown* cases, neither its *Bakke* nor *Grutter* holdings, nor virtually every other case in which it has considered race-conscious government action since 1954, would have been possible. For if the *Brown* cases require absolute color-blindness, then there is never any reason to assess whether race-conscious action passes strict scrutiny. Simply stated, if

the United States' contentions were accepted, then all race-conscious action is forbidden (except perhaps its remedial forms), and of course this is not the case. In short, the abolition of official segregation by the *Brown* cases did not establish, and has never been recognized as establishing, a principle that government may never act with consciousness of the race of its citizens. Rather, the question always has been, and remains today, to what extent government may use race.[7]

B. The Means Chosen By The Districts Here Are Narrowly Tailored.

In assessing whether a means are sufficiently narrowly tailored to meet strict scrutiny, the Court has looked to a number of factors. In past cases, the Court has focused on whether less restrictive alternatives are available; whether race is one factor among many or the only factor to be considered; whether the use of race prevents individualized consideration based on merit; and whether the use of race is limited in time. Applying these factors here shows why the means chosen by the Districts in these cases are sufficiently narrowly tailored to meet the requirements of equal protection.

For example, the Court has considered whether other less restrictive alternatives are capable of achieving the same governmental goal. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), for example, the Court invalidated a board of education's effort to increase teacher diversity in its schools by

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[7] Nor, following *Grutter*, can petitioners successfully argue that race-conscious action is justifiable only in the context of *de jure* segregation. In rejecting the limitation of compelling governmental interests to those that are remedial in nature, the Court necessarily broadened the voluntary uses of race that may be sustained under strict scrutiny. *See* Pt. I.B., *supra*.

laying off white faculty with greater seniority than African-American teachers who were retained. Writing for a plurality of the Court, Justice Powell stressed that "[a]s a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes . . . are available." *Id.* at 283-84.

But there are no less restrictive or intrusive alternatives when it comes to desegregating schools than the use of race. A simple example is powerfully illustrative. Imagine an elementary school with 40 first grade students divided between two equally sized classrooms. If there are 10 girls among the 40 students, surely the school could look to gender in assigning students, rather than a random draw, so that it did not turn out that one class had nine girls, while the other had only one. Likewise, if there were 10 African-Americans among the 40 students, the school could look to race in assigning the students between classrooms. There would be no gender-blind or race-blind way of achieving the goals. The same is true in assigning students among schools within a school district. It is hard to conceive of any effective gender- or race- neutral less restrictive or less intrusive alternative.

The Court also has emphasized that a race-conscious plan is more likely to be deemed narrowly tailored when it mandates that the responsible governmental unit consider race only as one factor among many in its decision-making. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system - it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334.

The programs here are designed to take into account many factors, including race, in assigning students to schools within the respective districts. For example, under the Seattle plan

geographic residence of students, whether they have siblings in the school, and whether the schools are under- or over-subscribed, all play an explicit role in student assignments. *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1166-71 (9th Cir. 2005). Under the Louisville plan, the factors are even more varied. There, a student's place of residence, school capacity, program popularity, random draw, and the nature of the student's choices" are taken into account, and in most cases these other factors will have "a more significant effect on school assignment" than race. *McFarland v. Jefferson County Public Schools*, 330 F. Supp.2d 834, 842-48 (W.D. Ky. 2004), *affirmed*, 416 F.3d 513 (6th Cir. 2005) (*per curiam*). Neither of the systems examines race in isolation, nor in any manner "insulates" one racial category from the effect of factors applied to other categories.

Finally, while this Court has condemned race-conscious programs that are unlimited in temporal scope, that is not the case here. The Districts' programs are self-limiting; their use of race is triggered only when racial concentration, whether majority or minority, reaches a point at which it may become of concern, and ceases when racial concentration falls outside those delineations.

C. No "Individualized, Holistic" Assessment Is Required In The Context Of Public School Assignment Plans.

Additionally, in evaluating whether means are sufficiently narrowly tailored the Court has considered the extent to which the use of race undermines government decisions based on individual merit. Thus, a crucial concern in cases such as *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), was that the use of race prevented individualized merits assessment of applicants for admission to selective graduate schools and universities. *See, e.g., Grutter*, 539 U.S. at

391 (Kennedy, J., dissenting) (stressing the importance of not "compromising individual assessment"). Similarly, in cases concerning government contracting, a crucial concern was that the use of race might prevent otherwise best suited bidders from receiving a contract. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating city program setting aside public works monies for minority-owned businesses). Because more meritorious applicants were excluded from the selection process, the use of race worked real and concrete harm to the fundamental requirement that government treat individuals equally. But this factor is not present in these cases. Even if race played *no* role in the assignment of students under the Districts' plans, there still would be no consideration of merit.

Yet *amicus* United States nonetheless contends that the Districts' plans "provide[] for no individualized, holistic consideration of students," and are thus invalid because *Grutter* purportedly requires such assessment. U.S. Br. at 6. This contention not only makes no sense in view of the origin of the rule requiring such "individual assessment," but is also flatly rebutted by Justice O'Connor's clear admonition in *Grutter* that "context matters." *Grutter* required "individualized, holistic" assessment in the context of selective graduate school and university admissions. It plainly did not require this in a context to which the requirement is unsuited, in elementary or secondary school assignment plans that do not assess individuals for relevant differences in order to decide who among them is best qualified for admission. In short, to apply that requirement to the context of these cases is to strain it beyond recognition.

CONCLUSION

It is well to recall that the Districts were under a duty to harmonize "two interrelated constitutional duties." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). The public schools

"are under a clear command . . ., starting with *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools," but, "[o]n the other hand . . . also must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with all governmentally imposed discriminations based on race.'" *Ibid.*, quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). As the Court noted in *Wygant*, "[t]hese related constitutional duties are not always harmonious; reconciling them requires [a school system] to act with extraordinary care." *Ibid.* The Districts here acted with just such care.

Both Seattle and Louisville had compelling reason to conclude that absent preventive steps their schools would revert to segregated assignment patterns, increasing racial isolation and leading to the harms that they had eliminated or reduced in the last decades. While they had made progress, in their own view they had not succeeded in "eliminat[ing] every vestige of racial segregation and discrimination in [their] schools." *Ibid.* These plans were intended to carry out that mandate. The Districts' judgments rest on the conviction that both fully desegregated schooling and diversity are necessary to further the educational missions of their schools. And they rest on the belief that community support for public schools is undermined unless full integration and diversity is maintained. They have thus honored the first of these *Wygant* duties.

Even more critically for purposes of these cases, they have equally honored their second duty - "to 'do away with all governmentally imposed discriminations based on race.'" *Ibid.* Contrary to the arguments of petitioners and their *amici*, this case presents no instance of "governmentally imposed discriminations based on race." The schools of the Seattle and Louisville districts are concededly equal in terms of funding and resources. Denial of a student's choice of school in no

manner results in "discrimination." What little burden is created by these assignment plans is of no constitutional import. No child is treated differently because of his or her race or ethnicity. No child receives a worse (or better) education because of a racial classification. No child is harmed by the Districts' plans, but all students collectively, the school systems themselves, and our society, are aided immeasurably. In short, full school integration, racial and ethnic diversity, decreased racial isolation, and community support for schools preserve our schools and improve our society.

The judgments of the respective courts of appeals should be affirmed.

Respectfully submitted,

MARTIN E. KARLINSKY, ESQ.
(COUNSEL OF RECORD)
ERWIN CHEMERINSKY, ESQ.
FREDERICK M. LAWRENCE, ESQ.
HOWARD W. GOLDSTEIN, ESQ.
JONATHAN K. BAUM, ESQ.
MARVIN NATHAN, ESQ.
STEVEN M. FREEMAN, ESQ.
STEVEN C. SHEINBERG, ESQ.
ROBYN BENNETT, ESQ.

ATTORNEYS FOR *AMICUS CURIAE*
ANTI-DEFAMATION LEAGUE

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