No. 05-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)?

(2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

(3) May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner, Parents Involved in Community Schools, is a Washington nonprofit corporation. Seattle School District No. 1, one of the defendants below, is a political subdivision of the State of Washington.

In addition to the parties listed in the caption, the following individuals were named as defendants in all the proceedings below: Joseph Olchefske, in his official capacity as Superintendent; Barbara Schaad-Lamphere, in her official capacity as President of the Board of Directors of Seattle Public Schools; Donald Neilson, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; and Steven Brown; Jan Kumasaka; Michael Preston; and Nancy Waldman, in their official capacities as members of the Board of Directors.

CORPORATE DISCLOSURE STATEMENT

The petitioner is a nonprofit corporation. It has no parent company, and no publicly held companies hold any stock of the petitioner.

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Parents Involved in Community Schools ("Parents") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion herein was that of the district court, reported at 137 F. Supp. 2d 1224 (W.D. Wash. 2001) and attached at App. 269-303. On appeal to the Court of Appeals for the Ninth Circuit, the three-judge panel rendered opinions reported at 285 F.3d 1236 (9th Cir. 2002), addressing Parents' state law claims. Those opinions were withdrawn, 294 F.3d 1084 (9th Cir. 2002), and state law issues were certified, 294 F.3d 1085 (9th Cir. 2002), to the Washington Supreme Court, whose opinions are reported at 149 Wash.2d 660, 72 P.3d 151 (2003). The subsequent opinions of the three-judge panel of the court of appeals deciding Parents' federal law claims are reported at 377 F.3d 949 (9th Cir. 2004) and attached at App. 129-268. The court of appeals granted rehearing *en banc*, 395 F.3d 1168 (2005), and its opinions, issued on October 20, 2005, are reported at 426 F.3d 1162 (9th Cir. 2005) and attached at App. 1-128.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

42 U.S.C. § 2000d provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This case presents an opportunity to clarify for lower courts and school boards across the country how the Equal Protection rights of public high school students are affected by the landmark decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), and an opportunity to resolve a split among the circuits over whether the Equal Protection Clause allows school districts to use race-based admissions to try to achieve a desired racial balance in their schools.

A. Seattle's Race-Based Assignment Plan and Parents' Suit.

Seattle's public high schools are not racially segregated, App. 73, 132, but they "vary widely in quality," App. 131, and popularity. App. 9, 72, 105, 125. Seattle's "open choice" assignment plan allows students to select any of the ten high

schools in the District, and since families can vote with their feet, five are oversubscribed, *i.e.*, they have more applicants than openings. App. 9-10, 105.

When a school is oversubscribed, the District first admits siblings of enrolled students. In an effort to achieve a predetermined racial balance in each school (40% white to 60% nonwhite, that being the ratio among all students in the District), the District next looks at a school's racial composition and uses race to determine who will be admitted. App. 8-11, 72, 86, 108. A student is deemed to be of the race specified in her registration materials (and if a parent declines to identify a child's race, the District assigns a race to the child based on a visual inspection of the student or parent). App. 88, 134. If the ratio of white to nonwhite pupils in an oversubscribed school deviates by more than a set number of percentage points from the desired balance, then a student whose race will move the school closer to the desired racial balance will be admitted, and a student whose race will move the school away from the desired balance will be denied admission. App. 10-11, 103. There is no individual consideration of applicants, App. 85-6, 107; whenever race is considered, it is the sole deciding factor, App. 103, 107. The Superintendent of Schools and others testified that there had been no study of race-neutral assignment plans when the plan was adopted. App. 111-14, 167-72.

The District offers several justifications for seeking its preferred racial balance. These include the educational benefits argued to flow from racial diversity, increased racial and cultural understanding, and the desire to avoid racially isolated schools. App. 20-21, 146-48.

In the 2000-01 school year, the trigger for the operation of the race tiebreaker was a school's deviation from the preferred 40/60 balance by ten percentage points. App. 11, 108. That year, the District denied over 300 students admission to their first-choice schools solely because of their race. About 210 students were denied their first choices (and many were denied their second and third choices) because they were white; about 90 were denied their first choices because they were not white. App. 11-12, 116-117.

These race-based assignments imposed significant burdens on affected families: (1) denial of admission to a chosen school (in an otherwise open choice system) and (2) imposition of cross-town commutes and the concomitant difficulty of parental involvement in schools. App. 116, 127. While these assignments denied hundreds of students admission to their chosen schools solely because of skin color, they had only a marginal effect on the racial balance of the schools affected: the District's data show that without the use of race, all the oversubscribed schools would host substantial numbers of white and nonwhite students. App. 196-210, 204. For example, without using race, Roosevelt High School would have enrolled a population that was 54.8% white and 45.2% nonwhite. The District's race-based assignments changed the racial balance at Roosevelt by less than four percentage points, increasing the minority enrollment from 45.2% to 48.9%. Similarly, using race changed the white/nonwhite percentages at other oversubscribed schools by only about two and a half to six percentage points. App. 196-201, 204.

Petitioner, Parents Involved in Community Schools ("Parents"), is a Washington nonprofit corporation formed by parents whose children were affected or could in the future

be affected by the District's race-based assignment scheme. App. 14, 136. Parents filed suit in federal district court asserting claims under the Washington Civil Rights Act (Wash. Rev. Code § 49.60.400 (1999)), the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the federal Civil Rights Act of 1964.[1] App. 14. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction).

After suit was filed, the District modified its admissions plan by changing the trigger from a ten point deviation to a fifteen point deviation from the desired racial balance, limiting the use of race to ninth grade assignments (previously the race tie-breaker also applied to new assignments to upper grades), and installing a "thermostat" so that when a school reaches the desired balance the use of race as a factor is stopped for that year (previously the tie-breaker applied to all assignments in a given year once it was triggered). App. 11-12, 135. The District rejected further narrowing proposals advocated by the superintendent of schools. App. 179-80.

B. The District Court Granted Summary Judgment to the School District.

On cross motions for summary judgment, the district court granted judgment in favor of the District (so there were no findings of fact). App. 269-303. The judge found no violation of state law, the Equal Protection Clause, or the federal Civil Rights Act, holding that "achieving racial

1. If the District's racial tiebreaker violates the Equal Protection Clause, it also violates Title VI. The courts below considered these claims simultaneously. *E.g.*, App. 14-15 n.10.

diversity and mitigating the effects of *de facto* residential segregation . . . are compelling government interests as a matter of law." App. 293. Explicitly deferring to the District's judgment, App. 293-94, the court concluded that the District had a "sufficient basis for implementing" the race tiebreaker, App. 296, and that the race tiebreaker is narrowly tailored to achieve those objectives. App. 300-02.

C. The Court of Appeals for the Ninth Circuit Reversed, Holding That the Plan Violated the Equal Protection Clause.

On appeal to the Ninth Circuit, a three-judge panel unanimously found for Parents on the state law claim and enjoined the use of the race tiebreaker. Later the panel withdrew that decision, vacated the injunction, and certified the state law issues to the Washington Supreme Court, which decided those issues in favor of the District.

While the federal claims were still pending in the Ninth Circuit, this Court decided *Grutter* and *Gratz*. Parents then rebriefed and reargued their Equal Protection claim in light of those decisions. The panel decided in favor of Parents, holding that the District's plan was not narrowly tailored because it "is virtually indistinguishable from a pure racial quota," App. 165; it "fails virtually every one of the narrow tailoring requirements," App. 165; and the record revealed "an unadulterated pursuit of racial proportionality that cannot possibly be squared with the demands of the Equal Protection Clause." App. 180. One judge dissented. App. 211-68.

D. A Sharply Divided *En Banc* Panel Affirmed the District Court, Holding That the Plan Was Constitutional.

A rehearing *en banc* resulted in a decision in favor of the District by a vote of seven (including one concurrence) to four. App. 1-128. The opinion and judgment of the *en banc* panel were entered on October 20, 2005. App. 1.

The *en banc* majority, relying on the observation in *Grutter* that "context matters," extended the reasoning in that decision. The majority held racial diversity, pursued for its "educational and social benefits" and to avoid "racially concentrated or isolated schools," can be a compelling governmental interest for high schools. *E.g.*, App. 33. The majority also held that much of the rigorous narrow tailoring analysis of *Grutter* and *Gratz* does not apply in the high school context, *e.g.*, App. 42, 47-8, so that, *inter alia*, a mechanical race-based admissions scheme can satisfy the narrow tailoring prong of strict scrutiny when implemented to achieve a pre-determined racial balance. In reaching this conclusion, the majority deferred to the judgment of the local school board regarding the need for a race-based admissions plan. *E.g.*, App. 51-2, 57-8. It also adopted a theory of Equal Protection rights as group rights, holding that a racial classification scheme does not "unduly harm any students" so long as it does not "uniformly benefit any race or group of individuals to the detriment of another." App. 59-60.

One judge concurred in the judgment. App. 63-70. He urged this Court to abandon strict scrutiny and adopt a "rational basis" standard for evaluating the constitutionality of race-based school assignment plans of the kind at issue. App. 68.

Four judges dissented. App. 71-128. They rejected, as inconsistent with strict scrutiny, the majority's "relaxed," "deferential" standard of review, App. 72, 77; its deference to the local school board, App. 95, 98-99, 112-13; and its group rights theory of the Equal Protection Clause, App. 115-19. The dissent concluded that when strict scrutiny is applied, the District's race tiebreaker violates the Equal Protection Clause because it seeks to accomplish only a predetermined white/nonwhite racial balance (not "genuine" diversity), *e.g.*, App. 84-6, 100, 125-26; because the plan operates as a quota system, App. 108-111; and because it does not satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*, App. 101, 111-15, 119-25.

REASONS FOR GRANTING THE PETITION

Although the court of appeals majority purported to apply *Grutter* and *Gratz* to the differing "context" of public high schools, App. 18, 27, 37, as recognized by the dissent and explained below, the court of appeals in this case deviated radically from established Equal Protection jurisprudence (1) by allowing unsegregated public schools to engage in racial balancing, (2) by deferring to school officials instead of conducting a genuinely strict scrutiny, and (3) by adopting the theory that Equal Protection rights belong to racial groups, not individuals. In so doing the Ninth Circuit joined the First Circuit in creating among the circuits a split of authority on the legality of racial balancing in America's public schools.

A. Courts Are Divided Over the Use of Racial Balancing in Public Schools.

The Supreme Court has never decided a case involving a school district's voluntary use of race-based pupil

assignments for any purpose other than remediation of the effects of past *de jure* segregation. Before the 2003 decisions in *Grutter* and *Gratz,* lower courts reviewing racial classifications by government applied the reasoning of Justice Powell's opinion in *Regents of Univ. of Calif. v. Bakke,* 438 U.S. 265 (1978), and of subsequent Equal Protection decisions of this Court such as *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), *Freeman v. Pitts,* 503 U.S. 467 (1992), and *Adarand Constructors Inc., v. Pena,* 515 U.S. 200 (1995). Accordingly, the federal courts of appeal consistently struck down racial balancing schemes by government, including race-based admission and assignment plans of secondary and primary schools.[2]

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2. *See, e.g., Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (university admissions); *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000) (applying *Bakke* to law school admissions); *Eisenberg v. Montgomery Cty. Pub. Schs*, 197 F.3d 123 (4th Cir. 1999) (transfers to magnet school); *Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (admissions to over-subscribed school); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (admission to Boston Latin School); *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998) (racial quotas for schools); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (radio station hiring); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997) (public contracting); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (college scholarships); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994) (hiring quotas); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (employment). *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000), *superceded on other grounds as stated in Zervos v. Verizon N.Y., Inc.,* 252 F.3d 163, 171 n.7 (2d Cir. 2001), held that racial balancing may be used to remedy *de facto* as well as *de jure* segregation of schools and remanded for trial. *Cf. Hunter v. Regents of Univ. of Calif.*, 190 F.3d 1061 (9th Cir. 1999) (allowing racial balancing for research purposes in university laboratory school).

In those cases, the First and Fourth Circuits assumed without deciding that diversity can be a compelling interest for secondary and primary schools but held that, in the absence of *de jure* segregation, plans designed to achieve a particular racial balance are unconstitutional, citing Justice's Powell's opinion in *Bakke* and subsequent Equal Protection cases applying strict scrutiny. *See Wessman; Eisenberg; Tuttle.* Similarly, the Ninth Circuit in *Ho* allowed racial quotas only to remove "vestiges of segregation." 147 F.3d at 865. Except for the Second Circuit in *Brewer*, there had been no federal court of appeals decision authorizing a plan of racial balancing even to remedy *de facto* school segregation.

In 2003, this Court addressed Equal Protection challenges to the race-conscious admissions plans at the University of Michigan's law school, *Grutter,* 539 U.S. 306, and its undergraduate school, *Gratz,* 539 U.S. 244. In those cases, this Court explicitly endorsed Justice Powell's *Bakke* opinion and adopted its reasoning. *E.g., Grutter*, 539 U.S. at 325; *Gratz,* 539 U.S. at 270-71. In *Grutter,* the Court affirmed that Equal Protection rights are "personal" rights, not group rights, and that strict scrutiny applies to all government racial classifications: the government must prove that the racial classification scheme is justified by a compelling interest and is narrowly tailored to achieve that goal. 539 U.S. at 326-27. The Court agreed with Justice Powell's *Bakke* opinion and held that "genuine diversity" (distinguished from mere racial or ethnic diversity) in the student body could be a compelling interest for institutions of higher education. *Id.* at 328-30. The Court also expressly endorsed Justice Powell's view that an interest in assuring that a student body contained "some specified percentage of a particular group merely because of its race . . . would amount to outright racial balancing, which is patently unconstitutional." *Id.* at 329-30 (internal quotation marks and citations omitted).

Grutter also set out the elements of the narrow tailoring prong of strict scrutiny: To pass muster, any race conscious plan must (1) provide for individualized consideration of applicants, (2) not operate as a quota system by imposing a fixed percentage that cannot be exceeded, (3) provide serious, good faith consideration of race-neutral alternatives, (4) not impose undue harm, and (5) have a logical end point. *Id.* at 334-42. Elaborating on these elements of the analysis, the Court stated that race must "be used in a flexible, nonmechanical way." *Id.* at 334. The plan cannot "make[] an applicant's race or ethnicity the defining feature of his or her application." It must "consider race or ethnicity only as a 'plus' in a particular applicant's file." *Id.* Applying those factors, the *Grutter* Court held that the law school plan was narrowly tailored, noting, *inter alia,* that it was flexible, provided serious individualized consideration to applicants, weighed many other diversity factors besides race, and did not operate mechanically such that race was always a determining factor when it was considered. *Id.* at 336-38.

In *Gratz*, the Court reiterated its endorsement of Justice Powell's view that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 539 U.S. at 270. Applying the standards articulated in *Grutter*, the Court held that the University of Michigan's undergraduate admissions plan was unconstitutional because it was not narrowly tailored: the plan did not provide for individualized consideration of an applicant's potential contributions to diversity (apart from his or her race), it was mechanical, and race was a decisive factor for virtually every minimally qualified minority applicant. *Id.* at 271-76.

Despite this Court's express adoption of Justice Powell's *Bakke* rationale and the *condemnation* of racial balancing in *Grutter* and *Gratz*, the court of appeals in this case (in a sharply divided decision) read *Grutter* and *Gratz* as an invitation to *approve* of racial balancing as a means for government to accomplish mere racial diversity. App. 24-33. The court of appeals also rejected most of the rigorous narrow tailoring requirements of *Grutter* and *Gratz* as inapplicable to the context of high school assignment plans and held that racial balancing could be a permissible means to accomplish the District's goal. App. 33-62.

The court of appeals' majority opinion found support for its Equal Protection analysis in a case decided only a few months earlier by a sharply divided *en banc* panel of the First Circuit, *viz.*, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied,* 126 S. Ct. 798 (2005). *Comfort* involved a use of race arguably less objectionable than Seattle's racial tiebreaker, because race was used in *Comfort* to deny only a student's request to transfer out of the neighborhood school to which she was assigned, and there was generous provision for hardship exemptions. *Id.* at 8. By contrast, the Seattle tiebreaker affects, not a student's request to *leave* her assigned school, but instead her request to *enter* a school that would be open to her if she were of another race, with resulting hardships for many families. Despite these factual differences, many of the novel constitutional principles enunciated by the court of appeals' majority in this case can be found in the majority opinion in *Comfort*, *e.g.*, that racial diversity is a compelling interest, 418 F.3d at 13-16; that individual consideration of applicants is irrelevant when the goal is racial diversity, *id.* at 17-18; that a race-based assignment causes no undue harm if "comparable education" is available at any school in the

system, *id.* at 20; that racial balancing is permissible if done to obtain the benefits of diversity, *id.* at 20-21; and that it is permissible in seeking diversity to consider only whites and nonwhites and to disregard ethnic and racial differences among nonwhites, *id.* at 21-22. The discussion of whether school officials adequately considered race-neutral alternatives is also similar in the two cases. *Compare* 418 F.3d at 22-23 *with* App. 51-61.

Soon after the court of appeals' decision in this case, *McFarland v. Jefferson Cty. Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005), affirmed *per curium* and adopted the opinion of the district court reported at 330 F. Supp. 2d 834 (W.D. Ky. 2004). In that case, parents challenged racial guidelines that affected some admissions to some schools and that sought to avoid in any school a black population of less than 15% or greater than 50% in a system whose overall student population was 34% black and which had operated under a desegregation decree until 2000. *Id.* at 840-42. Applying *Grutter* and *Gratz*, the court found a compelling interest in "maintaining integrated schools," *id.* at 849-55, and determined that the guidelines were narrowly tailored to achieve that objective, *id.* at 855-62, except at one group of schools where white and black applicants were put on separate assignment tracks – there the guidelines were held to constitute an "illegal quota," *id.* at 862-4. A few days after the appellate decision in *McFarland* another Sixth Circuit district court granted a temporary restraining order prohibiting denial of a student request for hardship transfer where the denial was based solely on race pursuant to a racial balancing plan. *Tharp v. Board of Educ. of N.W. Local Sch. Dist.*, 2005 WL 2086022 (S.D. Ohio 2005) (citing *Grutter* and the Fourth Circuit's decision in *Eisenberg*, 197 F.3d 123). Sixth Circuit courts thus appear to be following this Court's established Equal Protection doctrine.

Likewise in the Fifth Circuit, where *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246 (5th Cir. 2005), struck down a race-based magnet school admissions plan aimed at achieving a pre-determined racial balance. The court held that the school board had no compelling interest for its use of race because, although the district had operated under a desegregation decree between 1981 and 1990, there was no evidence of either current segregation or vestiges of past segregation, *id.* at 285-60, and that under the narrow tailoring analysis of *Grutter* the school board "cannot justify its outright racial balancing absent a showing of current effects of prior segregation, which it has not done," *id.* at 260-61.

In summary, while *Grutter* and *Gratz* continued and developed the Equal Protection doctrine enunciated in *Bakke* and *Croson*, including the prohibition of racial balancing, the decision in this case moves the law in a different direction. By taking *Grutter* and *Gratz* as a license to approve racial balancing, the Ninth Circuit in this case and the First Circuit in *Comfort* have opened wide the door to race-based school assignments (and by logical extension to other racial classifications claimed to promote racial diversity). It is hard to conceive of a racial diversity plan that would not pass constitutional muster under the approach taken in this case by the court of appeals. Not only is that wrong; it engenders substantial uncertainty in the courts.

For example, in this case alone, six judges of the Ninth Circuit concluded that Seattle's racial tiebreaker violates the Constitution, while eight judges concluded otherwise. The three-judge panel in the First Circuit struck down the race-balancing plan in *Comfort*, but the *en banc* panel divided three to two and upheld it. Among the circuits, racial balancing to increase diversity in public schools is

condoned by post-*Grutter* decisions in the First and the Ninth Circuits and condemned by post-*Grutter* decisions in the Fifth and (apparently) the Sixth Circuits. Pre-*Grutter* decisions that condemn such racial balancing remain precedent in the Fourth Circuit. The situation in the Second Circuit is unclear, as the *Brewer* court held, pre-*Grutter,* that racial balancing may be used to remedy *de facto* as well as *de jure* segregation. 212 F.3d 738.

To remove this uncertainty and confusion, this Court should clarify for the benefit of lower courts and the public schools of America how *Grutter* and *Gratz* affect the Equal Protection rights of students in public high schools.

B. The Court of Appeals Incorrectly Construed the Equal Protection Clause to Allow Racial Balancing by Unsegregated Public Schools for the Sake of Increased Diversity.

1. The Court of Appeals Incorrectly Found a Compelling Interest in Racial Diversity Defined as a Pre-determined Racial Balance Between White and Non-White Students.

The court of appeals extended *Grutter* to hold that public high schools may have a compelling interest in the achievement of *racial* diversity, as distinguished from the *genuine* diversity approved by *Bakke* and *Grutter* when race is only one factor among many to be considered in admissions decisions. But the court of appeals did not stop there. In deference to the judgment of school officials, the court of appeals accepted a notion of racial diversity defined as a pre-determined ratio between white and nonwhite students. This is contrary to this Court's precedent and renders nugatory much of the narrow tailoring prong of strict scrutiny.

Seattle school officials have defined racial diversity in a given high school as a ratio of white to nonwhite students that deviates by no more than a set percentage from the 40/60 ratio of white to nonwhite students in all District schools combined. Accepting this definition, the court of appeals allowed the use of a racial classification – the racial tiebreaker – by which children are granted or denied admission to their preferred high schools according to a mechanical, arithmetic formula implemented by computer and based solely on race. The immediate purpose of the tiebreaker and its only effect is to move the racial composition of the few schools affected closer to a pre-determined racial balance. And it is just this process of racial balancing – the mechanical use of racial classification to accomplish a pre-determined racial balance, whether of students, employees, or government contractors – that this Court has condemned beginning with *Bakke* and continuing through *Grutter* and *Gratz*. Therefore, regardless of the merits of diversity, to accept diversity as a compelling interest, where diversity means achievement of a pre-determined racial balance, is to find a compelling governmental interest in doing exactly what the Constitution forbids. Yet that is what the court of appeals has condoned.

There is, of course, one exception to the constitutional rule prohibiting government from engaging in racial balancing, namely, the use of such balancing to remedy present discrimination, or the effects of past discrimination, by the same governmental body. *Croson*, 488 U.S. at 505-506. In the context of school assignments and admissions, racial discrimination takes the form of school segregation. Although no one alleges that Seattle high schools are racially segregated, nevertheless the District and the court of appeals majority raise the specter of possible *future* segregation to

differentiate Seattle high schools from the University of Michigan undergraduate school whose racial classification was struck down in *Gratz*. The District asserts, and the court of appeals accepts, that but for the racial tiebreaker Seattle high schools would in the future become segregated through replication of "Seattle's segregated housing patterns." App. 46.

However, Seattle neighborhoods are not segregated,[3] and even if they were, this case is not about neighborhoods. It is about schools. In Seattle, children are *not* assigned automatically to attend the high school closest to home. Instead, every child is able (but for the racial tiebreaker) to attend whatever school she chooses, wherever it may be located. Therefore eliminating the tiebreaker would not lead to any significant increase in racial concentration, much less result in segregation. By accepting the District's speculative and unsubstantiated fears of possible future segregation as justification for use of a racial classification, the court of appeals has found an altogether new kind of compelling governmental interest, namely, in the prevention of possible *future* discrimination. Yet, since *Bakke* and *Croson* and continuing through *Grutter* and *Gratz*, this Court, while

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3. There is *no* evidence that Seattle neighborhoods are segregated, *i.e.*, that anyone is coerced by law or custom to live in a particular neighborhood or is not at liberty to live in any neighborhood he chooses. The only relevant evidence is that, to a decreasing extent, many people live in neighborhoods whose residents are predominantly of the same racial or ethnic group as themselves. *See* Profile of General Demographic Characteristics (Census 2000); City of Seattle, Race and Hispanic/Latino Ethnicity by Tract (2000); City of Seattle Sub-Area Profiles, 1990 (1993), *available at http://www.ci.seattle.wa.us/DCLU/Demographics/glance.asp.*

allowing consideration of race to achieve genuine diversity in higher education, has otherwise forbidden use of racial classifications for any purpose except to remedy the effects of racial discrimination by the governmental body adopting the classification. Well-settled Equal Protection jurisprudence thus condemns the court of appeals' novel analysis of compelling governmental interest.

Moreover, when racial balancing becomes a permissible government objective, few of the narrow tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which a student could contribute to diversity. The requirement that race not be a determining factor has no place. Likewise, the requirement that the plan not be a quota has no application if a particular racial balance is a permissible goal. Indeed, as the dissent pointed out, the court of appeals dispensed with much of the narrow tailoring inquiry as inapplicable in the high school "context." App. 115. And with the remaining requirements (that the use of race be necessary, that race-neutral alternatives have been considered, and that the plan has an end point), the court inappropriately deferred to the school board's judgments, as explained below.

2. Rather Than Undertaking a Strict Scrutiny, the Court of Appeals Incorrectly Held That Courts Should Defer to Local School Officials.

In *Grutter*, this Court accorded deference to the judgment of officials at the University of Michigan Law School that genuine diversity in the classroom was essential to its educational mission and thus was a compelling interest.

Grutter, 539 U.S. at 328-29. This unusual deference was justified because of a university's academic freedom and "a constitutional dimension, grounded in the First Amendment, of educational autonomy," that includes the freedom of a university to select its student body. *Grutter,* 539 U.S. at 329. This deference to the school's determination of what is a compelling interest was expressly limited to the university context and the "expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Id.*

In this case, the court of appeals improperly deferred to local school officials. For example, rather than scrutinize strictly whether a race-based plan was necessary and whether the District seriously considered and properly rejected race neutral alternatives to its race-based scheme, the majority cited the deference accorded university officials in *Grutter* and deferred to the District's judgment that race-neutral alternatives would have been inadequate to obtain the benefits of a racially diverse student body. *See* App. 51 ("Implicit in the [*Grutter*] Court's analysis was a measure of deference . . ."); *id.* at n.33 ("The Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy.")

The testimony of the Superintendent of Schools on these issues was plain. When asked whether the District "g[a]ve any serious consideration to the adoption of a plan . . . that did not use racial balancing as a factor or goal," he testified:

> ***I think the general answer to that question is no*** . . . I don't remember a significant body of work being done. I mean it's possible informally ideas were floated here or there, but I don't remember any significant staff work being done.

App. 111 (emphasis added). Other testimony confirmed this admission: the District never asked its demographer to analyze the effect of using race-neutral alternatives such as a lottery or a tie-breaker that relied upon non-racial characteristics, App. 112; the head of the Facilities, Planning, and Enrollment Department knew of no consideration of any race neutral plans; and Board Member Don Nielson confirmed that dropping race from the plan has "never been considered," App. 167-68 n.23.

In light of this testimony, the majority could find an earnest consideration by the District of race-neutral alternatives – an essential requirement of narrow tailoring – only by adopting a less exacting "rational basis" standard, which is exactly what the court did: according to the majority, the plan satisfied these aspects of narrow tailoring because "the record reflects that the District ***reasonably concluded*** that a race-neutral alternative would not meet its goals." App. 52 (emphasis added). The majority's deference to the government and the resulting rational basis scrutiny is inconsistent with the rigorous analysis required by strict scrutiny.

Likewise, the court inappropriately deferred to the District and "presume[d] . . . that school officials will demonstrate a good faith commitment" to terminating its use when the perceived need for the plan ends. App. 61. This relaxed scrutiny enabled the plan to pass muster even though it has no end point: so long as families tend to choose to live in areas with people of similar race or heritage, the District will always be able to offer its justification for using racial classifications if racial balance is a constitutionally permissible goal.

This Court should clarify that the extraordinary deference accorded the judgment of school officials in *Grutter* is (1) limited to officials in colleges and graduate schools (which occupy a "special niche in our constitutional tradition," *Grutter,* 539 U.S. at 329), and (2) limited to determining whether the school has asserted a compelling interest, *see Grutter,* 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). That deference should not extend to local school boards, and it should not apply to questions necessary to determine if a racial classification is narrowly tailored. The majority's deference to a local school board on such issues was inconsistent with the strict scrutiny required by the Constitution. *See Johnson v. California,* 543 U.S. 499, 125 S. Ct. 1141, 1146 n.1 (2005) ("deference [by the courts in applying strict scrutiny] is fundamentally at odds with our equal protection jurisprudence"); *id.* at 1150 (the Supreme Court "has refused to defer to state officials' judgments on race . . . where those officials traditionally exercise substantial discretion"); *Goss v. Lopez,* 419 U.S. 565, 574 (1975) (the "Fourteenth Amendment . . . protects citizens against the State itself and all of its creatures – Boards of Education not excepted").

This Court should take the opportunity presented by this case to make plain that the standard school officials must satisfy to defend a race-based assignment scheme is still strict scrutiny, not, as the dissent noted, the "relaxed, deferential standard of review," App. 77, employed by the majority in this case.

3. The Court of Appeals Incorrectly Held That Equal Protection Rights Belong to Racial Groups Rather Than Individual Students.

The race tiebreaker operates in some instances to deny white children their preferred assignments solely because they are white. In other instances it denies nonwhite children their preferred assignments solely because they are not white. Because Equal Protection rights are individual, personal rights, *e.g., Grutter,* 539 U.S. at 326 ("the Fourteenth Amendment 'protect[s] *persons,* not *groups*'") (emphasis in original, quoting *Adarand*, 515 U.S. at 227), each student affected by the operation of the tiebreaker suffers injury: an infringement of her personal right to be free from race-based decision-making by government and the denial of an otherwise generally available benefit (the opportunity to choose her high school) solely because of her race.

The *en banc* majority, however, abandons this bedrock principle of Constitutional law and treats Equal Protection rights as group rights. The majority held the District's plan was narrowly tailored in part because the tiebreaker "does not uniformly benefit any race or group of individuals to the detriment of another," and thus does not "unduly harm any students in the District." App. 60.

This group rights analysis is contrary to the traditional understanding of the right to Equal Protection as a *personal* right. *See, e.g., Grutter,* 539 U.S. at 326; *Miller v. Johnson,* 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class." (internal quotation marks omitted)); *Adarand*, 515

U.S. at 230 ("any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."). In *Loving v. Virginia*, 388 U.S. 1 (1967), this Court rejected a government argument much like that accepted by the court of appeals here. In *Loving* the Court rejected the argument that a miscegenation statute did not discriminate on the basis of race because it "punish[ed] equally both the white and the Negro participants in an interracial marriage." *Id.* at 8. The Court reasoned: "[i]n the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9.

Under the majority's view here, racial balancing programs do not impose undue burdens, and thus may withstand court scrutiny, if they discriminate against white students in some instances and against nonwhite students in others. Thus, if a school board decides that sports teams or chess clubs in a school are racially imbalanced and that students would benefit from cross-racial interactions that would result from more balance, it would be permitted to allocate memberships based on race, so long as all interested students get to join some sports team or club. Likewise, if the students choosing one elective course are predominantly white and the students choosing another are predominantly African-American, the school would be permitted to grant and deny students admission to the electives using race to ensure a better racial balance in each course. Under the majority's view of Equal Protection rights, the harms suffered by the individual students denied their preferred class or club or team are not of constitutional significance so long as in

other instances students of other races are also denied their preferences because of their race.

The majority opinion, if left to stand, will significantly erode the protections provided by the Constitution and authorize a major expansion of the use of racial balancing by government. It will grant what this Court warned against in *Croson*: a "license to create a patchwork of racial preferences," *Croson*, 488 U.S. at 499, based on a local government's conclusions about the best racial balance in various endeavors. As the three-judge panel majority observed, "[a]cross-the-board wrongs do not . . . make a right." App. 210. Except they do now in the Ninth Circuit, unless this Court clarifies that Equal Protection rights are still personal rights after *Grutter*.

C. This Case Is An Excellent Vehicle for Clarifying the Scope of Equal Protection Rights in Secondary Education After *Grutter* and *Gratz*.

As explained above, there is considerable disagreement among the lower courts about whether schools may, consistent with the Equal Protection Clause, engage in racial balancing for the sake of racial diversity. For several reasons, this case is an excellent vehicle for this Court to clarify the application of *Grutter* and *Gratz* to secondary schools and to confirm that these cases are not a license to ignore the long line of Equal Protection cases decided by this Court that expressly and repeatedly condemn racial balancing as unconstitutional.

First, there are no impediments to reaching the questions presented. None of the many opinions below found any procedural barrier, and each squarely addressed the questions presented.

Second, there are no factual disputes to prevent this Court's reaching the important legal questions raised by this case. The parties below agreed there were no material facts in dispute and that the question for the courts was the application of the Equal Protection Clause to those undisputed facts.

Third, this case squarely presents the question of the applicability of this Court's Equal Protection jurisprudence in a factual scenario likely to recur frequently: like many other school districts around the county, the Seattle School District is not racially segregated, but school officials desire to address perceived problems in the racial balance in some of its schools. Without clear guidance from this Court, uncertainty will remain, and the substantial volume of lengthy and costly litigation will continue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 20, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35450

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation,

Plaintiff-counter-defendant-Appellant,

v.

SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; Joseph Olchefske, in his official capacity as superintendent; Barbara Schaad-Lamphere, in her official capacity as President of the Board of Directors of Seattle Public Schools; Donald Neilson, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; Steven Brown; Jan Kumasaka; Michael Preston; Nancy Waldman, in their official capacities as members of the board of Directors,

Defendants-counter-claimants-Appellees.

Argued and Submitted En Banc June 21, 2005.
Filed Oct. 20, 2005.

Before: SCHROEDER, *Chief Judge*, PREGERSON, KOZINSKI, KLEINFELD, HAWKINS, W. FLETCHER, FISHER, TALLMAN, RAWLINSON, CALLAHAN and BEA, *Circuit Judges*.

Appendix A

Opinion by Judge FISHER; *Concurrence by Judges* KOZINSKI; *Dissent by Judge* BEA.

FISHER, *Circuit Judge, with whom Chief Judge* SCHROEDER and *Judges* PREGERSON, HAWKINS, W. FLETCHER and RAWLINSON *join concurring; Judge* KOZINSKI, *concurring in the result.*

This appeal requires us to consider whether the use of an integration tiebreaker in the open choice, noncompetitive, public high school assignment plan crafted by Seattle School District Number 1 (the "District") violates the federal Constitution's Equal Protection Clause. Our review is guided by the principles articulated in the Supreme Court's recent decisions regarding affirmative action in higher education, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and the Court's directive that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325. We conclude that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns.[1] We also conclude that the District's Plan is narrowly tailored to meet the District's compelling interests.

1. The terms "racial diversity," "racial concentration" and "racial isolation" have been used by the District to encompass racial *and* ethnic diversity, concentration and isolation. For the purposes of this opinion, we adopt this shorthand.

Appendix A

I. Background[2]

A. Seattle Public Schools: A Historical Perspective

Seattle's historical struggle with the problem of racial isolation in its public school system provides the context for the District's implementation of the current challenged assignment plan. Seattle is a diverse community. Approximately 70 percent of its residents are white, and 30 percent are nonwhite. Seattle public school enrollment breaks down nearly inversely, with approximately 40 percent white and 60 percent nonwhite students. A majority of the District's white students live in neighborhoods north of downtown, the historically more affluent part of the city. A majority of the city's nonwhite students, including approximately 84 percent of all African-American students, 74 percent of all Asian-American students, 65 percent of all Latino students and 51 percent of all Native-American students, live south of downtown.

The District operates 10 four-year public high schools. Four are located north of downtown—Ballard, Ingraham, Nathan Hale and Roosevelt; five are located south of downtown—Chief Sealth, Cleveland, Franklin, Garfield and Rainier Beach; one is located west of downtown—West Seattle. For over 40 years, the District has made efforts to attain and maintain desegregated schools and avoid the racial

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2. We draw the following restatement of facts largely from the district court opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224 (W.D.Wash.2001) ("*Parents I*"), and the Washington Supreme Court Opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wash.2d 660, 72 P.3d 151 (2003) ("*Parents IV*").

isolation or concentration that would ensue if school assignments replicated Seattle's segregated housing patterns. Since the 1960s, while courts around the country ordered intransigent school districts to desegregate, Seattle's School Board voluntarily explored measures designed to end de facto segregation in the schools and provide all of the District's students with access to diverse and equal educational opportunities.

In the late 1950s and early 1960s, school assignments were made strictly on the basis of neighborhood.[3] In 1962, Garfield High School reported 64 percent minority enrollment and it accommodated 75 percent of all African-American students. Meanwhile, the eight other high schools serving other major areas of the city remained more than 95 percent white.

The District responded to this imbalance, and racial tensions in the de facto segregated schools, in various ways. In the early 1960s, the District first experimented with small-scale exchange programs in which handfulls of students switched high schools for five-week periods. In 1963, expanding on this concept, the District implemented a "Voluntary Racial Transfer" program through which a student could transfer to any school with available space if the

3. The history that follows comes principally from two documents in the district court record. One is a report entitled, "The History of Desegregation in Seattle Public Schools, 1954-1981," which was prepared by the District's desegregation planners. The other is the "Findings and Conclusions" adopted by the Board in support of the current assignment plan. (They are cited as *History of Desegregation* and *Findings and Conclusions*, respectively.)

transfer would improve the racial balance at the receiving school. In the 1970s, the District increased its efforts again, this time adopting a desegregation plan in the middle schools that requested volunteers to transfer between minority- and majority-dominated neighborhood schools and called for mandatory transfers when the number of volunteers was insufficient, though this portion of the plan was never implemented. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities and eliminating "special transfers" that had previously allowed white students to leave Garfield. Finally, for the 1977-78 school year, the District instituted a magnet-school program. According to the District's history:

> While it appeared evident that the addition of magnet programs would not in itself desegregate the Seattle schools, there was supportive evidence that voluntary strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

History of Desegregation at 32.

By the 1977-78 school year, segregation had increased: Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 76 percent and Garfield 65 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment.

In the spring of 1977, the Seattle branch of the National Association for the Advancement of Colored People ("NAACP") filed a complaint with the United States

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Department of Education's Office of Civil Rights, alleging that Seattle's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the American Civil Liberties Union ("ACLU"), formally threatened to file additional actions if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop such a plan, the Office of Civil Rights concomitantly agreed to delay its investigation, and the ACLU agreed to delay filing a lawsuit.

During the summer of 1977, the District and community representatives reviewed five model plans. Ultimately, the District incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Seattle Plan." The Seattle Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve desegregation. Mandatory high school assignments were linked to elementary school assignments, although various voluntary transfer options were available. With the Seattle Plan,

> Seattle became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Seattle students and the Seattle School District.

History of Desegregation at 36-37.

Opponents of the Seattle Plan immediately passed a state initiative to block its implementation, but the Supreme Court

ultimately declared the initiative unconstitutional. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982).

The Seattle Plan furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways.[4] In 1988, a decade after its implementation, the District abandoned the Seattle Plan and adopted a new plan that it referred to as "controlled choice." Under the controlled choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Seattle's housing patterns, the District's planners explained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near students' homes, but others were in "racially and culturally different neighborhoods." *Findings and Conclusions* at 30-31. Although roughly 70 percent of students received their first choices, the controlled choice plan still resulted in mandatory busing for 16 percent of the District's students.

In 1994, the Board directed District staff to devise a new plan for all grade levels to simplify assignments, reduce costs and increase community satisfaction, among other things. The guiding factors were to be choice, diversity and

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4. For example, the Seattle Plan was confusing, required mandatory busing of nonwhite students in disproportionate numbers, made facilities and enrollment planning difficult and contributed to "white flight" from the city schools. *Findings and Conclusions* at 30.

predictability. Staff developed four basic options, including the then-existing controlled choice plan, a regional choice plan, a neighborhood assignment plan with a provision for voluntary, integration-positive transfers and an open choice plan.

Board members testified that they considered all the options as they related to the District's educational goals—with special emphasis, at the secondary school level, on the goals of choice and racial diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because student choice was seen to increase parental involvement in the schools and promote improvements in quality through a marketplace model. The District sought to maintain its commitment to racially integrated education by establishing diversity goals while moving away from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970s and 1980s.

The Board adopted the current open choice plan (the "Plan") for the 1998-99 school year. Under the Plan, students entering the ninth grade may select any high school in the District. They are assigned, where possible, to the school they list as their first choice. If too many students choose the same school as their first choice, resulting in "over-subscription," the District assigns students to each oversubscribed school based on a series of tiebreakers. If a student is not admitted to his or her first choice school as a result of the tiebreakers, the District tries to assign the student to his or her second choice school, and so on. Students not assigned to one of their chosen schools are assigned to the

closest school with space available; students who list more choices are less likely to receive one of these "mandatory" assignments. The most recent version of the Plan, which the School Board reviews annually, is for the 2001-02 school year and is the subject of this litigation.

B. The Plan

The District has sought to make each of its 10 high schools unique, with programs that respond to the continually changing needs of students and their parents. Indeed, the District implemented the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools, including adoption of a weighted funding formula, a facilities plan and a new teacher contract that would make teacher transfers easier. Nevertheless, the high schools vary widely in desirability. Three of the northern schools— Ballard, Nathan Hale and Roosevelt—and two of the southern schools—Garfield and Franklin—are highly desirable and oversubscribed, meaning that more students wish to attend those schools than capacity allows.[5] The magnitude of the oversubscription is noteworthy:

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5. The current popularity of Ballard High School is illustrative of the constantly changing dynamic of Seattle's public high schools. In the fall of 1999, Ballard moved to a new facility under the leadership of a new principal. Prior to the move, Ballard was not oversubscribed; now it is one of the most popular high schools in Seattle.

Similarly, the popularity and demographics of Nathan Hale High School changed significantly when it acquired a new principal who instituted a number of academic innovations, including joining the "Coalition of Essential Schools" and instituting a "Ninth Grade

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Appendix A

For the academic year 2000- 01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District become involved in the assignment process.

If a high school is oversubscribed, all students applying for ninth grade are admitted according to a series of four tiebreakers, applied in the following order: First, students who have a sibling attending that school are admitted. In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class.

Second, if an oversubscribed high school is racially imbalanced—meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker is "triggered" and the race of the applying student is considered. (For the purposes of the race-based tiebreaker, a student is deemed to be of the race specified in his or her registration materials.) Thus, if a school has more

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Academy" and "Tenth Grade Integrated Studies Program." Prior to 1998, Nathan Hale, a north area high school, was not oversubscribed, and the student body was predominantly nonwhite. Starting in 1998, the high school began to have a waitlist, and more white students, who had previously passed on Nathan Hale, wanted to go there. As a result, the number of nonwhite students declined dramatically between 1995 and 2000.

than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially imbalanced.

Originally, schools that deviated by more than 10 percent were deemed racially imbalanced. For the 2001-02 school year, however, the triggering number was increased to 15 percent, softening the effect of the tiebreaker.[6] For that year, the race-based tiebreaker was used in assigning entering ninth grade students only to three oversubscribed schools—Ballard, Franklin and Nathan Hale. Accordingly, in seven of the 10 public high schools in 2001-02, race was not relevant in making admissions decisions.

The race-based tiebreaker is applied to both white and nonwhite students. For example, in the 2000-01 school year—when the trigger point was still plus or minus 10 percent—89 more white students were assigned to Franklin than would have been assigned absent the tiebreaker, 107 more nonwhite students were assigned to Ballard than would have been assigned absent

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6. Although the record reflects the general effects of the tiebreaker in 2001-02, it does not include the specific number of students affected by the tiebreaker in the three oversubscribed schools where the tiebreaker applied. The record, however, does include these numbers for the 2000-01 school year. Although the tiebreaker operated differently in 2000-01, and applied to four schools rather than three, the 2000-01 numbers illustrate the general operation of the tiebreaker.

the tiebreaker, 82 more nonwhite students were assigned to Roosevelt than would have been assigned absent the tiebreaker and 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker.[7] These assignments accounted for about 10 percent of admissions to Seattle's high schools as whole. That is, of the approximately 3,000 incoming students entering Seattle high schools in the 2000-01 school year, approximately 300 were assigned to an oversubscribed high school based on the race-based tiebreaker.

In addition to changing the trigger point for the 2001-02 school year to plus or minus 15 percent, the District also developed a "thermostat," whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District "turns-off" the race-based tiebreaker, and there is no further consideration of a student's race in the assignment process. The tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer).

As demonstrated in the chart below, the District estimates that without the race-based tiebreaker, the nonwhite populations of the 2000-01 ninth grade class at Franklin would have been 79.2 percent, at Hale 30.5 percent, at Ballard 33 percent and at Roosevelt 41.1 percent. Using the race-based tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5 percent, 40.6 percent, 54.2 percent and 55.3 percent.

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7. The Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent, however, had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

2000-01 DIFFERENCE IN PERCENTAGES OF NONWHITE STUDENTS IN NINTH GRADE WITH AND WITHOUT TIEBREAKER

SCHOOL	WITHOUT TIEBREAKER	WITH TIEBREAKER	PERCENT Difference
FRANKLIN	79.2	59.5	-19.7
NATHAN HALE	30.5	40.6	+10.1
BALLARD	33.0	54.2	+21.2
ROOSEVELT	41.1	55.3	+14.2

In the third tiebreaker, students are admitted according to distance from the student's home to the high school. Distance between home and school is calculated within 1/100 of a mile, with the closest students being admitted first. In any given oversubscribed school, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade.

In the fourth tiebreaker, a lottery is used to allocate the remaining seats. Because the distance tiebreaker serves to assign nearly all the students in the District, a lottery is virtually never used.

C. Procedural History

Parents Involved in Community Schools ("Parents"), a group of parents whose children were not, or might not be, assigned to the high schools of their choice under the Plan, claimed that the District's use of the race-based tiebreaker for high school admissions is illegal under the Washington Civil Rights Act ("Initiative 200"),[8] the Equal Protection Clause of the Fourteenth Amendment[9] and Title VI of the Civil Rights Act of 1964.[10]

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8. Wash. Rev.Code § 49.60.400 ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

9. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

10. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

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Appendix A

Both Parents and the District moved for summary judgment on all claims. In a published opinion dated April 6, 2001, the district court upheld the use of the racial tiebreaker under both state and federal law, granting the District's motion. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224, 1240 (W.D.Wash.2001) ("*Parents I*"). Parents timely appealed, and on April 16, 2002, a three-judge panel of this court issued an opinion reversing the district court's decision, holding that the Plan violated Washington state law and discussing federal law only as an aid to construing state law. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236 (9th Cir.2002) ("*Parents II*"). The panel subsequently withdrew its opinion and certified the state law question to the Washington Supreme Court. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1084, 1085 (9th Cir.2002) ("*Parents III*"). The Washington Supreme Court disagreed with the panel's decision, holding that the open choice plan did not violate Washington law. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wash.2d 660, 72 P.3d 151, 166 (2003) ("*Parents IV*") (holding that Washington law "does not prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant"). Thereafter, a majority of the three-judge panel

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assistance."). Because "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI," we address the twin challenges to the racial tiebreaker simultaneously. *Gratz*, 539 U.S. at 276 n. 23, 123 S.Ct. 2411.

of this court held that although the District demonstrated a compelling interest in achieving the benefits of racial diversity, the Plan violated the Equal Protection Clause because it was not narrowly tailored. *Parents Involved in Comty. Schs. v. Seattle Sch. Dist., No. 1*, 377 F.3d 949 (9th Cir.2004) ("*Parents V*"). We granted en banc rehearing and now affirm the district court.[11]

II. Discussion

A. Strict Scrutiny

We review racial classifications under the strict scrutiny standard, which requires that the policy in question be narrowly tailored to achieve a compelling state interest. *See Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1146, 160 L.Ed.2d 949 (2005); *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226- 27, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).[12]

11. We review the district court's resolution of cross-motions for summary judgment de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003).

12. Judge Kozinski's concurrence makes a powerful case for adopting a less stringent standard of review here because the Plan does not attempt to "benefit[ ] or burden[ ] any particular group;" therefore it "carries none of the baggage the Supreme Court has found objectionable" in earlier equal protection cases. Kozinski, J., concurring, *infra* at 1194 and 1196. Recognizing the importance of context in the Supreme Court's equal protection jurisprudence, Judge Kozinski proposes "robust and realistic" rational basis rather than strict scrutiny review. *Id. at* ——. *Cf. Coalition for Economic Equity*

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v. Wilson, 122 F.3d 692, 708 n. 16 (9th Cir.1997) ("We have recognized . . . that 'stacked deck' programs trench on Fourteenth Amendment values in ways that 'reshuffle' programs do not. Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.") (internal quotation marks, alterations and citations omitted).

Nonetheless, the Supreme Court in *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), rejected the argument that a California Department of Corrections ("CDC") policy in which all inmates were segregated by race should be subjected to relaxed scrutiny because the policy "neither benefits nor burdens one group or individual more than any other group or individual." *Id.* at 1147 (internal quotation marks omitted); *see also id.* at 1146 (noting that all racial classifications "raise special fears that they are motivated by an invidious purpose" and that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics" (internal quotation marks and citation omitted)). As Judge Kozinski aptly notes, *Johnson* is not entirely analogous to the instant case because the CDC segregated inmates on the basis of race, whereas the District's use of race is aimed at achieving the opposite result—attaining and maintaining integrated schools. Kozinski, J., concurring, *infra.* at 1194. Nevertheless, like the First and Sixth Circuits—the only other circuits to rule, post-*Grutter* and *Gratz*, on the constitutionality of a voluntary plan designed to achieve the benefits of racial diversity in the public secondary school setting—we conclude that the Plan must be reviewed under strict scrutiny. *See Comfort v. Lynn School Committee*, 418 F.3d 1, 6 (1st Cir.2005) (en banc); *McFarland v. Jefferson County Public Schools*, 416 F.3d 513, 514 (6th Cir.2005) (per curiam).

The strict scrutiny standard is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237, 115 S.Ct. 2097 (internal quotation marks 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, 123 S.Ct. 2325. We employ strict scrutiny to "smoke out" impermissible uses of race by ensuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *Id.* at 327, 123 S.Ct. 2325 (internal quotation marks omitted). This heightened standard of review provides 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. *Smith v. Univ. of Washington*, 392 F.3d 367, 372 (9th Cir.2004). In evaluating the District's Plan under strict scrutiny, we also bear in mind the Court's directive that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

B. Compelling State Interest

Under strict scrutiny, a government action will not survive unless motivated by a "compelling state interest." *See id.* at 325, 327, 123 S.Ct. 2325. Because strict scrutiny requires us to evaluate the "fit" between the government's means and its ends, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), it is critical to identify precisely the governmental interests—the ends—to which the government's use of race must fit. *See United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (stating that, in order to determine whether an order was narrowly tailored, "we must examine the purposes the order was intended to serve").

Appendix A

Although the Supreme Court has never decided a case involving the consideration of race in a voluntarily imposed school assignment plan intended to promote racially and ethnically diverse secondary schools, its decisions regarding selective admissions to institutions of higher learning demonstrate that one compelling reason for considering race is to achieve the educational benefits of diversity. The compelling interest that the Court recognized in *Grutter* was the promotion of the specific educational and societal benefits that flow from diversity. *See Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (noting that the law school's concept of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce"). In evaluating the relevance of diversity to higher education, the Court focused principally on two benefits that a diverse student body provides: (1) the learning advantages of having diverse viewpoints represented in the "robust exchange of ideas" that is critical to the mission of higher education, *id.* at 329-30, 123 S.Ct. 2325; and (2) the greater societal legitimacy that institutions of higher learning enjoy by cultivating a group of national leaders who are representative of our country's diversity, *id.* at 332-33, 123 S.Ct. 2325. The Court also mentioned the role of diversity in challenging stereotypes. *Id.* at 330, 333, 123 S.Ct. 2325. The Court largely deferred to the law school's educational judgment not only in determining that diversity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission. *Id.* at 328-33, 123 S.Ct. 2325.[13]

13. The Court also heeded the judgment of amici curiae—including educators, business leaders and the military—that the educational benefits that flow from diversity constitute a compelling

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Appendix A

Against this background, we consider the specific interests that the District's Plan seeks to advance. These interests are articulated in the "Board Statement Reaffirming Diversity Rationale" as:

> Diversity in the classroom increases the likelihood that students will discuss racial or ethnic i ues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.
>
> Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. It also fosters racial and cultural understanding, which is

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interest. *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 ("The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity."); *see also id.* ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *id.* at 331, 123 S.Ct. 2325 ("[H]igh-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'").

particularly important in a racially and culturally diverse society such as ours.

The District's commitment to the diversity of its schools and to the ability to voluntarily avoid racially concentrating enrollment patterns also helps ensure that all students have access to those schools, faculties, course offerings, and resources that will enable them to reach their full potential.

Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

The District's interests fit into two broad categories: (1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.

Appendix A

1. Educational and Social Benefits that Flow from Diversity

The District has established that racial diversity produces a number of compelling educational and social benefits in secondary education. First, the District presented expert testimony that in racially diverse schools, "both white and minority students experienced improved critical thinking skills—the ability to both understand and challenge views which are different from their own."

Second, the District demonstrated the socialization and citizenship advantages of racially diverse schools. School officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. According to the District's expert, the social science research "clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more . . . inclusive experience for all citizens. . . . The research further shows that *only a desegregated and diverse school can offer such opportunities and benefits.* The research further supports the proposition that these benefits are long lasting." (Emphasis added.) Even Parents' expert conceded that "[t]here is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among various racial and ethnic groups."[14] That

14. Academic research has shown that intergroup contact reduces prejudice and supports the values of citizenship. *See* Derek

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is, diversity encourages students not only to think critically but also democratically.

Third, the District's expert noted that "research shows that a[ ] desegregated educational experience opens opportunity networks in areas of higher education and employment . . . [and] strongly shows that graduates of desegregated high schools are more likely to live in integrated communities than those who do not, and are more likely to have cross-race friendships later in life."[15]

The District's interests in the educational and social benefits of diversity are similar to those of a law school as

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Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L.Rev. 923, 951-52 (2002) (collecting academic research demonstrating that interpersonal interaction in desegregated schools reduces racial prejudice and stereotypes, improving students' citizenship values and their ability to succeed in a racially diverse society in their adult lives).

15. The District's compelling interests in diversity have been endorsed by Congress. In the Magnet Schools Assistance Act, Congress found that "It is in the best interests of the United States—(A) to continue the Federal Government's support of local educational agencies that are *voluntarily* seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education; (B) to ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4) (emphasis added).

articulated in *Grutter*. The contextual differences between public high schools and universities, however, make the District's interests compelling in a similar but also significantly different manner. *See Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (noting that the compelling state interest in diversity is judged in relation to the educational benefits that it seeks to produce).

The Supreme Court in *Grutter* noted the importance of higher education in "preparing students for work and citizenship." 539 U.S. at 331, 123 S.Ct. 2325. For a number of reasons, public secondary schools have an equal if not more important role in this preparation. First, underlying the history of desegregation in this country is a legal regime that recognizes the principle that public secondary education serves a unique and vital socialization function in our democratic society. As the Court explained in *Plyler v. Doe*, "[w]e have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests." 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (internal quotation marks and citations omitted); *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (stating that the inculcation of civic values is "truly the work of the schools") (internal quotation marks omitted); *Plyler*, 457 U.S. at 221-23, 102 S.Ct. 2382 (noting that public education perpetuates the political system and the economic and social advancement of citizens and that "education has a fundamental role in maintaining the fabric of our society"); *Ambach v. Norwick*, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (observing that public schools transmit

to children "the values on which our society rests," including "fundamental values necessary to the maintenance of a democratic political system"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("[Education] is required in the performance of our most basic public responsibilities. . . . 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."). Under Washington law, such civic training is mandated by the state constitution: "Our constitution is unique in placing paramount value on education for citizenship." *Parents IV*, 72 P.3d at 158.

Second, although one hopes that all students who graduate from Seattle's public schools would have the opportunity to attend institutions of higher learning if they so desire, a substantial number of Seattle's public high school graduates do not attend college.[16] For these students, their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment. We reject the notion that only those students who leave high school and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom. Indeed, it would be a perverse reading of the Equal Protection Clause that would allow a university, educating a relatively small percentage of the population, to

16. According to the *Seattle Times'* School Guide submitted by Parents, for the year 2000, on average 34 percent of Seattle's high school graduates attend four-year colleges after graduation and 38.2 percent attend two-year colleges, although percentages vary from high school to high school.

use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Third, the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity. *See Comfort*, 418 F.3d at 15-16 ("In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages."); *Comfort v. Lynn School Committee*, 283 F.Supp.2d 328, 356 (D.Mass.2003) (noting expert testimony describing racial stereotyping as a " 'habit of mind' that is difficult to break once it forms" and explaining that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking"); *see also* Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 755 (2004) ("[I]f 'diminishing the force of [racial] stereotypes' is a compelling pedagogical interest in elite higher education, it can only be *more so* in elementary and secondary schools—for the very premise of *Grutter's* diversity rationale is that students enter higher education having had too few opportunities in early grades to study and learn alongside peers from other racial groups.") (citing *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325) (emphasis added)).

The dissent insists that racial diversity in a public high school is not a compelling interest, arguing that *Grutter* endorsed a law school's compelling interest in diversity only

in some broader or more holistic sense. Bea, J., dissenting, *infra.* at 1202. To attain this broader interest, the dissent contends, the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself. 539 U.S. at 330, 123 S.Ct. 2325 (discussing the "substantial" benefits that flow from a racially diverse student body and citing several sources that detail the impact of racial diversity in the educational environment).

In short, the District has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits of such diversity unique to the public secondary school context.

2. Avoiding the Harms Resulting from Racially Concentrated or Isolated Schools

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated or isolated schools. In particular, the District is concerned with making the educational benefits of a diverse learning environment available to all its students and ensuring that "no student should be required to attend a racially concentrated school." *See* "Board Statement Reaffirming Diversity Rationale," quoted *supra* p. 1174. Research regarding desegregation has found that racially concentrated or isolated schools are

characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses—"[w]ith few exceptions, separate schools are still unequal schools." *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http:// www.civilright sproject.harvard.edu /research/ reseg03/ AreWeLosing theDream.pdf) (hereinafter "*Civil Rights Project* ") (last visited October 11, 2005) (cited in *Grutter*, 539 U.S. at 345, 123 S.Ct. 2325 (Ginsburg, J., concurring)).

In Seattle, the threat of having to attend a racially concentrated or isolated school is not a theoretical or imagined problem.[17] As the district court found, the District "established that housing patterns in Seattle continue to be racially concentrated," and would result in racially concentrated or isolated schools if school assignments were based solely on a student's neighborhood or proximity to a particular high school. *Parents I*, 137 F.Supp.2d at 1235. Accordingly, the District's Plan strives to ensure that patterns of residential segregation are not replicated in the District's school assignments. *Cf. Comfort*, 418 F.3d at 29 ("The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods. Lynn's aim

17. The prospect of children across the nation being required to attend racially concentrated or isolated schools is a crisis that school boards, districts, teachers and parents confront daily. *See Civil Rights Project* 4 ("At the beginning of the twenty-first century, American public schools are now twelve years in the process of continuous resegregation. The desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades.").

is to preserve local schools as an option without having the housing pattern of *de facto* segregation projected into the school system.") (Boudin, C.J., concurring). Although Parents make much of the fact that "Seattle has never operated a segregated school system," and allege that "this is not a school desegregation case," each court to review the matter has concluded that because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures. *See Parents I*, 137 F.Supp.2d at 1237; *Parents II*, 285 F.3d at 1239-40; *Parents III*, 294 F.3d at 1088; *Parents IV*, 72 P.3d at 153.

The district court found that, "[t]he circumstances that gave rise to the court-approved school assignment policies of the 1970s [e.g., Seattle's segregated housing patterns] continue to be as compelling today as they were in the days of the district's mandatory busing programs. . . . [I]t would defy logic for this court to find that the less intrusive programs of today violate the Equal Protection Clause while the more coercive programs of the 1970s did not." *Parents I*, 137 F.Supp.2d at 1235. Thus, it concluded that "[p]reventing the re-segregation of Seattle's schools is . . . a compelling interest." *Id.* at 1237; *see id.* at 1233-35. Several other courts have also conceived of a school district's voluntary reduction or prevention of de facto segregation as a compelling interest. *See Comfort*, 418 F.3d at 14 (holding that the "negative consequences of racial isolation that Lynn seeks to avoid and the benefits of diversity that it hopes to achieve" constituted compelling interests); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir.2000) (holding that "a compelling interest *can* be found in a program that has as its object the reduction of racial isolation

and what appears to be de facto segregation"), *superseded on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n. 7 (2d Cir.2001); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 579 (2d Cir.1984) ("[W]e held that the Board's goal of ensuring the continuation of relatively integrated schools for the maximum number of students, even at the cost of limiting freedom of choice for some minority students, survived strict scrutiny as a matter of law.") (citing *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 717-20 (2d Cir.1979)); *McFarland v. Jefferson County Pub. Sch.*, 330 F.Supp.2d 834, 851 (W.D.Ky.2004) (concluding that voluntary maintenance of the desegregated school system was a compelling state interest and the district could consider race in assigning students to comparable schools), *aff'd* 416 F.3d 513 (6th Cir.2005).[18] We join these courts in recognizing that school districts have a compelling interest in ameliorating real, identifiable de facto racial segregation.

The dissent, however, contends first that the District is not "desegregating" but rather is engaged in racial balancing. Bea, J., dissenting, *infra.* at 1197-1198. Further, for the dissent, segregation requires a state actor intentionally to

18. Like the District, none of the school districts in the above-cited cases was subject to a court-ordered desegregation decree nor, with the exception of *Andrew Jackson*, did the schools face an imminent threat of litigation to compel desegregation. Like the District, they may have been vulnerable to litigation in decades past, but the districts' voluntary desegregation measures would make it difficult today to make the required showing that the districts *intended* to create segregated schools. *See, e.g., Comfort*, 283 F.Supp.2d at 390 (explaining that the district's vulnerability to litigation had been "headed off by the very Plan in contention here").

separate the races; and in the absence of such offensive state conduct, the Supreme Court cases detailing the remedies for Fourteenth Amendment violations are of no relevance. Bea, J., dissenting, *infra.* at 1208, n. 17. Thus, without a court finding of de jure segregation the elected school board members of the District may not take voluntary, affirmative steps towards creating a racially diverse student body. We disagree. The fact that de jure segregation is particularly offensive to our Constitution does not diminish the real harms of separation of the races by other means. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law. . . ." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (emphasis added). The benefits that flow from integration (or desegregation) exist whether or not a state actor was responsible for the earlier racial isolation. *Brown's* statement that "in the field of public education . . . [s]eparate educational facilities are inherently unequal" retains its validity today. *Id.* at 495, 74 S.Ct. 686. The District is entitled to seek the benefits of racial integration and avoid the harms of segregation even in the absence of a court order deeming it a violator of the U.S. Constitution.

Support for this conclusion comes from statements in the Supreme Court's school desegregation cases, which repeatedly refer to the *voluntary integration* of schools as sound educational policy within the discretion of local school officials.[19] *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*,

19. The dissent correctly notes that these decisions were rendered in the context of de jure segregation. But their import is (Cont'd)

402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (stating that school authorities "are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *Bustop, Inc. v. Bd. of Educ. of Los Angeles*, 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (denying a request to stay implementation of a voluntary desegregation plan and noting that there was "very little doubt" that the Constitution at least *permitted* its implementation); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) (Powell, J., concurring in part and dissenting in part) ("School boards would, of course, be free to develop and initiate further plans to promote school desegregation. . . Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. at 480, 487, 102 S.Ct. 3187 (holding

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also significantly compelling in the context of de facto segregation, as in Seattle. Indeed, in *Swann*, the Court further stated, "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly *or indirectly*, on account of race. . . ." 402 U.S. at 23, 91 S.Ct. 1267 (emphasis added).

unconstitutional the state initiative that blocked the Seattle School District's use of mandatory busing to remedy de facto segregation).

In sum, we hold that the District's interests in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern are clearly compelling.

C. Narrow Tailoring

We must next determine whether the District's use of the race-based tiebreaker is narrowly tailored to achieve its compelling interests. *See Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. The narrow tailoring inquiry is intended to " 'smoke out' illegitimate uses of race" by ensuring that the government's classification is closely fitted to the compelling goals that it seeks to achieve. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Here, our analysis is framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*, which, though informed by considerations specific to the higher education context, substantially guides our inquiry. *See Grutter*, 539 U.S. at 334, 123 S.Ct. 2325 (stating that the narrow tailoring inquiry is context-specific and must be "calibrated to fit the distinct issues raised" in a given case, taking "relevant differences into account") (internal quotation marks omitted).

In *Gratz*, the Court held unconstitutional the University of Michigan's undergraduate admissions program, which automatically assigned 20 points on the admissions scale to

an applicant from an underrepresented racial or ethnic minority group. 539 U.S. at 255, 272, 123 S.Ct. 2411. In *Grutter*, by contrast, the Court upheld the University of Michigan Law School's admissions policy, which took race into account as one of several variables in an individual's application. 539 U.S. at 315-16, 340, 123 S.Ct. 2325. The law school's policy also attempted to ensure that a "critical mass" of underrepresented minority students would be admitted in order to realize the benefits of a diverse student body.[20] *Id.* at 316, 123 S.Ct. 2325.

In its analysis, the Court identified five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point. *Smith v. Univ. of Washington*, 392 F.3d 367, 373 (9th Cir.2004); *Comfort*, 418 F.3d at 17 (characterizing *Grutter* as outlining a "four-part narrow tailoring inquiry").

Hallmarks two through five are applicable here despite significant differences between the competitive admissions plans at issue in *Gratz* and *Grutter* and the District's high school assignment Plan. The first hallmark, however, is less

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20. The Court explained that "critical mass" was defined by the law school as "meaningful numbers" or "meaningful representation," or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Grutter*, 539 U.S. at 318, 123 S.Ct. 2325 (internal quotation marks omitted).

relevant to our analysis because of the contextual differences between institutions of higher learning and public high schools.

1. Individualized, Holistic Consideration of Applicants

a. An applicant's qualifications

In the context of university admissions, where applicants compete for a limited number of spaces in a class, the Court in *Grutter* and *Gratz* focused its inquiry on the role race may play in judging an applicant's qualifications. The Court's underlying concern was that the "admissions policy is flexible enough to consider all pertinent elements of diversity in light of the particular *qualifications* of each applicant, and to place them on the *same footing* for consideration, although not necessarily according them the same weight." *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 (emphasis added) (internal quotation marks omitted); *see Adarand*, 515 U.S. at 211, 115 S.Ct. 2097 ("The injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from *competing* on an *equal footing.*") (emphasis added) (internal quotation marks omitted). The focus on fair competition is due, in part, to the stigma that may attach if some individuals are viewed as unable to achieve success without special protection. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Powell, J., concurring) ("preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth"); *Croson*, 488 U.S. at 493, 109 S.Ct. 706 ("Classifications based on

race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

In *Grutter* and *Gratz*, in order to prevent race from being used as a mechanical proxy for an applicant's qualifications, the Court required individualized, holistic consideration of each applicant across a broad range of factors (of which race may be but one). *Grutter*, 539 U.S. at 336-37, 123 S.Ct. 2325; *see Gratz*, 539 U.S. at 272, 123 S.Ct. 2411 (holding that the undergraduate admissions policy was not narrowly tailored because the "automatic distribution of 20 points has the effect of making 'the *factor of race . . . decisive* ' for virtually every *minimally qualified* underrepresented minority applicant") (emphasis added). This focus on an applicant's qualifications—whether these qualifications are such things as an applicant's test scores, grades, artistic or athletic ability, musical talent or life experience—is not applicable when there is no competition or consideration of qualifications at issue.

All of Seattle's high school students must and will be placed in a Seattle public schoc[1] [21] Students' relative

21. Parents do not claim that their children have a right to attend a particular school, nor could they. *See Bustop Inc.*, 439 U.S. at 1383, 99 S.Ct. 40 (rejecting any legally protected right to have children attend their nearest school). In any case, under the current Plan, all students can attend a school close to their home. Because there are multiple schools in the north and south of Seattle, students for whom proximity is a priority may elect as their first choice one of the schools in their residential area that is not oversubscribed and be guaranteed an assignment to that school.

qualifications are irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment; no assignment to any of the District's high schools is tethered to a student's qualifications. Thus, no stigma results from any particular school assignment.[22] Accordingly, the dangers that are present in the university context—of substituting racial preference for qualification-based competition—are absent here. *See Comfort*, 418 F.3d at 18 ("Because transfers under the Lynn Plan are not tied to merit, the Plan's use of race does not risk imposing stigmatic harm by fueling the stereotype that 'certain groups are unable to achieve success without special protection.' ") (quoting *Bakke*, 438 U.S. at 298, 98 S.Ct. 2733).

b. Differences in compelling interests

The Court's requirement of individualized, holistic review in *Grutter* is also more relevant to the compelling interest advanced by the law school ("the robust exchange

22. In *Bakke*, Justice Powell noted:

> Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

438 U.S. at 301 n. 39, 98 S.Ct. 2733.

of ideas" fostered by viewpoint diversity) than it is to the District's (racial diversity and avoiding racially concentrated or isolated schools). *See Grutter*, 539 U.S. at 337, 123 S.Ct. 2325. The Court noted that the law school did not "limit in any way . . . the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 338, 123 S.Ct. 2325. To this end, the law school's policy made clear that "[t]here are many possible bases for diversity admissions, and provide[d] examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and had successful careers in other fields." *Id.* (internal quotation marks and citations omitted). These multiple bases for diversity ensure the "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (internal citations omitted).

Although the District's Plan, like the plan in *Grutter*, is designed to achieve the educational and social benefits of diversity, including bringing "different viewpoints and experiences to classroom discussions," *see* "Statement Reaffirming Diversity Rationale," viewpoint diversity in the law school and high school contexts serves different albeit overlapping ends. In the law school setting, viewpoint diversity fosters the "robust exchange of ideas." *Grutter*, 539 U.S. at 324, 123 S.Ct. 2325; *see Comfort*, 418 F.3d at 16 ("[L]ively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting."). In the high school context,

viewpoint diversity fosters racial and civic understanding.[23] For example, Eric Benson, the principal of Nathan Hale High School, one of the District's most popular schools, testified that as a result of racial diversity in the classroom, "students of different races and backgrounds tend to have significant interactions both in class, and outside of class. When I came to Nathan Hale, there were racial tensions in the school, reflected in fighting and disciplinary problems. These kind of problems have, to a large extent, disappeared."

In addition, the law school takes other diversity factors, besides race and ethnicity, into consideration in order to achieve its other compelling interest—cultivating a group of national leaders. For example, extensive travel, fluency in foreign languages, extensive community service and successful careers in other fields demonstrate that a candidate is somehow exceptional or out of the ordinary. *cf. Gratz*, 539 U.S. at 273, 123 S.Ct. 2411 (disapproving of the undergraduate admissions plan, in part, because of its failure to consider whether an applicant was extraordinary and noting that "[e]ven if [a] student['s] 'extraordinary artistic

23. The dissent believes that "the educational benefits from diversity, if any, are much greater at the higher educational level because such benefits are greatly magnified by the learning that takes place outside the classroom. . . ." Bea, J., dissenting, *infra.* at 1207. This belittles the substantial role of high school classroom discussions in contributing to the educational development of our young citizens. "The [high school] classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues." *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 512, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (internal quotation marks omitted).

talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points" as opposed to the automatic 20 points given to an applicant from an underrepresented minority). In contrast, the District is required to educate all high school age children, both the average and the extraordinary, regardless of individual leadership potential.

The District also has a second compelling interest that is absent from the university context—ensuring that its school assignments do not replicate Seattle's segregated housing patterns. The holistic review necessary to achieve viewpoint diversity in the university context, across a broad range of factors (of which race may be but one), is not germane to the District's compelling interest in preventing racial concentration or racial isolation. Because race itself is the relevant consideration when attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students. *See Comfort*, 418 F.3d at 18 (holding that when racial diversity is the compelling interest—"[t]he only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest"); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, *212 F.3d at 752* ("If reducing racial isolation is—standing alone—a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race."). We therefore conclude that if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner.[24]

24. The dissent calculates that individualized consideration would be administratively feasible because only 300 students would

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The dissent insists that absent such individualized consideration, the District's plan cannot serve a compelling interest and is not narrowly tailored to protect individuals from group classifications by race. Bea, J., dissenting, *infra.* at 1209. This is a flawed reading of the Fourteenth Amendment.[25] The District's compelling interest is to avoid the harms of racial isolation for all students in the Seattle school district. As we have explained, to accomplish that objective the District may look to the racial consequences of honoring the preferred choices of individual students (and their parents). It is true that for some students their first choice of school, based on geographical proximity, will be denied because other students' choices are granted in order to advance the overall interest in maintaining racially diverse

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need to be considered holistically. Though it is true that 300 students were subject to the race-based tiebreaker, it does not follow that only those 300 would require individualized consideration. Under the dissent's view of the way the District should operate, all 3,000 students would have to be subject to holistic consideration to determine their proper school assignment. Whether or not this is administratively feasible is not clear in the record, but we believe it is ultimately irrelevant because individualized consideration is not required in the co[r] text presented here.

25. Reliance on group characteristics is not necessarily constitutionally infirm under Fourteenth Amendment jurisprudence. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant.")

school enrollments. The Fourteenth Amendment in this context does not preclude the District from honoring racial diversity at the expense of geographical proximity. We must not forget that "race unfortunately still matters," *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325, and it is race that is the relevant consideration here.

In sum, the contextual differences between public high schools and selective institutions of higher learning make the first of the *Grutter* hallmarks ill-suited for our narrow tailoring inquiry.[26] The remaining hallmarks, however, are relevant and control our analysis.

2. Absence of Quotas

In *Grutter*, the Court approved the law school's plan, in part, because it did not institute a quota, whereby a fixed number of slots are reserved exclusively for minority groups, thereby insulating members of those groups from competition with other candidates.[27] 539 U.S. at 335, 123 S.Ct. 2325. Although the

26. The dissent's alternative proposals to achieve the District's interests in diversity illustrate the difficulty of individualized consideration in the high school context. For example, the dissent offers socioeconomic status as a more narrowly tailored and acceptable form of diversifying the District's schools. However, socioeconomic status does nothing more than substitute a number from a family's tax return for race. There is no holistic, individualized consideration under such an approach.

27. Much like the rationale underlying the Court's requirement of individualized, holistic review, the rationale underlying the Court's prohibition of quotas does not apply to the race-based tiebreaker. In paradigmatic affirmative action settings—employment and admissions to institutions of higher learning—the Court disapproves

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law school's plan did not seek to admit a set number or percentage of minority students, during the height of the admission's season, the law school would consult "daily reports" that kept track of the racial composition of the incoming class. *Id.* at 318, 123 S.Ct. 2325. The Court held that this attention to numbers did not transform the law school plan into a quota, but instead demonstrated that the law school sought to enroll a critical mass of minority students in order "to realize the educational benefits of a diverse student body." *Id.* Similarly, we conclude that the District's 15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interests.[28]

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of quotas because they are viewed as insulating minority candidates from competition with nonminority candidates for scarce government resources usually awarded on the basis of an applicant's qualifications—jobs, promotions or places in a law school class. *See Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.). This is objectionable because no "matter how strong their qualifications," nonminority candidates are never afforded the chance to compete with applicants from the preferred groups for the set-aside. *Id.* at 319, 98 S.Ct. 2733. Because noncompetitive assignment to Seattle's public high schools is not based on a student's relative qualifications, the dangers that are presented by a quota—of substituting racial preference for qualification-based competition—are absent here.

28. Although the dissent contends that the "tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students," we believe it is more appropriately viewed as a "permissible goal." Such a goal "requires only a good faith effort . . . to come within a range

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Appendix A

a. No fixed number of slots

The District's race-based tiebreaker does not set aside a fixed number of slots for nonwhite or white students in any of the District's schools. The tiebreaker is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent variance has not been satisfied. That is, if the applicant pool has been exhausted, no students are required or recruited to attend a particular high school in order to bring it within the 15 percent plus or minus range for that year.

Moreover, the number of white and nonwhite students in the high schools is flexible and varies from school to school and from year to year.[29] This variance in the number of

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demarcated by the goal itself." *Grutter*, 539 U.S at 334, 123 S.Ct. 2325 (internal quotation marks and citation omitted). The tiebreaker's broad, 30% range and the District's willingness to turn off the use of the tiebreaker after the ninth grade are consistent with a goal as opposed to a rigid ratio.

29. Notably, the District's percentage of white and nonwhite enrollment is significantly more varied than the percentage of underrepresented minorities admitted to the University of Michigan's Law School, which remained relatively consistent. From 1995 to 1998, the percentage of minority students enrolled in the law school was 13.5 percent, 13.8 percent, 13.6 percent and 13.8 percent. *Grutter*, 539 U.S. at 389-90, 123 S.Ct. 2325 (Kennedy, J., dissenting).

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nonwhite and white students throughout the District's high schools is because, under the Plan, assignments are based on students' and parents' preferences.[30] The tiebreakers come into play in the assignment process only when a school is oversubscribed. As Morgan Lewis, the Manager of Enrollment Planning, Technical Support and Demographics, testified, "If all the parents . . . don't pick [a] school in a massive number, then everyone gets in. And so it's . . . a case where the choice patterns, the oversubscription . . . [is] the reason the [tiebreaker] kicks in. . . . Everything happens when more people want the seats. And why they want the seats sometimes we don't know."

b. Critical mass

Within this flexible system, where parental and student choices drive the assignments to particular schools, the District seeks to enroll and maintain a relatively stable critical mass of white and nonwhite students in each of its oversubscribed high schools in order to achieve its compelling interest in racial diversity and to prevent the

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In contrast, the District's percentage of white and nonwhite enrollment encompasses a wide range. For example, for the 2000-01 school year, the percentage of nonwhite students in the ninth grade classes of the four oversubscribed public high schools after the racial tiebreaker was applied, varied from 54.2 percent at Ballard, to 59.5 percent at Franklin, to 40.6 percent at Nathan Hale to 55.3 percent at Roosevelt.

30. Slightly more than 80 percent of all entering ninth grade students were assigned to their first choice school.

assignments from replicating Seattle's segregated housing patterns. Faced with the question of what constituted a critical mass of students in this particular context, the District determined that a critical mass was best achieved by adopting the 15 percent plus or minus variance tied to demographics of students in the Seattle public schools. Thus, when an oversubscribed high school has more than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially concentrated or isolated, meaning that it lacks a critical mass of students needed "to realize the educational benefits of a diverse student body."

Parents attack the District's use of the 15 percent plus or minus variance tied to the District's school population demographics because they believe that the District cannot use race *at all* in its assignment process. We have rejected this argument, however, applying *Grutter* and *Gratz*. *See supra* Part II.B. Alternatively, Parents contend that the District's goal of enrolling between 75 and 45 percent nonwhite students and between 25 and 55 percent white students in its oversubscribed schools establishes a quota, not a critical mass. They note that the critical mass sought by the law school in *Grutter* was smaller, consisting of between 12 and 20 percent of underrepresented minority students in each law school class.

Parents' argument, however, ignores *Grutter's* admonition that the narrow tailoring inquiry be context-specific. First, like the District's enrollment goals, which are tied to the demographics of the Seattle schools' total student population, the law school's goal of enrolling between 12 to 20 percent of underrepresented minorities in a given year was tied to the demographics of *its* applicant pool.[31] Second, in tying the use of the tiebreaker to the District's demographics with a 15 percent plus or minus trigger point, the District adopted a common benchmark in the context of voluntary and court-ordered school desegregation plans. As the District's expert testified,

> Most of the cases I've participated in . . . generally worked with numbers that reflect the *racial composition of the school district* but, at the same time, tr[ied] to allow the district sufficient flexibility so that it would not have to regularly and repeatedly move students on a short-term basis simply to maintain some specific number. That's why *we see ranges of plus or minus 15 percent* in most cases of school desegregation.

Even Parents' expert testified that school districts throughout the country determine whether a district is

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31. For example, in 1995, 662 (approximately 16 percent) of the 4147 law school applicants were underrepresented minorities; in 1996, 559 (approximately 15 percent) of the 3677 law school applicants were underrepresented minorities; in 1997, 520 (approximately 15 percent) of the 3429 law school applicants were underrepresented minorities. *See Grutter*, 539 U.S. at 384, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting).

sufficiently desegregated by looking to the "population of the district" in question. *See also Comfort*, 418 F.3d at 21 (holding that a "transfer policy conditioned on district demographics (+/-10- 15%)" was not a quota because it "reflects the defendants' efforts to obtain the benefits of diversity in a stable learning environment"); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 287-88 (4th Cir.2000) (Traxler, J., dissenting) (citing to a book written by David J. Armor, Parents' expert, *Forced Justice: School Desegregation and the Law* 160 (1995), which observed that over 70 percent of the school districts with desegregation plans use a variance of plus or minus 15 percent or greater); *cf.* 34 C.F.R. § 280.4(b) (defining "minority group isolation" as a "condition in which minority group children constitute more than 50 percent of the enrollment of [a] school"). Given this empirically and time-tested notion of critical mass in the public high school desegregation context, it would make little sense to force the District to utilize the same percentages that constituted a critical mass in the elite law school context to determine what constitutes a critical mass for Seattle public high schools. *See Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.") (internal quotation marks and citations omitted).

Accordingly, we conclude that the District's 15 percent plus or minus trigger point tied to the demographics of the Seattle school population is not a quota. It is a context-specific, flexible measurement of racial diversity designed to attain and maintain a critical mass of white and nonwhite students in Seattle's public high schools.

Appendix A

3. Necessity of the Plan and Race-Neutral Alternatives

Narrow tailoring also requires us to consider the necessity of the race-based plan or policy in question and whether there are equally effective, race-neutral alternatives.

a. Necessity of the Plan

The District argues that the compelling interests that it seeks are directly served by the race-based tiebreaker. The tiebreaker allows the District to balance students' and parents' choices among high schools with its broader compelling interests—achieving the educational and social benefits of diversity and the benefits specific to the secondary school context, and discouraging a return to enrollment patterns based on Seattle's racially segregated housing pattern.

i. Need for race-based tiebreaker

When the District moved from its controlled choice plan to the current Plan, *see supra* Part I.A, it predicted that families would tend to choose schools close to their homes. Indeed, this feature was seen as a positive way to increase parental involvement. However, unfettered choice—especially with tiebreakers based on neighborhood or distance from a school—created the risk that Seattle's high school enrollment would again do no more than reflect its segregated housing patterns. *See supra* Part II.C.2.

It is this de facto residential segregation across a white/nonwhite axis that the District has battled historically and that it seeks to ameliorate by making the integration

tiebreaker a part of its open choice Plan.[32] The District, mindful of both Seattle's history and future, appropriately places its focus here. In the 2001-02 school year, the integration tiebreaker operated in three high schools (that is, three high schools were oversubscribed and deviated by more than 15 percent from the ratio of white to nonwhite students district-wide). The integration tiebreaker served to alter the imbalance in the schools in which it operated in a minimally intrusive manner. The tiebreaker, therefore, successfully achieved the District's compelling interests.

ii. White/Nonwhite distinction

Parents argue that the District paints with too broad a brush by distinguishing only between white and nonwhite students, without taking into account the diversity within the "nonwhite" group. However, the District's choice to increase diversity along the white/nonwhite axis is rooted in Seattle's history and current reality of de facto segregation resulting from Seattle's segregated housing patterns. The white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of city and vice versa. This white/nonwhite focus is also consistent with the history of public school desegregation measures throughout the country, as reflected in a current

32. Although we characterize it as de facto residential segregation, we are mindful of Justice Marshall's dissent in *Board of Education v. Dowell*, "The . . . conclusion that the racial identity of the northeast quadrant now subsists because of 'personal preference[s]' pays insufficient attention to the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation." 498 U.S. 237, 263, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) (internal citation omitted).

federal regulation defining "[m]inority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school," without distinguishing among the various categories included within the definition of "minority group." 34 C.F.R. § 280.4(b); *see Grutter*, 539 U.S. at 316, 123 S.Ct. 2325 (noting that the law school sought to enroll a critical mass of "minority students," a category that included African Americans, Hispanics and Native Americans); *Comfort*, 418 F.3d at 22 ("By increasing diversity along the white/nonwhite axis, the Plan reduced racial tensions and produced positive educational benefits. *Narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well.*") (emphasis added).

b. Race-neutral alternatives

In *Grutter*, the Court explained that narrow tailoring "require[s] serious, good faith consideration of *workable* race-neutral alternatives *that will achieve the diversity the university seeks.*" 539 U.S. at 339, 123 S.Ct. 2325 (emphasis added). On the other hand, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* Furthermore, the Court made clear that the university was not required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission. *Id.* at 340, 123 S.Ct. 2325. Implicit in the Court's analysis was a measure of deference toward the university's identification of those values.[33] *See id.* at 328,

33. The Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections

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340, 123 S.Ct. 2325. Here, the record reflects that the District reasonably concluded that a race-neutral alternative would not meet its goals.

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and educational policy. *See generally* Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 Wm. & Mary L.Rev. 1691 (2004). The theme of local control over public education has animated Supreme Court jurisprudence. *See, e.g.*, *Brown*, 349 U.S. at 299, 75 S.Ct. 753 (directing local school officials, with court oversight, to devise remedies for segregation in the light of "varied local school problems"); *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *Freeman*, 503 U.S. at 490, 112 S.Ct. 1430 ("As we have long observed, 'local autonomy of school districts is a vital national tradition.' " (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977))); *see also Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board."); *LaVine v. Blaine School District*, 257 F.3d 981, 988 (9th Cir.2001) ("In the school context, we have granted educators substantial deference as to what speech is appropriate.") (citing and quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)). These Supreme Court decisions suggest that secondary schools occupy a unique position in our constitutional tradition. For this reason, we afford deference to the District's judgment similar to that which *Grutter* afforded the university. *See Grutter*, 539 U.S. at 328- 29, 123 S.Ct. 2325.

Appendix A

i. Using poverty as an alternative measure of diversity

The record demonstrates that the School Board considered using a poverty tiebreaker in place of the race-based tiebreaker. It concluded, however, that this proxy device would not achieve its compelling interest in achieving racial diversity, and had other adverse effects. Although there was no formal study of the proposal by District staff, Board members' testimony revealed two legitimate reasons why the Board rejected the use of poverty to reach its goal of racial diversity. First, the Board concluded that it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status. Second, for the group of students for whom poverty would correlate with minority status, the implementation would have been thwarted by high school students' understandable reluctance to reveal their socioeconomic status to their peers.

Because racial diversity is a compelling interest, the District may permissibly seek it if it does so in a narrowly tailored manner. We do not require the District to conceal its compelling interest of achieving racial diversity and avoiding racial concentration or isolation through the use of "some clumsier proxy device" such as poverty. *See Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring).

ii. The Urban League plan

Parents also assert that the District should have more formally considered an Urban League proposal, which did not eliminate the integration tiebreaker but merely considered

it after other factors. The Urban League plan was a comprehensive plan seeking to enhance the quality of education in Seattle's schools by focusing on educational organization, teacher quality, parent-teacher interaction, raising curricular standards, substantially broadening the availability of specialized and magnet programs (which could attract a broader cross-section of students to undersubscribed schools) and supporting extra-curricular development. The plan proposed decreasing the School District's reliance on race in the assignment process by pairing neighborhoods with particular schools and creating a type of neighborhood/ regional school model. Under the Urban League plan, preference initially would be given to students choosing a school in their paired region, and the existing racial tiebreaker would be demoted from second to third in the process of resolving any remaining oversubscription. The plan also suggested adding an eleventh high school.

Board members testified that they rejected the plan because of the high value the District places on parental and student choice. Moreover, given Seattle's segregated housing patterns, by prioritizing a neighborhood/regional school model where students are assigned to schools close to their homes, the Urban League plan did not sufficiently ensure the achievement of the District's compelling interests in racial diversity and avoidance of racial concentration or isolation. As one member of the School Board testified, "[it] would become Controlled Choice all over again. That's basically what Controlled Choice was, [ ] a regional plan; it controlled your options by using regions or geography." It was therefore permissible for the District to reject a plan that neither comported with its priorities nor achieved its compelling interests.

Appendix A

iii. Lottery

Parents additionally contend in this court that the District should have considered using a lottery to assign students to the oversubscribed high schools. As an initial matter, we note that Parents did not argue before the district court that a lottery was a workable race-neutral alternative that would achieve the Districts' compelling interests. Parents now argue on appeal, however, that a lottery would achieve the District's compelling interests without having to resort to the race-based tiebreaker. They ask us to assume that because approximately 82 percent of all students want to attend one of Seattle's oversubscribed schools, the makeup of this 82 percent, as well as that of the applicant pool for each school, mirrors the demographics of the District (60 percent white and 40 percent nonwhite). Employing this assumption, Parents also ask us to assume that a random lottery drawing from this pool would produce a student body in each of the oversubscribed schools that falls within the District's 15 percent plus or minus variance. These assumptions, however, are not supported—indeed, are undercut—by the factual record. For example, Superintendent Olchefske explained that District patterns indicate that more people choose schools close to home. That would mean that the pool of applicants would be skewed in favor of the demographic of the surrounding residential area. That is, the applicant pool for the north area oversubscribed high schools would have a higher concentration of white students and the applicant pool for the south area oversubscribed high school would have a higher concentration of nonwhite students. Thus, random sampling from such a racially skewed pool would produce a racially skewed student body. As one Board member testified,

a lottery was not a viable alternative because "[i]f applicants are overwhelmingly majority and you have a lottery, then your lottery—the pool of your lottery kids are going to be overwhelmingly majority. We have a diversity goal."

Although the District has the burden of demonstrating that its Plan is narrowly tailored, *see Gratz*, 539 U.S. at 270, 123 S.Ct. 2411, it need not "exhaust[ ] every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325. Parents' belated and bald assertion that a lottery could achieve the District's compelling interests, without any evidence to support their claim, fails to demonstrate that a lottery is a viable race-neutral alternative. *See id.* at 340, 123 S.Ct. 2325 (dismissing the race-neutral alternative of "percentage plans," advocated by the United States in an amicus brief, because the "United States [did] not . . . explain how such plans could work for graduate and professional schools"); *Comfort*, 418 F.3d at 23 (noting that Lynn rejected the use of a lottery in place of the race-based tiebreaker and holding that "Lynn must keep abreast of possible alternatives as they develop . . . but it need not prove the impracticability of every conceivable model for racial integration") (internal citation omitted).

c. The District's use of race

The dissent posits variables the District could use instead of race, for example, embracing the San Francisco school district's approach as a possible model for integration that would meet the dissent's criteria. Bea, J., dissenting, *infra.* at 1218, n. 26. Perhaps San Francisco has experienced success (however that school district defines it) in its multi-variable

plan—the details and evaluations of which are not in the record. The District is free to consider the San Francisco model when it engages in the annual review of its own Plan. However, even assuming that San Francisco's plan is working, that does not mean that it must be used by other cities in other states. Much can be gained from the various states employing locally appropriate means to achieve desirable ends. In our system, where states are considered laboratories to be used to experiment with myriad approaches to resolving social problems, we certainly should not punish one school district for not adopting the approach of another. Justice Brandeis said it well,

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

In sum, the District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a

race-based tiebreaker and a proximity preference. Over the long history of the District's efforts to achieve desegregated schools, it has experimented with many alternatives, including magnet and other special-interest programs, which it continues to employ, and race-conscious districting. But when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution. Even Parents' expert conceded that, "if you don't consider race, it may not be possible to offer an integrated option to students. . . . [I]f you want to guarantee it you have to consider race." As Superintendent Olchefske stated, "when diversity, meaning racial diversity, is part of the educational environment we wanted to create, I think our view was you took that issue head on and used—you used race as part of the structures you developed." The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account.[34] *Cf. Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir.1999) (upholding as narrowly tailored the admissions policy of an elementary school—operated as a research laboratory—that explicitly considered race in pursuit of a racially balanced research sample).

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34. The dissent urges, "The way to end discrimination is to stop discriminating by race." Bea, J., dissenting, *infra.* at 1221. More properly stated, the way to end segregation is to stop separation of the races. The Seattle school district is attempting to do precisely that.

4. Undue Harm

A narrowly tailored plan ensures that no member of any racial group is unduly harmed. *Grutter*, 539 U.S. at 341, 123 S.Ct. 2325. Parents argue that every student who is denied his or her choice of schools because of the integration tiebreaker suffers a constitutionally significant burden. We agree with the Supreme Court of Washington, however, in its assessment that the District's Plan imposes a minimal burden that is shared equally by all of the District's students. *Parents IV*, 72 P.3d at 159-60 (noting that the burden of not being allowed to attend one's preferred school is shared by all students equally). As that court noted, it is well established that "there [is] no right under Washington law to attend a local school or the school of the student's choice." *Id.* at 159.[35] Indeed, public schools, unlike universities, have a tradition of compulsory assignment. *See Bazemore v. Friday*, 478 U.S. 385, 408, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (White, J., concurring) (noting that "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend"). When an applicant's qualifications are not under consideration at all, there is no notion that one student is entitled to a place at any particular school. *See Comfort*, 418 F.3d at 20 ("The denial of a transfer under the [District's] Plan is . . . markedly different from the denial of a spot at a unique or selective educational institution.").

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35. Subject to federal statutory and constitutional requirements, structuring public education has long been within the control of the states as part of their traditional police powers. *See Barbier v. Connolly*, 113 U.S. 27, 31-32, 5 S.Ct. 357, 28 L.Ed. 923 (1884) (describing the states' traditional police powers).

Moreover, it is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another. At some schools, white students are given preference over nonwhite students, and, at other schools, nonwhite students are given preference over white students. For example, in the 2000-01 school year, 89 more white students were assigned to Franklin, one of Seattle's most popular schools, than would have been assigned absent the tiebreaker; 107 more nonwhite students were assigned to Ballard, another of Seattle's most popular schools, than would have been assigned absent the tiebreaker; 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker; and 82 more nonwhite students were assigned to Roosevelt than would have been absent the tiebreaker.[36]

In sum, because (1) the District is entitled to assign all students to any of its schools, (2) no student is entitled to attend any specific school and (3) the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another, the tiebreaker does not unduly harm any students in the District.

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36. As detailed earlier, the Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

5. Sunset Provision

A narrowly tailored plan must be limited not only in scope, but also in time. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. The Court held in *Grutter* that this durational requirement can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The District's Plan includes such reviews. It revisits the Plan annually and has demonstrated its ability to be responsive to parents' and students' choice patterns and to the concerns of its constituents. For example, in 2000, when a higher than normal number of students selected the same schools, the Board responded by increasing the race-based trigger from 10 percent to a 15 percent deviation from the school population, adopting the thermostat that turns off the tiebreaker as soon as the school has come within the 15 percent plus or minus trigger point and by using the tiebreaker solely for the incoming ninth grade class.

With respect to the dissent's concern for a "logical end point," Bea, J., dissenting, *infra.* at 1217, like Justice O'Connor this court shares in the hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. We expect that the District will continue to review its Plan, and we presume, as did the Court in *Grutter*, that school officials will demonstrate a good faith commitment to monitoring the continued need for the race-based tiebreaker and terminating its use when that need ends.[37] *See* 539 U.S. at 343, 123 S.Ct. 2325.

37. It is worth noting that plans like the District's may actually contribute to achieving the Court's vision in *Grutter* that racial

(Cont'd)

III. Conclusion

For the foregoing reasons, we hold that the Plan adopted by the Seattle School District for high school assignments is constitutional and the use of the race-based tiebreaker is narrowly tailored to achieve the District's compelling interests. Accordingly, we **AFFIRM** the district court's judgment.

AFFIRMED.

(Cont'd)

preferences will no longer be necessary in 25 years—or even sooner. As Justice Ginsburg observed, "As lower school education in minority communities improves, an increase in the number of [highly qualified and competitive] students may be anticipated." *Grutter*, 539 U.S. at 346, 123 S.Ct. 2325 (Ginsburg, J., concurring).

Appendix A

KOZINSKI, *Circuit Judge, concurring*:

My colleagues in the majority and the dissent have written extensively and well. Given the exacting standard they are attempting to apply, I cannot say that either is clearly wrong. But there is something unreal about their efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here. I hear the thud of square pegs being pounded into round holes. Ultimately, neither analysis seems entirely persuasive.

I start as did our eminent colleague Chief Judge Boudin of the First Circuit, in commenting on a highly-analogous plan adopted by the city of Lynn, Massachusetts:

> [The] plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes). *E.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). By contrast to *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), the plan does not segregate persons by race. *See also Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

> Nor does it involve racial quotas. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir.2005) (Boudin, C.J., concurring).

These are meaningful differences. When the government seeks to use racial classifications to oppress blacks or other minorities, no conceivable justification will be sufficiently compelling. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Similarly, when lawyers use peremptory challenges to exclude jurors of a particular race, thereby denying them the right to participate in government service, they must justify their challenges based on objective, *non*-racial considerations; justifications based on race will be rejected out of hand, no matter how compelling they might seem. *See Batson v. Kentucky*, 476 U.S. 79, 85-88, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). When government seeks to segregate the races, as in *Johnson*, the courts will look with great skepticism at the justifications offered in support of such programs, and will reject them when they reflect assumptions about the conduct of individuals based on their race or skin color. *See Johnson*, 125 S.Ct. at 1154 (Stevens, J., dissenting) (concluding that California's policy of racially segregating inmates "supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration"). When the government engages in racial gerrymandering, it not only keeps the races apart, but exacerbates racial tensions by making race a proxy for political power. *See Shaw v. Reno*, 509 U.S. 630, 648, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)

("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."). Programs seeking to help minorities by giving them preferences in contracting, *see, e.g., Adarand*, and education, *see, e.g., Bakke*, benign though they may be in their motivations, pit the races against each other, and cast doubts on the ability of minorities to compete with the majority on an equal footing.

The Seattle plan suffers none of these defects. It certainly is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

Because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review. By rational basis, I don't mean the standard applied to economic regulations, where courts shut their eyes to reality or even invent justifications for upholding government

programs, *see, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), but robust and realistic rational basis review, *see, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it.

Under this standard, I have no trouble finding the Seattle plan constitutional. Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population. Such stirring of the melting pot strikes me as eminently sensible.

The record shows, and common experience tells us, that students tend to select the schools closest to their homes, which means that schools will reflect the composition of the neighborhood where they are located. Neighborhoods, however, do not reflect the racial composition of the city as a whole. In Seattle, "as in many other cities, minorities and whites often live in different neighborhoods." *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring). To the extent that students gravitate to the schools near their homes, the schools will have the same racial composition as the neighborhood. This means that student patterns of interacting primarily with members of their own race that are first developed by living in racially isolated neighborhoods will be continued and exacerbated by the school experience.

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 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.

It may be true, as the dissent suggests, that students are influenced far more by their experiences in the home, church and social clubs they attend outside of school. But this does not negate the fact that time spent in school and on school-related activities, which may take up as much as half of a student's waking hours, nevertheless has a significant impact on that student's development. The school environment forces students both to compete and cooperate in the classroom, as well as during extracurricular activities ranging from football to forensics. Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities cannot help but foster the live-and-let-live spirit that is the essence of the American experience. I believe this is a rational objective for an educational system—every bit as rational as teaching the three Rs, advanced chemistry or driver's education. Schools, after all, don't simply prepare students for further education, though they certainly can and should do that; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.

To borrow Judge Boudin's words once again, the plan here is "far from the original evils at which the Fourteenth Amendment was addressed. . . . This is not a case in which, against the background of core principles, all doubts should be resolved against constitutionality." *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring). I am acutely mindful of the Supreme Court's strong admonition only last Term that any and all racial classifications must be adjudged under the strict scrutiny standard of review. *See Johnson*, 125 S.Ct. at 1146 (citing cases). But the Supreme Court's opinions are necessarily forged by the cases presented to it; where the case at hand differs in material respects from those the Supreme Court has previously decided, I would hope that those seemingly categorical pronouncements will not be applied without consideration of whether they make sense beyond the circumstances that occasioned them.

When the Supreme Court does review the Seattle plan, or one like it, I hope the justices will give serious thought to bypassing strict—and almost always deadly—scrutiny, and adopt something more akin to rational basis review. Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials. Long past is the day when losing an election or a legislative vote on a hotly contested issue was considered the end of the matter—at least until the next election when the voters might "throw the rascals out." Too often nowadays, an election or a vote is a mere precursor to litigation, with the outcome of the dispute not known until judges decide the case many years later.

Appendix A

Whatever else the strict scrutiny standard of review may do, it most certainly encourages resort to the courts and often delays implementation of a program for years. The more complex and exacting the standard of review, the more uncertain the outcome, and the greater are the incentives for the parties to bloat the record with depositions, expert reports, exhibits, documents and various other materials they hope will catch the eye of the judges who ultimately decide the issue. This is a perfectly fine example, the litigation having taken over five years so far, generating 11 published opinions from the 24 judges who have considered the matter in the federal and state courts. In the meantime, the plan was put on hold, and at least one class has entered and will have completed its entire high school career without ever being affected by it.

While it's tempting to adopt rules of law that give us the ultimate say on hotly contested political questions, we should keep in mind that we are not infallible, nor are we the repository of ultimate wisdom. Elected officials, who are much closer to ground zero than we are—and whose political power ebbs and flows with the approval of the voters—understand the realities of the situation far better than we can, no matter how many depositions and expert reports we may read in the quiet of our chambers. It therefore behooves us to approach issues such as those presented here with a healthy dose of modesty about our ability to understand the past or predict the future. It should make us chary about use of the strict scrutiny standard of review, which proclaims us the ultimate arbiters of the issue and gives those who oppose the policy in question every incentive to turn litigation, to paraphrase Clausewitz, into a continuation of politics by other means.

To resort to Chief Judge Boudin's words one last time, "we are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent. The problems that the . . . plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one. . . ." *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring). I share Judge Boudin's preference for resolving such difficult issues by trial and error in the real world, rather than by experts jousting in the courtroom. When it comes to a plan such as this—a plan that gives the American melting pot a healthy stir without benefitting or burdening any particular group—I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable. It is on this basis that I would affirm the judgment of the district court.

Appendix A

BEA, *Circuit Judge, with whom Circuit Judges* KLEINFELD, TALLMAN and CALLAHAN *join dissenting*:

I respectfully dissent.

At the outset, it is important to note what this case is *not* about. The idea that children will gain social, civic, and perhaps educational skills by attending schools with a proportion of students of other ethnicities and races, which proportion reflects the world in which they will move, is a notion grounded in common sense. It may be generally, if not universally, accepted.[1] But that is not the issue here. The issue here is whether this idea may be imposed by government coercion, rather than societal conviction; whether students and their parents may choose, or whether their government may choose for them.[2]

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1. For a dissenting view, *see infra* pp. 1204-1205.

2. Because of our country's struggle with racial division and the injustices of compelled government *de jure* segregation, we must be especially suspicious of any compulsive government program based upon race, even when such a program is supposedly beneficial. Good intentions cannot insulate the government's use of race from the commands of the Equal Protection Clause; history is rife with examples of well-intentioned government programs which later caused grievous harm to society and individuals. *See Adarand Constructors v. Pena*, 515 U.S. 200, 226, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."); *Olmstead v. United States*, 277 U.S. 438, 479, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

Appendix A

In the Seattle School District ("District"), some schools are oversubscribed and in higher demand than others, so the District uses a tiebreaker to assign some ninth-grade students, and not others, to those schools. The tiebreaker operates solely on the basis of the student's race. In fact, rather than differentiating between African-American, Asian-American, Latino, Native American, or Caucasian students, the tiebreaker classifies students only as "white" or "nonwhite."[3] The District seeks a racially balanced student body of 40% white, 60% nonwhite children; the tiebreaker excludes white or nonwhite students from an oversubscribed school if their admission will not further that preferred ratio.

Notwithstanding the majority's fervent defense of that plan, the District is engaged in simple racial balancing, which the Equal Protection Clause forbids. The majority can arrive at the opposite conclusion only by applying a watered-down standard of review—improperly labeled "strict scrutiny"—which contains none of the attributes common to our most stringent standard of review. I respectfully disagree with the majority's gentle endorsement of the racial tiebreaker and would instead hold the District violates the Equal Protection Clause whenever it excludes a student from a school solely on the basis of race.

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3. This makes all the more puzzling the majority's assertion that "that the District has a compelling interest in securing the educational and social benefits of racial (and *ethnic*) diversity." Majority op. 1166 (emphasis added). There simply is no *ethnic* tiebreaker.

Appendix A

I.

As an introductory note, I call attention to the majority's frequent misuse of the terms "segregation," "segregated schools," and "segregated housing patterns." *See, e.g.*, Majority op. at 1166, 1167. As a perfectly understandable rhetorical ploy, the majority continually uses those charged terms when there has been no such segregation in the Seattle schools in any textual or legal sense.[4] Throughout the desegregation cases, the U.S. Supreme Court stated that only the remediation of *de jure* segregation justified the use of racial classifications. *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) (emphasis in original); *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (" 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, *but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.*") (emphasis added).

"Segregate" is a transitive verb. It requires an actor to do an act which effects segregation. *See* OXFORD ENGLISH DICTIONARY (2d ed.1989) ("segregate, *v.* 1. a. *trans.:* To separate (a person, a body or class of persons) from the general

4. Remediation of *de jure* segregation is not at issue here; the parties concede the District's schools have never been *de iure* segregated. No one even suggests that Seattle's housing market has ever been affected by *de jure* segregation.

body, or from some particular class; to set apart, isolate, seclude").[5] Instead of *de jure* segregation, what the majority describes is racial imbalance in the District's schools and Seattle's residential makeup.

Of course, it is much easier to argue for measures to end "segregation" than for measures to avoid "racial imbalance." Especially is this so in view of the U.S. Supreme Court's frequent pronouncements that "racial balancing" violates the Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306, 330, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("[O]utright racial balancing . . . is patently unconstitutional."); *Freeman*, 503 U.S. at 494, 112 S.Ct. 1430 ("Racial balance is not to be achieved for its own sake."); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

It should be remembered by the reader of the majority opinion that one can no more "segregate" without a person actively doing the segregation than one can separate an egg without a cook.

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5. Indeed, the term "*de facto* segregation" is somewhat of an oxymoron. That is perhaps why the Supreme Court preceded the term with the qualifier "so-called." *See Keyes*, 413 U.S. at 208, 93 S.Ct. 2686.

Like Judge Boudin,[6] in his concurring opinion Judge Kozinski tries to distinguish past Supreme Court cases involving racial discrimination by focusing on the effects of the discrimination, rather than the fact of the discrimination.

This creates for them two categories different from the effects of the Seattle plan: (1) the effects of other race discrimination plans were much *worse* than Seattle's and (2) the effects were visited on *certain races.*

But the difference reflected in these two categories are irrelevant. "[T]here is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.' " *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir.1997). Second, the Fourteenth Amendment protects individual rights, not the rights of certain races or groups.

Further, that a "plan does not segregate persons by race"[7] does not justify it in refusing school admission to a qualified scholar because he does not belong to a particular race. There was no segregation by race at Cal Davis medical school, when Bakke was improperly refused admission. *See Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750.

Also, it is quite accurate to say the Seattle plan does not "involve racial quotas."[8] The numerical quota is the

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6. *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27 (1st Cir.2005) (Boudin, C.J., concurring).

7. *Id.*

8. Concurrence at —— - —— (citing *Comfort*, 418 F.3d at 27 (Boudin, C.J., concurring)).

percentage by which the school in question's racial composition differs from the school district's target.[9] Not calling it a quota, does not make it something other. "A rose by any other name . . . etc."

Perhaps the Supreme Court will adopt a "rational relation" basis for review of race-based discrimination by government, based on the concurrence's view of what is "realistic" or what are "real-world circumstances."[10] As indicated above, however, it certainly has given no such indication.[11] But if it does, one doubts that it will do so based on a "melting pot" metaphor.

Up to now, the American "melting pot" has been made up of people voluntarily coming to this country from different lands, putting aside their differences and embracing our common values. To date it has not meant people who are told whether they are white or non-white, and where to go to school based on their race.

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9. *See infra* pp. 1212-1214 (discussion of why the racial tiebreaker used by Seattle is a quota).

10. What is "the reality" or "realistic" or "real-world" is usually a rhetorical tool for dressing up one's own view as objective and impartial, and therefore, more presentable.

11. *See e.g. Adarand*, 515 U.S. at 224, 115 S.Ct. 2097, *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1146, 160 L.Ed.2d 949 (2005). On this point, the majority agrees. *See* Majority op. pp. 1172 n. 12.

The suggestion that local political forces should decide when to employ racial discrimination in the allocation of governmental resources is certainly nothing new in American history. Such "local option" discrimination was adopted in the Missouri Compromise of 1820, which established the Mason-Dixon line, and the Compromise of 1850. But since then, the Civil War, the post-war Amendments to the Constitution and *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) have made racial discrimination a matter of national concern and national governance.

As noted in the opening lines of this dissenting opinion, it certainly is rational to believe that racial balancing in schools achieves better racial socialization and, as a result, better citizens. The issue is not that, but whether what is rational can be achieved by compulsory racial discrimination by the State.

II.

I agree with the majority that the District's use of the racial tiebreaker is a racial classification, and all racial classifications are subject to "strict scrutiny" review under the Equal Protection Clause. *See* Majority op. at 1173. Yet the majority conceives of strict scrutiny as some type of relaxed, deferential standard of review. I view it differently.

"No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The right to equal protection is an individual one, and so where federal or state governments classify a

person according to race—"a group classification long recognized as in most circumstances irrelevant and therefore prohibited"—we review such state action under the most "detailed judicial inquiry"—that is, under strict scrutiny. *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325; *see Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.)" (internal quotation marks omitted).

The right to equal protection is held equally among all individuals. "*[A]ll* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand*, 515 U.S. at 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis added). Strict scrutiny applies regardless whether the racial classifications are invidious or benign and "is not dependent on the race of those burdened or benefited by a particular classification." *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411; see Johnson, 125 S.Ct. at 1146 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.") (internal citations omitted). We require such a demanding inquiry "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Adarand*, 515 U.S. at 226, 115 S.Ct. 2097.

Appendix A

The right to equal protection provides a liberty; it represents freedom from government coercion based upon racial classifications. *See Miller*, 515 U.S. at 904, 115 S.Ct. 2475 (the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking"). Thus, under strict scrutiny, all racial classifications by the government, regardless of purported motivation, are "inherently suspect," *Adarand*, 515 U.S. at 223, 115 S.Ct. 2097, and "presumptively invalid," *Shaw v. Reno*, 509 U.S. 630, 643-44, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). They are permissible only where the government proves their use is "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

It follows, then, that the government carries the burden of proving that its use of racial classifications satisfies strict scrutiny. *Johnson*, 125 S.Ct. at 1146 n. 1 ("We put the burden on state actors to demonstrate that their race-based policies are justified."); *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411; *W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 990 (9th Cir.2005) ("The burden of justifying different treatment by ethnicity . . . is always on the government.") (quoting *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir.1997)).

Despite this formidable standard of review, the majority does not hesitate to endorse the District's use of the racial tiebreaker. Rather than recognizing the protections of the individual against governmental racial classifications, the majority instead endorses a rigid racial governmental grouping of high school students for the purpose of attaining racial balance in the schools. For the reasons expressed

below, I do not share in the majority's confidence that such a plan is constitutionally permissible.

III.

I consider first whether the District has asserted a "compelling governmental interest," the first element of the strict scrutiny test. The District contends it has a valid compelling governmental interest in using racial balancing to achieve "the educational and social benefits of racial . . . diversity" within its high schools and avoid "racially concentrated" schools. The District argues its interest will enhance student discussion of racial issues in high school and will foster cross-racial socialization and understanding, both in school and later in the students' lives.

The U.S. Supreme Court has "declined to define compelling interest or to tell [the lower courts] how to apply that term." *Hunter v. Regents of the Univ. of Calif.*, 190 F.3d 1061, 1070 n. 9 (9th Cir.1999) (Beezer, J., dissenting); Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 Calif. L.Rev. 1299, 1349 (1999) (the definition of a compelling interest "is admittedly imprecise. The Supreme Court has never offered a workable definition of the term . . . and is unlikely ever to do so, preferring to approach matters on a case-by-case basis").

The majority is correct in noting the U.S. Supreme Court has never endorsed "racial balancing" as a "compelling interest." Indeed, throughout the history of strict scrutiny, the Supreme Court has rejected as invalid all such asserted

compelling interests, save for two exceptions. With respect, the majority errs in creating a third.

A.

The Court has endorsed two race-based compelling governmental interests in the public education context. First, the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation. *Freeman*, 503 U.S. at 494, 112 S.Ct. 1430. Second, the Court has allowed undergraduate and graduate universities to consider race as part of an overall, flexible assessment of an individual's characteristics to attain student body diversity. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325; *Gratz*, 539 U.S. at 268-69, 123 S.Ct. 2411.

Besides those two valid compelling interests, the Court has struck down every other asserted race-based compelling interest that has come before it. *See Shaw v. Hunt*, 517 U.S. 899, 909-12, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (rejecting racial classifications to "alleviate the effects of societal discrimination" in the absence of findings of past discrimination, and to promote minority representation in Congress); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality) (rejecting racial classifications in the awarding of public construction contracts in the absence of findings of past discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (rejecting racial classifications in a school district's teacher layoff policy when offered as a means of providing minority role models for its minority students and as a means of alleviating past societal

discrimination); *Bakke*, 438 U.S. at 310-11, 98 S.Ct. 2733 (Powell, J.) (rejecting the application of race-conscious measures to improve "the delivery of health-care services to communities currently underserved"). A crucial guiding point here—and one elided entirely by the majority—is the Court's consistent reiteration that "outright racial balancing . . . is patently unconstitutional." *See, e.g.*, *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325.

Thus, we face a landscape littered with rejected asserted "compelling interests" requiring race-based determinations, but with two exceptions still standing. The first exception is inapplicable here because the Seattle schools have never been *de jure* segregated. *See Freeman*, 503 U.S. at 494, 112 S.Ct. 1430.

The second exception is also inapplicable, albeit not so directly acknowledged. At oral argument, the District conceded that it is not asserting the *Grutter* "diversity" interest; the majority recognizes this in stating the District's asserted interest is "significantly different" in some ways from the interest asserted in *Grutter*. Majority op. at 1176. Nonetheless, the majority concludes those differences are inconsequential because of the different "context"[12] between

12. The majority cites often to *Grutter's* statement that "context matters" in reviewing racial classifications under the Equal Protection Clause. *See* 539 U.S. at 327, 123 S.Ct. 2325 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). There, the Court counseled that strict scrutiny was to take "relevant differences" into account. *Id.*

Indeed, "context" does matter; context *always* matters in the application of general rules of law to varied factual settings. (Cont'd)

high schools and universities, and the District's asserted interest is a compelling governmental interest in its own right.

Not so. The very differences between the *Grutter* "diversity" interest and the District's asserted interest

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(Cont'd)

See Gomillion v. Lightfoot, 364 U.S. 339, 343-44, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) ("Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."). In *Grutter*, the "context" was a public law school's race-conscious, individualized consideration of applicants for purposes of admissions, designed to achieve diversity. Here, the context is different; we consider a rigid racial tiebreaker, which considers only race, designed to avoid racial imbalance in the schools. And so, as we do for all cases, we look to general principles of law and apply them through the correct standard of review, cognizant of the different results reached in other cases because of different facts and the "context" in which the cases arose. But what must be remembered is that a different "context" does not change the general rules of law, nor does a different "context" change the applicable standard of review (at least for government-imposed racial classifications).

Yes, "context" matters, but the mention of "context" should not be a talisman to banish further enquiry. The "context" of the Michigan Law School is different from the District's schools. But the difference is in the age of the students, their number and the obligation of the District to admit all students. Does that change the fact that some students are sent to certain schools solely because of their races? How does "context" change that? Let us not succumb to the use of an abstraction ("context") to invoke "sensitivity" to "nuances," thus to attempt to change the bald fact of selection based on race.

illustrate why the latter violates the Equal Protection Clause as opposed to the former. The *Grutter* "diversity" interest focuses upon the individual, of which race plays a part, but not the whole. The District's asserted interest, however, focuses only upon race, running afoul of equal protection's focus upon the individual.

B.

In *Grutter* and *Gratz*, the Court made clear that the valid compelling interest in "diversity" does *not* translate into a valid compelling interest in "racial diversity." The "diversity" interest

> is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups. . . . Rather, the diversity that furthers a compelling state interest encompasses *a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.*

Grutter, 539 U.S. at 324-25, 123 S.Ct. 2325 (emphasis added); *see Gratz*, 539 U.S. at 272-73, 123 S.Ct. 2411 ("[T]he critical criteria [in a permissible race-conscious admissions program] are often individual qualities or experiences not dependent upon race but sometimes associated with it.").

The *Grutter* "diversity" interest focuses upon the individual, which can include the applicant's race, but also includes other factors, such as the applicant's family

background, her parent's educational history, whether she is fluent in other languages, whether she has overcome adversity or hardship, or whether she has unique athletic or artistic talents. *See* 539 U.S. at 338, 123 S.Ct. 2325. Such a focus is consistent with the Equal Protection Clause, which protects the individual, not groups.

But here, the District's operation of the racial tiebreaker does not consider the applicant as an individual. To the contrary, the racial tiebreaker considers only whether the student is white or nonwhite. While the *Grutter* "diversity" interest pursues *genuine* diversity in the student body (of which race is only a single "plus" factor), the District pursues an interest which considers only *racial* diversity, *i.e.*, a predefined grouping of races in the District's schools.[13] Such an interest is not a valid compelling interest; it is simple

13. The majority fails to recognize this distinction. For example, comparing the District's claimed interest with those endorsed in *Grutter*, the majority reasons high schools "have an equal if not more important role" in preparing students for work and citizenship, and concludes "it would be a perverse reading of the Equal Protection Clause that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies." Majority op. at 1175, 1176. Yet *Grutter* did *not* allow universities to consider race in admissions to achieve racial balancing. The whole point of *Grutter* and *Gratz* was that universities may consider race, but only as part of the overall individual. I see nothing perverse in recognizing the Equal Protection Clause to be the protector of the individual, whether he be among the few at an elite law school, or among the many in a public high school.

racial balancing, forbidden by the Equal Protection Clause. *See id.* at 330, 123 S.Ct. 2325 (stating a government institution's interest "to assure within its student body some specified percentage of a particular group merely because of its race . . . would amount to outright racial balancing, which is patently unconstitutional").

Grutter emphasized the dangers resulting from lack of an individualized consideration of each applicant. Observing that the Michigan Law School sought an unquantified "critical mass" of minority students to avoid only token representation, rather than some defined balance, *id.* at 330, 123 S.Ct. 2325, the Court reasoned the law school's individualized focus on students forming that "critical mass" would avoid perpetuating the stereotype that all "minority students always . . . express some characteristic minority viewpoint on any issue," *id.* at 333, 123 S.Ct. 2325.

But here, the District's concept of racial diversity is a predetermined, defined ratio of white and nonwhite children. The racial tiebreaker works to exclude white students from schools that have a 50-55% white student body (depending on the tiebreaker trigger used in a particular year), and works to exclude nonwhite students from schools with a 70-75% nonwhite student body (depending on the tiebreaker trigger used). Thus, the District's concept of racial diversity does not permit a school with a student body that is *too* white, or a school with a student body that is *too* nonwhite.

The District argues its concept of racial diversity is necessary to foster classroom discussion and cross-racial socialization. That argument, however, is based on the

stereotype that all white children express traditional white viewpoints and exhibit traditional white mannerisms; all nonwhite children express opposite nonwhite viewpoints and exhibit nonwhite mannerisms, and thereby white and nonwhite children will better understand each other. Yet there is nothing in the racial tiebreaker to ensure such viewpoints and mannerisms are represented within the preferred student body ratio. As noted in *Grutter*, the only way to achieve diverse viewpoints and mannerisms is to look at the individual student. White children have different viewpoints and backgrounds than other white children; the same goes for nonwhite children; and some white children have the same viewpoints and backgrounds as some nonwhite children. The assumption that there is a difference between individuals just because there is a difference in their skin color is a stereotype in itself, nothing more.[14]

The District also claims it must use the racial tiebreaker to avoid racially imbalanced schools, which may result in schools with large white or nonwhite student bodies and in which the supposed benefits from the District's concept of racial diversity will not occur. This theory, however, presents another racial stereotype, which assumes there is something wrong with a school that has a heavy nonwhite student body population, or something better about a school that has a heavy white student body population. *See Missouri v. Jenkins*, 515 U.S. 70, 122, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995)

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14. Again, there is nothing illegal in freely choosing to believe in this stereotype and to act upon it as a private citizen in sending one's child to a particular school. The case changes when such racial stereotype is accepted by the state, and is the basis for the imposition of racial discrimination.

(Thomas, J., concurring) ("After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.").

Besides the District's reliance on racial stereotypes, there is good reason categorically to forbid racial balancing. The process of classifying children in groups of color, rather than viewing them as individuals, encourages "notions of racial inferiority" in both white and nonwhite children and incites racial hostility. *See Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Indeed, those risks are particularly great here because of the blunt nature of the racial tiebreaker. The District's racial grouping of students, either as white or nonwhite, assumes that each minority student is the same, regardless whether he is African-American, Asian-American, Latino, or Native American; the only difference noted by the District is that the minority student is not white.[15] The District thus "conceives of racial diversity in simplistic terms as a

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15. The majority notes that for purposes of the racial tiebreaker, "a student is deemed to be of the race specified in his or her registration materials." Majority op. at 1169. That generalization declines to note a particularly overbearing facet of the racial tiebreaker. Although the District encourages the students' parents to identify the race of their student in the registration materials, if a parent or student chooses to follow the example of Tiger Woods and refuses to identify his or her race, the District then engages in a visual inspection of the student or parent and will decide the child's color notwithstanding the parent's or student's choice.

dichotomy between white and nonwhite, as if to say all nonwhites are interchangeable." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wash.2d 660, 72 P.3d 151, 169 n. 5 (2003) (Sanders, J., dissenting). I join my colleague on the Washington Supreme Court in observing that "[a]s a theory of racial politics, this view is patently offensive and as a policy to promote racially diverse schools, wholly inadequate." *Id.*

Unlike a voluntary decision by parents to expose their children to individuals of different races or background, the District classifies each student by skin color and excludes certain students from particular schools— solely on the basis of race— to ensure those schools remain racially balanced. Even if well-intentioned, the District's use of racial classifications in such a stark and compulsory fashion risks perpetuating the same racial divisions which have plagued this country since its founding:

> Race is perhaps the worst imaginable category around which to organize group competition and social relations more generally. At the risk of belaboring the obvious, racial categories in law have played an utterly pernicious and destructive role throughout human history. This incontrovertible fact should arouse wonder . . . at the hubris of those who imagine that we can distinguish clearly enough between invidious and benign race discrimination to engrave this distinction into our constitutional order. Vast human experience mocks this comforting illusion, as does the fact that most Americans, including many minorities, think racial preferences are invidious, not benign. Whether benignly intended

> or not, using the category of race—which affirmative action proponents oddly depict as socially-constructed and primordial and immutable—to distribute advantage and disadvantage tends to ossify the fluid, forward-looking political identities that a robust democratic spirit inspires and requires.

Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 92-93 (2002).

We should not minimize these shadows that are cast over the supposed benefits of the District's asserted interest. The District's stark racial classifications not only offend intrinsic notions of individuality, they even suggest principles opposite to what the District claims to seek. Although the District contends it uses the racial tiebreaker for good, *i.e.*, to foster cross-racial socialization and understanding, the District's concept of racial diversity also suggests other principles which many may find objectionable, especially when taught to children:

> While a public law preference does express a certain kind of compassion for and commitment to the preferred groups, other signals dominate its message—among them, that American society thinks it just to group people by race and ethnicity, to treat those groups monolithically, and to allocate precious resources and opportunities accordingly; that it holds equal treatment and individual merit as secondary, dispensable ideals; that the preferred groups cannot succeed without special public favors; that such favors do not

> stigmatize them in the minds of fair-minded others; that those who oppose preferences thereby oppose the aspirations of the preferred groups; and that society can assuage old injustices by creating new ones. When public law says such things, it speaks falsely, holds out vain promises, and brings itself into disrepute.

Id. at 87-88.

The District's asserted interest may be supported by noble goals. But the stereotypes on which it is based, and the risks that it presents, make that interest far from compelling.

C.

The sociological evidence presented by the District, relied upon strongly by the majority, does not change my view. The majority discusses much of the evidence that supports the District's position that racially balanced schools foster cross-racial socialization and understanding in school and later in the students' lives. Majority op. at 1174-1175. Yet the majority puts aside the other evidence suggesting there is no definitive agreement as to the beneficial effects of racial balance in K-12 schools, that the benefits attributed to racially balanced schools are often weak, and that any benefits do not always have a direct correlation to racial balance. Yet again, a private citizen is free to accept one body of opinion and reject another in deciding to send his child to a particular school. Is the state similarly privileged when required to determine that its claimed goal is a "compelling

interest"? One would think that to be "compelling" there would be no room for doubt of the need for the measure. That is certainly not the case here.

For example, a source provided by the District states that "family background has a significantly stronger effect on student achievement than any other single school factor or constellation of school factors, including school racial and ethnic composition." [SER 182.] Another source presented by the District states that court-ordered desegregation (*i.e.*, a court-ordered breakup of a *de jure* segregated student body) resulted in only minimal benefits:

> [R]esearch suggests that desegregation has had some positive effect on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. Such is not the case with mathematical skills, which seem generally unaffected by desegregation. Second, there is some evidence that desegregation may help to break what can be thought of as a generational cycle of segregation and racial isolation. Although research on this topic is scant and often marred by unavoidable flaws, evidence has begun to accumulate that desegregation may favorably influence such adult outcomes as college graduation, income, and employment patterns. The measured effects are often weak. . . .

[SER 205, 207-208.]

That source concludes that "[t]he evidence regarding the impact of desegregation on intergroup relations is generally held to be inconclusi and inconsistent." [SER 208.]. *See Grutter*, 539 U.S. at 364-65, 123 S.Ct. 2325 (Thomas, J., dissenting) (collecting studies suggesting black students perform at higher levels of achievement at historically black colleges); David I. Levine, *Public School Assignment Methods after Grutter and Gratz: The View from San Francisco*, 30 Hastings Const. L.Q. 511, 536 (2003) (noting that a high school's focus on racial balance misses the "key element" in the context of education, *i.e.*, that "the life chances of students are improved only with economic integration").[16]

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16. *See also* David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, in *Beyond the Color Line: New Perspectives on Race and Ethnicity in America* 251 (Abigail Thernstrom & Stephan Thernstrom eds., 2002) ("[R]acial composition by itself has little effect on raising the achievement of minority students or on reducing the minority-white achievement gap. Some studies show that there is no relationship at all between black achievement and racial composition . . . , and other studies show that there is no relationship between the black-white achievement gap and racial composition. In either case, though there is some evidence here that achievement can be affected by programmatic changes, there is no evidence that it responds to improved racial balance by itself."); *id.* at 252 ("The evidence on the benefit of school desegregation for race relations is probably the weakest of all. Indeed, there are more studies showing harmful effects than studies showing positive effects." This led to another and more recent reviewer of the race relations literature to conclude, somewhat generously: " 'In general, the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were. . . . Virtually all of the

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Appendix A

The serious risks presented by racial classifications counteract the marginal benefits provided by racial balancing. Courts have long recognized racial classifications promote "notions of racial inferiority and lead to a politics of racial hostility." *See Grutter*, 539 U.S. at 328, 123 S.Ct. 2325; Michael Perry, *Modern Equal Protection*, 79 Colum. L.Rev. 1023, 1048 (1979) ("Affirmative action " 'inevitably foments racial resentment and thereby strains the effort to gain wider acceptance for the principle of moral equality of the races.' " "). Other studies suggest that where racial classifications are a means of achieving racial balance, academic achievement by minorities is hindered, and racial tensions are riled:

> In a culture that ardently affirms the principles of individual freedom, merit, and equality of opportunity, [the] demoralization and anger [precipitated by being victim to government-imposed racial classifications] must be counted as a very large social cost. It is no less a cost because it is borne by whites, and often less privileged whites at that. If these principles make it unfair to impose this cost, the fact that the

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reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn. The reluctance of reviewers to draw conclusions about the benefits of school desegregation for race relations or self-esteem only reinforces our conclusion that the psychological harm theory of de facto segregation and the social benefit theory of desegregation are clearly wrong, at least when applied to desegregation as a racial balance policy.' ").

> unfairness is spread across a large group of people may not make it any more palatable. In fact, diffusing the unfairness in this way will simply increase the number of people who feel themselves aggrieved.

Schuck, *supra*, at 69.

But despite the inconsistencies in the sociological evidence and the vivid risks of the District's asserted interest, the majority implicitly defers to the District's position. *Grutter* took a similar approach, emphasizing that its endorsement of the "diversity" interest relied in large part upon deference to the educational judgment of the Michigan Law School. 539 U.S. at 330, 123 S.Ct. 2325.

Yet perhaps to steal a line from the majority, the "context" here is different. We are not faced with a university's "academic freedom," which arises from "a constitutional dimension, grounded in the First Amendment, of educational autonomy," and which includes the freedom to select its student body. *Id.* We instead consider a public high school's admissions plan which admits or excludes students from particular schools solely on the basis of their race. For several reasons, we should not defer to such a plan.

First, other than for race-conscious university admissions based on holistic diversity, deference to a government actor is inconsistent with strict scrutiny. *See Johnson*, 125 S.Ct. at 1146 n. 1 (stating generally that "deference [by the courts in applying strict scrutiny] is fundamentally at odds with our equal protection jurisprudence"); *id.* at 1150 (stating the

Supreme Court has "refused to defer to state officials' judgments on race . . . where those officials traditionally exercise substantial discretion."). In *Grutter*, the Court deferred to the Michigan Law School's "diversity" interest because of the law school's "academic freedom"—grounded in the First Amendment and including the law school's freedom to select its own student body—and the law school's asserted need for diversity to achieve a "robust exchange of ideas" within its classrooms, a vital part of the law school's mission. 539 U.S. at 330, 123 S.Ct. 2325.

None of those same issues are implicated here. The "academic freedom" of a university allows it "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (Powell, J.). High schools do not have such similar freedoms. They cannot determine who may teach, at least when that determination is based upon racial grounds. *See Wygant*, 476 U.S. at 274-76, 106 S.Ct. 1842. They also cannot determine who may be admitted to study; when the government chooses to provide public education in secondary schools, it "must be made available to all on equal terms." *See Plyler v. Doe*, 457 U.S. 202, 221-23, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Further, there is no comparable line of U.S. Supreme Court cases affording high schools the special "[A]cademic freedom[s]" granted to universities by the First Amendment. *See United States v. Fordice*, 505 U.S. 717, 728-29, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) ("a state university system is quite different in very relevant respects from primary and secondary schools."); Jay P. Lechner, *Learning From Experience: Why Racial Diversity Cannot Be a Legally*

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Compelling Interest in Elementary and Secondary Education, 32 SW. U.L.Rev. 201, 215 (2003) (stating the Supreme Court "has been less deferential to the discretion of elementary or secondary school officials in Equal Protection cases, in part because the Court has viewed school desegregation as serving social rather than educational goals. The Court has acknowledged that even the most important, delicate, and highly discretionary functions of state educators are subject to the limits of the Bill of Rights and subordinate to the Constitutional freedoms of the individual. Moreover, the educational benefits from diversity, if any, are much greater at the higher educational level because such benefits are greatly magnified by the learning that takes place outside the classroom—in dormitories, social settings, and extracurricular activities—as students must learn to live and work with persons of other races and ethnic backgrounds.") (internal quotation marks omitted).

Moreover, there is a crucial difference between the "robust exchange of ideas" theory referenced in *Grutter* and the District's claim that its interest "brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process." [ER 237.] The District applies the racial tiebreaker only to entering ninth-grade students. [ER 253, 308.] It is self-evident that classroom discussion plays a significantly more vital role in universities with their typical dialectic or Socratic teaching method, than in ninth-grade high school courses with their typical didactic or rote teaching method.

Last, the District's claim that its asserted interest helps to foster cross-racial socialization and understanding later

in the students' lives is a sociological judgment outside the expertise of the District's educators. Those external benefits are diffuse, manifest long after students leave the classroom, and cannot be measured with skills possessed uniquely by educators. Unlike *Grutter*, which deferred to the Law School on the basis that diversity in the classroom was vital to its educational mission during the three-year law school curriculum, here, the District's asserted interest depends upon benefits only loosely linked to the District's educational mission and to take effect years after its schooling of the children, or entirely outside the expertise of its educators. Here, high school administrators and teachers are predicting what sociologists will find years later.

Strict scrutiny cannot remain strict if we defer to judgments not even within the particular expertise or observation of the party being scrutinized. Hence, deference is not due to the District regarding the benefits the District contends are attributable to its claimed interest.[17]

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17. The majority states that *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), supports the proposition that the District has broad discretion to engage in racial balancing as an "educational policy." In *Swann*, the Supreme Court stated: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id.* at 16, 91 S.Ct. 1267;

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In the absence of deference to the District's sociological evidence, the faults of the District's asserted interest come into sharper focus. It has none of the saving graces present

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see also North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) (same, citing *Swann*, 402 U.S. at 16, 91 S.Ct. 1267). *Swann's* passage seems to provide powerful language for the majority's position, but alas, the majority takes the passage out of context. *Swann* considered the remedies available to a federal court to combat past *de jure* segregation. The Court never considered whether a school district could use racial classifications to achieve racial balance absent *de jure* segregation. Indeed, the Court stated: "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. . . . Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; *it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.*" *Id.* at 22-23, 91 S.Ct. 1267 (emphasis added).

Swann was also decided decades before the Court resolved the issue of the level of scrutiny to apply to "benign" racial classifications, vis-a-vis "invidious" racial classifications. Thus, *Swann's* dictum cannot shelter the District's use of the racial tiebreaker from the searching inquiry required by strict scrutiny. The majority similarly errs in relying on *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). There, the Court also specifically stated it did not reach the issue of the constitutionality of "race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." *Id.* at 472 n. 15, 102 S.Ct. 3187.

in the *Grutter* holistic diversity interest. It perpetuates racial stereotypes and risks fomenting racial hostility. Last, the District enforces the interest through government compulsion in the starkest black and white terms, espousing the principle that race trumps the individual.

The sociological evidence presented by the District suggests that *some* benefits will accrue from racial balancing. To me, evidence of *some* benefits does not satisfy the District's burden of proving a compelling governmental interest, especially in light of the Supreme Court's frequent pronouncements that racial balancing itself is unconstitutional. Thus, viewed under the lens of strict scrutiny, and without the deference invoked in *Grutter*, the District's interest is simply not a compelling governmental interest. Hence, I would hold that the District's operation of the racial tiebreaker is an impermissible racial classification and violates the Equal Protection Clause.

IV.

Even if the District's asserted interest were a compelling governmental interest, the means used by the District must still be narrowly tailored to serve that interest. *See Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. For argument's sake, I here assume, without conceding, the District has asserted a valid compelling governmental interest in using racial balancing to achieve "the educational and social benefits of racial . . . diversity" within its high schools and to avoid "racially concentrated" schools. Yet even under that assumption, the District's use of the racial tiebreaker is not narrowly tailored to serve that interest.

The majority notes that *Grutter* set forth "five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point." Majority op. at 1180. I agree with that general formulation. Yet the majority's application of those factors again evinces an improper deference to the District; such deference is ill suited for the searching inquiry needed under the narrow-tailoring prong of strict scrutiny. *See Johnson*, 125 S.Ct. at 1146 n. 1. I consider below whether the District's use of the racial tiebreaker is narrowly tailored to its asserted interest, and conclude that racial tiebreaker is *not* narrowly tailored.

A.

The first narrow-tailoring factor requires the District to engage in an individualized consideration of each applicant's characteristics and qualifications. *See Grutter*, 539 U.S. at 337, 123 S.Ct. 2325. The importance of this factor is self-evident; individualized consideration serves the primary purpose of the Equal Protection Clause, which protects the individual from group classifications, especially those by race. *See id.* at 326, 123 S.Ct. 2325.

Yet the majority concludes that individualized consideration of each applicant is irrelevant here "because of the contextual differences between institutions of higher learning and public high schools." Majority op. at 1180. I

could not disagree more.[18] By removing consideration of the individual from the narrow tailoring analysis, the majority threatens to read the Equal Protection Clause out of the Constitution. It is the very nature of equal protection to require individualized consideration when the government uses racial classifications: "the Fourteenth Amendment "protects *persons*, not *groups*." " *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325 (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097) (emphasis in original). *Grutter* emphasized the importance of the individualized consideration of each applicant: in the context of a race-conscious university admissions program, such consideration

> must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*

Id. at 337, 123 S.Ct. 2325 (emphasis added). The differences between university and secondary education do not justify denial of individualized equal protection of the law to secondary school students.

Individualized consideration of an applicant does not require an admissions program to be oblivious to race; the program may consider race, but in doing so, it must remain

18. *See supra* pp. 1201-1202 n. 12 (explaining why the talismanic use of "context" can not alter the fact of racial discrimination).

"flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* at 334, 123 S.Ct. 2325. There can be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable . . . [such as the awarding of] mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* at 337, 123 S.Ct. 2325.

Here, the racial tiebreaker works to admit or exclude high school students from certain oversubscribed schools solely on the basis of their skin color. No other consideration affects the operation of the racial tiebreaker; when it operates, it operates to admit or exclude either a white or nonwhite student, depending upon how the admission will affect the preferred balance at the oversubscribed school. Such a program is precisely what *Grutter* warned against, and what *Gratz* held unconstitutional: a mechanical, predetermined policy "of automatic acceptance or rejection based on a[ ] single 'soft' variable," that being the student's skin color. *See id.*

The racial tiebreaker's overbroad classification of students as "white" or "nonwhite" also runs counter to the required individualized consideration of each applicant. The District does not even consider the student's actual race. Instead, the District presumably places all Caucasian students into the "white" category, and then places all African-American, Latino, Asian-American, Pacific Islander and Native Americans into the "nonwhite" category. This puts aside the categorization of any individuals whose skin color

does not correlate directly with the classifications. Although parents and students may identify their particular group on the registration materials, if they do not, the District will make the racial identification itself through visual inspection of the parent or student. Thus, a fair-skinned minority may wind up in the "white" category, or a darker-skinned Caucasian may wind up in the "nonwhite" category.

Courts have often recognized that the inclusion of all minorities within a "nonwhite" classification suggests the operation of a racial classification is not narrowly tailored. *See Wygant*, 476 U.S. at 284 n. 13, 106 S.Ct. 1842 (noting the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan"); *Monterey Mech. Co.*, 125 F.3d at 714 (noting the inclusion of all minority races within a broad "minority" category serves as a "red flag[ ] signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored"). At the very least, a narrowly tailored program would require an individualized focus which would separate the student according to his or her correct race, rather than as a process of simple pigmental matching.

The majority concludes, however, that individualized consideration of each applicant is unnecessary because the District does not exclude any student from a public education by operation of the racial tiebreaker. The majority reasons that because all students are entitled to a public education in one of the District's schools, there is no competition in the District for admission to any of those schools, and thus no racial stigma could attach when a student is excluded from

admission to one of the schools on the basis of his race. Majority op. at 1181-1182.

Yet the majority offers no explanation why, in the 2000-01 school year, 82% of the students selected one of the oversubscribed schools (*i.e.*, the schools subject to the racial tiebreaker) as their first choice, while only 18% picked one of the undersubscribed schools as their first choice. Majority op. at 10-11. Clearly, the students' and their parents' "market" appraise some of the schools as providing a better education than the others. Even the District's superintendent confirmed that the students' parents considered some of the schools to be of higher quality. [ER 534.]

It is common sense that some public schools are better than others. Parents often move into areas offering better school districts, and ubiquitous research guides compare the quality of public schools according to standardized test scores, program offerings, and the sort. It may be that soothing, if self-interested, bureaucratic voices sing a lullaby of equal educational quality in the District's schools. But the facts show that parents and children have voted with their feet in choosing some schools rather than others. The verdict of that "market" makes a hash out of such assurances by the District.

Thus, the District's operation of the racial tiebreaker in reality does limit access to a governmental benefit among certain students. The District insulates applicants belonging to certain racial groups from competition for admission to those schools perceived to be of higher quality. A narrowly tailored race-conscious admissions program "cannot insulate

each category of applicants with certain desired [racial] qualifications from competition with all other applicants." *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325. The racial tiebreaker fails that test.

Yet the majority insist that because the District seeks to avoid racially concentrated schools, "the District's tiebreaker must necessarily focus on the race of its students." Majority op. at 1183. Again, the majority misses the crucial protection provided by the Equal Protection Clause. The District's narrow-tailoring obligation does not prohibit it from considering race; it just cannot consider *only* race. The constitutional guarantee of equal protection requires the District to focus upon the individual's whole make up, rather than just a group's skin color; this protects *each* student's right to equal protection under the law. *See Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

The counter-argument, of course, is that administrative inconveniences would prohibit the District from examining each student's file for individual characteristics, of which race may be a part. To the contrary, the record shows such an effort is certainly feasible.

First, thirteen- or fourteen-year-old students[19] are not so young that they have not yet developed unique traits to set themselves apart from other students and add greater diversity to the student body. The students's race is a factor in assessing the student as an individual, but the student may also speak

19. As noted, the District applies the racial tiebreaker only to entering ninth-grade students (presumably around thirteen to fourteen years old).

English as a second language, come from a different socioeconomic stratum than other students, have overcome adversity, be a talented baseball player, musician, or have participated in community service.

Second, as noted by the majority, in the 2000-01 school year, approximately 3,000 students entered the District's high schools as ninth graders. Ten percent of those students were subject to the racial tiebreaker. Majority op. at 1170. Thus, under an individualized approach, the District would have had to examine only three hundred applications to determine who to admit to the oversubscribed schools. Instead, the District grouped those three hundred students into white and nonwhite categories and allowed a computer to select their assignment based solely upon their race.[20]

Thus, rather than providing an individualized consideration of applicants, the District is engaged in a "*de jure* [policy] of automatic acceptance or rejection based on a[ ] single 'soft' variable." *See Grutter*, 539 U.S. at 337, 123 S.Ct. 2325. Such inflexibility shows the racial tiebreaker is not "narrowly tailored to any goal, except perhaps outright racial balancing." *See Croson*, 488 U.S. at 507, 109 S.Ct. 706 (plurality).

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20. Three hundred applications seem like only a minor administrative challenge, but the Supreme Court's admonition bears repeating nonetheless: "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Gratz*, 539 U.S. at 275, 123 S.Ct. 2411.

B.

The second narrow-tailoring factor prohibits the use of quotas based upon race. *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325. A quota is defined as "a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." *Id.* at 335, 123 S.Ct. 2325 (internal quotation marks and citations omitted).

Here, when a District school is oversubscribed and "integration positive"—*i.e.*, the white or nonwhite student body of the school deviates by plus or minus 10% or 15% (depending on the school year)[21] of the preferred 40% white/ 60% nonwhite ratio—the District uses the racial tiebreaker to admit students whose presence will move the overall student body closer to the preferred ratio. Using the 2000-2001 school year as an example, the District would employ the racial tiebreaker to exclude white students and admit nonwhite students where the white student body population exceeded 50%. The District would also employ the racial tiebreaker to exclude nonwhite students and admit white students where the nonwhite student body population in a particular school exceeded 70%.

By its nature, the tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students, and thus operates to reach "a fixed number or *percentage.*" (emphasis supplied). *Gratz* specifically rejected such a plan as not

21. In 2000-01, the District used a 10% deviation trigger, but increased the trigger to 15% for the 2001-02 school year.

narrowly tailored. *See* 539 U.S. at 270, 123 S.Ct. 2411 ("[T]he University's policy, which automatically distributes [20%] . . . of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored. . . ."); *id.* at 271-72, 123 S.Ct. 2411 ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.").

Yet the majority argues no quota exists here because the racial tiebreaker "does not set aside a fixed number of slots for nonwhite or white students," nor is the 10 or 15% variance always satisfied (generally because there are insufficient numbers of white or nonwhite students needed to balance the school). Majority op. at 1185.[22] With respect, the majority misses the point. A quota does not become less of a quota because there are an insufficient number of whites or nonwhites to fill the preselected spots. The District created a quota when it established the predetermined, preferred ratio of white and nonwhite students. In *Bakke*, the medical school argued that it did not operate a quota in its admissions system

22. Although the majority concludes a quota does not exist here, it also concludes "the rationale underlying the . . . prohibition of quotas does not apply" here. Majority op. at 1184 n. 27. The majority reasons that because there is no competition in assignment to the District's schools, the dangers presented by a quota—*i.e.*, insulating applicants from competition on the basis of race—are absent here. Majority op. at 1184 n. 27. But saying it does not make it so, whether it is said by the District or by the majority. As explained above, there is clearly a "market" for higher quality schools in the District, and there is competition for the schools the parents and students view to be the better schools.

because it did not always fill the preselected seats; thus, its admissions system only had a "goal." Justice Powell rejected that argument, stating that regardless of whether the preselected seats were a "quota" or a "goal," such a

> semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

Bakke, 438 U.S. at 289, 98 S.Ct. 2733 (Powell, J.).

The majority makes a further attempt to avoid *Grutter's* admonition against quotas by attempting to classify the District's predetermined ratio as a "critical mass." The District's preferred ratio could not be further from the definition of a "critical mass." *Grutter* recognized that a "critical mass" had no quantified definition; instead, it was generally referred to as "meaningful numbers" or "meaningful representation" of minorities. 539 U.S. at 318, 123 S.Ct. 2325. The Court expressly stated that a "critical mass" was not a means "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 329, 123 S.Ct. 2325 (internal quotation marks omitted).

But unlike the unquantified "critical mass" from *Grutter*, the District's preferred ratio is firmly set at 40% white, 60% nonwhite. When the 15% deviation trigger is used with the racial tiebreaker, the District seeks to enroll between 75% and 45% nonwhite students and 25% to 55% of white students. The District's admissions plan clearly seeks to assure a specified percentage of white or nonwhite students in its schools; rather than seeking a "critical mass," the District instead seeks racial balance. Thus, the District's operation of the racial tiebreaker fails this factor as well.

C.

The third narrow-tailoring factor requires the District to have engaged in a "serious, good-faith consideration of workable race-neutral alternatives." *See id.* at 339, 123 S.Ct. 2325. The majority concludes the District made such an effort. Majority op. at 1188. For several reasons, I disagree.

First, the District's superintendent flatly admitted the District did not engage in a serious, good-faith consideration of race-neutral alternatives. When asked whether the District "g[a]ve any serious consideration to the adoption of a plan for the assignment of high school students that did not use racial balancing as a factor or goal," the District's superintendent stated: "I think the general answer to that question is no . . . I don't remember a significant body of work being done. I mean it's possible informally ideas were floated here or there, but I don't remember any significant staff work being done." [ER 521.]

The record supports this concession. The District never asked its demographer to conduct any analysis regarding the effect of using a race-neutral lottery. [ER 483.] The District also never asked its demographer to conduct any analysis regarding a diversity program with non-racial indicia such as a student's eligibility for free lunch or the students's socioeconomic background.[23] [ER 481-82.]

23. The majority makes the conclusory statement that the District's "white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of the city and vice versa" as an effort to combat Seattle's racially imbalanced residential patterns. Majority op. at 1188. Yet the District's attempt to balance students from north Seattle and south Seattle strongly suggests a less-restrictive, race-neutral approach to achieve such balancing: socioeconomic balancing. As the majority notes, the northern Seattle area contains a majority of "white" students and is "historically more affluent." Majority op. at 1166. This would mean the southern Seattle area is less affluent. Thus, moving more affluent students south, and less affluent students north, could possibly provide a more diverse student body. At the very least, serious consideration would have been warranted into this race-neutral alternative. *See* Levine, *supra*, at 536 (noting the key element to successfully integrating students of different backgrounds and race is not racial balance, but "economic integration").

Yet the majority accepts the District's rejection of the use of socioeconomic factors, reasoning that "[a]lthough there was no formal study of the proposal by District staff, Board members' testimony revealed two legitimate reasons" for rejecting the socioeconomic alternative: (1) "it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status;" and (2) students would be reluctant to reveal their socioeconomic status to their peers. Majority op. at 1189. Such analysis seems far from the "serious, good-faith consideration of workable race-neutral

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Also, in 2000, the Urban League of Metropolitan Seattle presented a high school assignment plan to the District. The plan proposed that each neighborhood region in Seattle would have a designated high school. Students would still be able to apply to any high school in Seattle, but when oversubscription occurred, students living in the designated "reference area" would first be assigned to their regional high school ahead of those who did not. To avoid racial

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alternatives" demanded by *Grutter*. *See* 539 U.S. at 339, 123 S.Ct. 2325. First, without formal studies (or indeed any earnest consideration of the alternatives), we have no way of knowing whether the District actually seriously considered, and rejected for valid reasons, less-restrictive race-neutral alternatives. In *Croson*, the Court emphasized the importance of a satisfactory record to determine whether race-neutral alternatives were considered. *See Croson*, 488 U.S. at 498-511, 109 S.Ct. 706 (plurality) (detailing the government actor's failure to document the basis for its use of a racial quota and stressing the need to do so). Second, the majority's insistence that the District's consideration of poverty would be "insulting" ignores the demeaning—and indeed, constitutionally objectionable—effect of placing persons into groups solely by their skin color for the purpose of receiving or being denied a governmental benefit. *See Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("[T]his Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality."). Even if a sole focus on poverty might be insulting to some minorities, socioeconomic considerations need not inquire only into poverty status; eligibility for free lunch, the parents' levels of education, or whether English is a second language for the child are also relevant determinations in evaluating diversity. Third, there is no reason students would have to reveal their socioeconomic status to their peers; the District could, of course, keep such information confidential.

concentration in the schools, the plan proposed "merit-based academic, avocational and vocational magnet programs." These programs "will help each school address racial diversity issues by encouraging students to travel outside of their communities to participate in a specific magnet program."[24]

Despite the majority's assertion, the record suggests the District did not seriously consider this plan. The District did not ask its demographer to conduct any analysis as to the effect or workability of the plan [ER 504]; one District board member stated the District "didn't deal with" the plan [ER 514]; another board member stated the District didn't consider the plan [ER 643]; and last, another board member stated he refused to read the proposal because he would "rather play with my bass lunker fishing game." [ER 573.]

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24. Similar race-neutral alternatives are common throughout the United States. For example, the San Francisco, California public school district employs a program focused on enhancing diversity in the classrooms. The program allows students to choose any school within the district. When a school is oversubscribed, the program first assigns students with siblings to the same school, and then accommodates students with specialized learning needs. After that, the "Diversity Index" handles further assignments. "Under the Diversity Index process, the school district calculates a numerical profile of all student applicants. The current Diversity Index is composed of six binary factors: socioeconomic status, academic achievement status, mother's educational background, language status, academic performance index, and home language." David I. Levine, *Public School Assignment Methods after Grutter and Gratz: The View from San Francisco*, 30 HASTINGS CONST. L.Q. 511, 528-31 (2003). Notably, the San Francisco system "does not use race as an express criterion for school assignments" and thus avoids the sharp focus of strict scrutiny. *Id.* at 531.

Of course, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325, but it does require an earnest, good-faith consideration of the alternatives. Here, the District made no such attempt, and thus the District's use of the racial tiebreaker fails this narrow-tailoring factor.[25]

D.

The fourth narrow-tailoring factor requires that the District's use of the racial tiebreaker "must not unduly burden individuals who are not members of the favored racial and ethnic groups." *See Grutter*, 539 U.S. at 341, 123 S.Ct. 2325. The majority adjusts this test slightly to consider "any racial

25. In assessing whether the District seriously considered race-neutral alternatives, the majority applies deference to the District's consideration (or lack thereof) and rejection of the various alternatives. Majority op. at 1188 n. 33. With respect, the majority errs in two respects. First, as previously noted, deference to local officials' use of race is generally barred in the application of strict scrutiny. *See Johnson*, 125 S.Ct. at 1146 n. 1. Second, if the majority is attempting to apply the deference invoked in *Grutter*, the Court there applied deference in determining whether the Law School asserted a compelling governmental interest, not whether the means used to achieve that interest were narrowly tailored. *See* 539 U.S. at 328, 123 S.Ct. 2325 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

The pattern now established by the majority seems suspicious. Out of five narrow-tailoring factors, the majority has concluded two are inapplicable, and now a third is entitled to deference. I find it difficult to understand how such analysis could truly be considered strict scrutiny as to the narrowing requirement.

group," rather than just members of the disfavored group. Majority op. at 1180. Because the racial tiebreaker disadvantages both white and nonwhite children, I agree that the modification is valid. But unlike the majority, I conclude the District's operation of the racial tiebreaker fails this factor as well.

The racial tiebreaker unduly burdens thirteen- and fourteen-year-old school children by (1) depriving them of their choice of school, and (2) imposing on them tedious cross-town commutes, solely upon the basis of their race.

First, as recognized above, the "good" schools in Seattle are a limited government benefit. Thus, the racial tiebreaker burdens white or nonwhite students, and often deprives them of the opportunity to enroll at what are considered the better schools, solely on the basis of race.

Second, the children of plaintiff members Jill Kurfurst and Winnie Bachwitz were denied admission to Ballard High School based on their race and instead were forced to attend Ingraham, a school on the other side of Seattle from their home. To attend that school, the two white students faced a daily multi-bus round-trip commute of over four hours. The parents instead enrolled their children in private schools. Those children were not only deprived of the school of their choice, they were effectively denied a public education (surely at much lower cost than private tuition), based on nothing but their race.

A look at the operation of the tiebreaker provides further evidence of the injury the District inflicts on both white *and*

nonwhite students. As noted by the majority, in the 2000-01 school year, 89 more white students were assigned to Franklin than would have occurred absent the tiebreaker; 107 more nonwhite students were admitted to Ballard; 82 more nonwhite students were admitted to Roosevelt; and Twenty-seven more nonwhite students were admitted to Nathan Hale. Majority op. at 1170. To place the racial tiebreaker into proper perspective, in the 2000-01 school year, 89 *nonwhite, minority* students were denied admission to Franklin, and had to attend what to them was a less desirable school, solely because of their skin color. One hundred-seven *white* students were denied admission to Ballard, and had to attend what to them was a less desirable school, solely because of their skin color. Eighty-two *white* students were denied admission to Roosevelt, and had to attend what to them was a less desirable school, solely because of their skin color. Twenty-seven *white* students were denied admission to Nathan Hale, and had to attend what to them was a less desirable school, solely because of their skin color.

Yet the majority discounts the burdens imposed by the racial tiebreaker, concluding that (1) the "minimal burden" of the tiebreaker is shared equally among white and nonwhite students; (2) no student is entitled to attend any specific school in any event; and (3) the tiebreaker does not uniformly benefit one race over the other because the tiebreaker operates against both whites and nonwhites. Majority op. at 1191-1192. Regarding the first point, the U.S. Supreme Court has long rejected the notion that a racial classification which burdens races equally is any less objectionable under the Equal Protection Clause. In *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the U.S. Supreme

Court held a Virginia statute criminalizing interracial marriages was unconstitutional under the Equal Protection Clause. *Id.* at 12, 87 S.Ct. 1817. The Court rejected the state's argument that the miscegenation statute did not discriminate on the basis of race because it "punish[ed] equally both the white and the Negro participants in an interracial marriage." *Id.* at 8, 87 S.Ct. 1817. The Court reasoned: "In the case at bar ... we deal with statutes containing racial classific ions, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9, 87 S.Ct. 1817. Hence, it is irrelevant whether the racial tiebreaker disadvantages both races equally.

Second, I think I have already disposed of the majority's argument that no student is entitled to attend any specific District school. The students and parents clearly value some of the District's schools above the others, and limiting access to those higher quality schools on the basis of race is just the same as any other preferential racial classification.

Third, I agree the tiebreaker does not uniformly benefit one race over the other and can exclude both white and nonwhite students from the preferred schools. Yet that does not lessen the injury of being subject to a racial classification. Equal protection is an individual right, and whenever the District tells one student, whether white or nonwhite, he or she cannot attend a particular school on the basis of race, that action works an injury of constitutional proportion. *See Adarand*, 515 U.S. at 230, 115 S.Ct. 2097 ("[A]ny individual suffers an injury when he or she is disadvantaged

by the government because of his or her race, whatever that race may be."); *Monterey Mech. Co.*, 125 F.3d at 712 ("Race discrimination is never a 'trifle.' ").

The District's use of the racial tiebreaker thus unduly burdens members of the disfavored class, and the tiebreaker fails this narrow-tailoring factor as well.

E.

The fifth and final narrow-tailoring factor requires the District's use of the racial tiebreaker to "be limited in time," and "have a logical end point." *See Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. A workable "sunset" provision within any government-operated racial classification is vital:

> [A] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. . . . The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.

Id. at 341-42, 123 S.Ct. 2325 (internal quotation marks and alterations omitted).

Citing *Grutter*, the majority contends the racial tiebreaker satisfies this factor because "this durational requirement can be met by periodic reviews to determine whether racial

preferences are still necessary to achieve student body diversity," and the District engages in such periodic reviews. Majority op. at 1192. Yet citing *Grutter* in full shows that "the durational requirement can be met by sunset provisions in race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342, 123 S.Ct. 2325 (emphasis added). Periodic reviews are not enough; there must be some "durational requirement," some "logical end point," to the racial classifications.

The District argued the end point is in the "thermostat" to the tiebreaker, in which the District ceases to use the racial tiebreaker at any school for the year once its use had brought the school into racial balance. Yet it is undisputed that the District has never been segregated by law; the racial imbalance in its schools results from Seattle's racially imbalanced housing patterns. If Seattle's children were simply assigned to the high schools nearest their homes, those schools supposedly would tend to reflect such imbalance.

Because there is no reason—much less *evidence*—to conclude Seattle's housing patterns will change, or that the District's student assignment program will affect such patterns, I must respectfully disagree that such a provision satisfies the "sunset provision" requirement enunciated in *Grutter.* Presumably, where the District employs the racial tiebreaker, the schools will become racially balanced, that is 40% white, 60% nonwhite (plus or minus a few percentage points, depending on the particular percentage deviation triggering the tiebreaker that year). Pursuant to the "thermostat," the District would then stop using the racial

tiebreaker. But because Seattle's residential makeup is racially imbalanced[26] (and remains so despite the use of the racial tiebreaker), assignment to the oversubscribed schools would then occur only with use of (1) the sibling tiebreaker; and (2) the distance tiebreaker. Assuming that not every student also has a sibling attending one of the District's schools, the schools will inevitably become racially imbalanced again because of the racially imbalanced residential makeup, thus rendering the thermostat useless as a "sunset provision."

One could argue, then, that this result supports the need for use of the racial tiebreaker. Not necessarily so. If the racial imbalance in the schools is caused not by the students, but by the choices of the parents as to where to live, then why not put the onus of remedying that imbalance on the parents rather than the students? Seattle's city council could create "incentives" for whites to move into nonwhite areas, and for nonwhites to move into white areas. And if incentives do not accomplish the task, well, why not use compulsion, as the District does to high school children? The city council could take measures to prevent new persons taking up residence in Seattle from living in areas where their presence might otherwise alter the sought-after racial balance. This would protect the racial balance within the schools and squarely put the burden of remedying the racial imbalance upon the parents, rather than the students.

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26. About 70% of the residents of Seattle, Washington are white, and 30% of the residents are nonwhite. Sixty-six percent of white students live in the northern part of Seattle, while 75% of nonwhite students live in the southern part of Seattle.

Of course, less political resistance can be expected from choosing students for social engineering experiments in racial balancing, than in telling everyone—including voters—into which neighborhood they can move. Further, regulation of residence by race might run afoul of *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), although it is difficult to distinguish why the "compelling interest" of socialization among the races could not as easily be pressed in housing regulation as it is in schooling regulation.

The simple truth is that some people choose to live near members of their own ethnic or racial group.

> There is no denying that American blacks often live in their own residential enclaves, especially in our big cities. But the same is true of whites and of every other racial and ethnic group—Jews, Chinese, Cambodians, Cubans, Arabs. Such racial and ethnic clustering means that a third of non-Asian minorities attend schools that are less than 10-percent white. And even though whites constitute just over 60 percent of the nation's schoolchildren, the average white student goes to a school that is 80-percent white.
>
> But why should we expect identical proportions of blacks and whites to live in each and every neighborhood? People like to live near others with whom they identify, and the schools mirror their choices. When asked about their residential preferences, only about 5 percent of blacks said they wished to live on an entirely or almost entirely white

> block. The vast majority preferred neighborhoods that were half or more than half African-American—in other words, neighborhoods in which the black concentration was "disproportionately" high. According to the 2000 census, this happens to correspond closely to the actual distribution of black city-dwellers.
>
> In a complex, heterogenous society, it is only natural that people should sort themselves out in urban space along lines of race as well as of religion and social class. This pattern was firmly established in the U.S. by the European immigrants who landed in the cities of the North in the 19th and early 20th centuries. The sociologists who studied these settlements recognized the important social functions served by "Little Italies" and "Poletowns".

Abigail Thernstrom[27] & Stephan Thernstrom, *Have We Overcome?*, Commentary, Nov. 2004, at 51-52.[28]

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27. Mrs. Thernstrom is presently the Vice Chair of the U.S. Commission on Civil Rights.

28. Further evidence that such self-selection results is submitted by this year's Nobel Laureate, Thomas C. Schelling, by application of game theory in chapter four of his book *Micromotives and Macrobehavior* (1978). Schelling employs an exercise using coins to demonstrate how an integrated neighborhood can become largely segregated as long as each resident desires at least one third of his or her neighbors to be of his or her race. When one person moves to get a preferred set of neighbors, it causes a chain reaction which settles down only when the neighborhood is effectively segregated.

Of course, the continuing racial imbalance in some residential areas is in significant part a byproduct of past efforts to exclude minority groups from predominately white areas. Yet as racial tolerance and enforcement of civil rights laws have increased, neighborhoods are becoming more racially balanced. *Id.* In 1960, 15% of African-Americans lived in suburbs. In 2004, 36% live in suburbs. *Id.* African-Americans account for 9% of the total suburban population, "surprisingly close to proportionality for a group that constitutes only 12 percent of the American population." *Id.* Moreover, from 1960 to 2000, the proportions of African-American living in census tracts that were over 80% black fell from 47% to under 30%. *Id.* During that same period, the proportion residing in census tracts that were over 50% black fell from 70% to 50%. *Id.* Most importantly, this balancing takes place without any government coercion, except perhaps by the enforcement of fair housing laws which *prevent* racial discrimination such as California's Unruh Civil Rights Act, Cal. Civ.Code § 51 (West 2001).

> No one who understands what makes America great can quarrel with ethnic pride. At home, on the weekend, in the family and the neighborhood, Jews will be Jews, Italians Italian—and there is no reason blacks should be any different. Religion and ethnicity are essential parts of our lives, and government should not curtail how we express them in the private sphere. But when it comes to public life, even the benevolent color coding of recent decades has proved a recipe for alienation and resentment. Society need not be color-blind or color-less, but the law cannot work unless it is

> color-neutral, and the government should not be in the business of abetting or paying for the cultivation of group identity.

Schuck, *supra*, at 88 (quoting Tamar Jacoby, *Someone Else's House: America's Unfinished Struggle for Integration* 541 (1998)) (internal alteration omitted).

The racial imbalance in Seattle's schools results not from *de jure* segregation nor from any invidious exclusion of nonwhite minorities from the schools. Instead, it results from racially imbalanced residential housing patterns, an issue which the District does not even contend it can alter. Hence, the method chosen by the District to impose racially balanced schools is fatally flawed. Because it does not respond to the racial imbalances in Seattle's residential makeup, and instead only attempts to fix it within the schools, there will be no sunset to the use of the racial tiebreaker. *See Grutter*, 539 U.S. at 343, 123 S.Ct. 2325 ("It would be a sad day indeed were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all."). Thus, the District's operation of the racial tiebreaker fails this factor as well.

V.

As pointed out in the majority opinion, other courts have concluded that a school district's use of a racial tiebreaker in search of racial balance in the student body passes muster

under the Equal Protection Clause.[29] I respectfully disagree. The District's use of the racial tiebreaker to achieve racial balance in its high schools infringes upon each student's right to equal protection and tramples upon the unique and valuable nature of each individual. We are not different because of our skin color; we are different because each one of us is unique. That uniqueness incorporates our opinions, our background, our religion (or lack thereof), our thought, *and* our color. *Grutter* attempted to strike a balance between the individual protections of equal protection and being conscious of race even when looking at the individual. The District's use of the racial tiebreaker, however, attempts no such balance; it instead classifies each ninth-grade student solely by race. Because of that, I must conclude such a program violates the Equal Protection Clause.

The majority's decision risks unfortunate repercussions. On the short-term, the specter of "white flight" (a recurring issue in the aftermath of the elimination of *de jure*

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29. *Cf. Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 5 (1st Cir.2005) (en banc) (holding a public high school district had a compelling interest, in the absence of *de jure* segregation, in using race-based assignments to "secur[e] the educational benefits of racial diversity," and the means used to serve that interest were narrowly tailored); *McFarland v. Jefferson County Pub. Sch.*, 330 F.Supp.2d 834, 850 (W.D.Ky.2004) (holding a public high school district had a compelling interest in using race-based assignments to maintain racially integrated schools, and the means used to serve that interest were narrowly tailored), *aff'd*, 416 F.3d 513 (6th Cir.2005); *Brewer v. W. Irondequoit Central Sch. Dist.*, 212 F.3d 738, 752 (2d Cir.2000) (holding a public middle school district had a compelling interest, in the absence of *de jure* segregation, in using race-based assignments to reduce "racial isolation" in its schools).

desegregation) manifests itself here. The racial balancing of students will require busing and long-distance transportation to schools outside of some students' neighborhoods. Parental involvement in those distant schools (such as with the PTA) will undoubtedly decrease. Parents who can afford private education (such as those in the more affluent northern part of Seattle) may very well choose to pull their children from the District schools and enroll them elsewhere, much like the Kurfurst and Bachwitz children. On the long-term, such an exodus could result in a decreased tax base and public support for the District schools and may result in the exact opposite the District hopes to achieve-a loss of white students from their school campuses.

One of the greatest stains upon the history of our country is our struggle with race discrimination. Perhaps that stain would not be so deep had we chosen a different approach to our equal protection jurisprudence, an approach often-quoted:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

Or, as more recently said by the late Justice Stanley Mosk of the California Supreme Court:

> Racism will never disappear by employing devices of classifying people and of thus measuring their rights. Rather, wrote Professor Van Alstyne, 'one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment [n]ever to tolerate in one's own life or in the life or practices of one's government the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.'

Price v. Civil Serv. Comm., 26 Cal.3d 257, 161 Cal.Rptr. 475, 604 P.2d 1365, 1391 (1980) (Mosk, J., dissenting) (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L.REV. 775, 809-10 (1979)).

The way to end racial discrimination is to stop discriminating by race.

For the reasons expressed above, I respectfully dissent and would reverse the judgment of the district court, holding the District's use of the racial tiebreaker in its high school admissions program violates the equal protection rights of each student excluded from a particular school solely on the basis of that student's race.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 27, 2004

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-35450

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation,

Plaintiff-Counter-Defendant-Appellant,

v.

SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; Joseph Olchefske, in his official capacity as superintendent; Barbara Schaad-Lamphere, in her official capacity as President of the Board of Directors of Seattle Public Schools; Donald Neilson, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; Steven Brown; Jan Kumasaka; Michael Preston; Nancy Waldman, in their official capacities as members of the board of Directors,

Defendants-Counter-Claimants-Appellees.

Argued and Submitted Dec. 4, 2001.
Filed April 16, 2002.
Withdrawn and Question Certified June 17, 2002.
Certificate of Finality Received Sept. 8, 2003.
Reargued and Resubmitted Dec. 15, 2003.
Filed July 27, 2004.

Appendix B

Before REAVLEY,* O'SCANNLAIN, and GRABER, *Circuit Judges.*

Opinion by Judge O'SCANNLAIN; Dissent by Judge GRABER

O'SCANNLAIN, *Circuit Judge.*

Following the Washington Supreme Court's resolution of certified state-law questions, we must decide whether the use of race in determining which students will be admitted to oversubscribed high schools in Seattle, Washington, violates the federal Constitution's Equal Protection Clause.

I

This opinion marks the fourth time a federal court has addressed the Seattle Public Schools' use of an explicit "racial tiebreaker" in choosing which student applicants it will admit to the City's most popular public high schools. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224 (2001) [*Parents Involved I*], *rev'd*, 285 F.3d 1236 (9th Cir.2002) [*Parents Involved II*], *withdrawn*, 294 F.3d 1084 (9th Cir.2002), *certifying questions*, 294 F.3d 1085 (9th Cir.2002) [*Parents Involved III*]. We draw the following restatement of facts largely from *Parents Involved II.*

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix B

A

Seattle School District Number 1 (the "School District") operates ten public high schools: Ballard, Chief Sealth, Cleveland, Franklin, Garfield, Ingraham, Nathan Hale, Rainier Beach, Roosevelt, and West Seattle. Four of these (Ballard, Ingraham, Nathan Hale, and Roosevelt) are located north of downtown Seattle; of the remaining six, five (Chief Sealth, Cleveland, Franklin, Garfield, and Rainier Beach) are located south of downtown, and one (West Seattle) is located directly west of downtown.

These schools vary widely in quality, as measured by such factors as standardized test scores,[1] numbers of college preparatory and Advanced Placement (AP) courses offered and the availability of an Internal Baccalaureate (IB) program, percentages of students taking AP courses and SATs, percentages of graduates who attend college, *Seattle Times* college-preparedness rankings, University of Washington rankings, and disciplinary statistics. Moreover, some of the schools offer unique educational programs or opportunities not offered in other schools.[2]

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1. For instance, year 2000 data indicates that the average combined score on the Scholastic Achievement Tests (SATs) at Garfield was 1208-some 154 points above the state average-while at Cleveland it was 838, some 216 points below the state average. Similarly, while just one-quarter of students at Roosevelt scored below the 25th percentile on the Iowa Tests of Educational Development, more than three-quarters of Rainier Beach students scored below the 25th percentile.

2. For instance, Ballard High School offers a unique "Biotech Academy." Ballard describes its Biotech program as "[a] specialized

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The School District has never been segregated by law. However, due to Seattle's racially imbalanced housing patterns,[3] if Seattle's children were simply assigned to the high schools nearest their homes, those schools would tend to reflect such imbalance. That is, the demographic profile of the individual high schools would not mirror the demographic makeup of the city's student population as a whole.[4] As part of its continuing efforts to prevent such

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learning program that brings together science, mathematics and language arts to prepare students for advanced study and a career in science." Ballard Biotech Academy Website <http://ballard.seattleschools.org/academics/academies/biotech.html> (visited Mar. 24, 2004). The program has its own separate admissions procedure with required prerequisite classes. Admission to the program does not, however, guarantee admission to Ballard-which is governed by the School District's open enrollment plan.

3. For graphic representations of the racial and ethnic dispersion within Seattle's population, interested readers may wish to consult the various thematic maps derived from year 2000 U.S. Census data and made available by the City of Seattle at: <http://www.cityofseattle.net/DCLU/demographics/data_census.asp> (visited March 29, 2004). They indicate that census tracts north of Seattle's downtown and those along the City's waterfronts tend to be predominantly white, while those south of downtown (and particularly in the City's southeast quadrant) tend to reflect more substantial non-white populations.

4. Seattle's student population is approximately 40 percent white and 60 percent non-white. Splitting Seattle along a north-south axis, data introduced by the School District indicates that 74.2 percent of the District's Asian students, 83.6 percent of its black students,
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imbalance and to promote racial diversity in its high schools, the School District has adopted an open choice plan instead of simply assigning students to the high schools nearest their homes. Pursuant to this system, each student may choose to attend any of the ten high schools in the city, so long as there is room available in that school.

The District's open choice plan provides for a multi-step application process. Each student is first asked to rank the high schools he or she would like to attend. If a student is not admitted to his or her first-choice school because that school is full, the School District attempts to assign him or her to his or her second-choice school, and so on. If a student is not admitted to any of his or her chosen schools, he or she receives a mandatory assignment to a school with available space.

Not surprisingly, a significant problem arises when a school becomes "oversubscribed"-that is, when more students want to attend that school than there are spaces available. For the academic year 2000-01, five of the School District's high schools were oversubscribed and five were undersubscribed.[5] The magnitude of oversubscription during

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65.0 percent of its Hispanic students, and 51.1 percent of its Native American students live in the southern half of the city. By contrast, 66.8 percent of the District's white student population lives in the northern half of the city. Overall, approximately 77.2 percent of students in the southern half of the city, and just 35.7 percent of students in the northern half of the city, are non-white.

5. Oversubscription was apparently not tied to geographic location. The oversubscribed schools included three high schools

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the 2000-01 school year underscores its problematic nature: Approximately 82 percent of students selected one of the oversubscribed high schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice.

To resolve the dilemma of oversubscription, the School District's high school assignment plan uses a series of four "tiebreakers" to determine which students will be admitted to each oversubscribed school. The first tiebreaker gives a preference to students with siblings already attending the requested school. This tiebreaker accounts for somewhere between 15 percent and 20 percent of high school assignments. If a school is still oversubscribed after applying this first tiebreaker, the School District proceeds to a second tiebreaker, which is based entirely on race. For purposes of the racial tiebreaker, students are deemed to be of the race specified in their registration forms, which ask parents to identify their child's race. Because registration must be completed in person by a parent, if a parent declines to specify a racial category, the School District assigns the student a category based on a visual inspection of the parent (and, if present, the student) at the time of registration. It is this second-racial-tiebreaker that spawned the present suit.

Use of the racial tiebreaker is designe o balance the racial makeup of the city's public high schools. Accordingly,

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north of downtown (Ballard, Nathan Hale, and Roosevelt) and two high schools south of downtown (Garfield and Franklin). The undersubscribed schools included one north of downtown (Ingraham), three south of downtown (Chief Sealth, Cleveland, and Rainier Beach), and one west of downtown (West Seattle).

if an oversubscribed school's demographic profile deviates from the overall demography of Seattle's student population (approximately 40 percent white and 60 percent non-white) by more than a set number of percentage points, the School District designates that school "integration positive." The racial tiebreaker is then applied in the course of determining admissions to such schools, so that students whose race (coded by the School District simply as white or non-white) will push an integration positive school closer to the desired racial ratio are automatically admitted.[6] Thus, at Franklin (for instance), whites are admitted preferentially because they

6. During the 2000-01 school year, the acceptable deviation (called "the band") was fixed at +/10 percent. Thus, if an oversubscribed school had fewer than 31 percent or more than 51 percent white students, the tiebreaker would operate. Between the 2000-01 and 2001-02 school years-while this litigation was pending-the school board expanded the band to +/15 percent, meaning that the tiebreaker would operate only if an oversubscribed school had fewer than 26 percent or more than 56 percent white students. During the 2000-01 school year, four of the city's five oversubscribed schools were considered integration positive and therefore employed the tiebreaker: Ballard, Franklin, Nathan Hale, and Roosevelt. With the expansion of the band to +/15 percent prior to the 2001-02 school year, the tiebreaker ceased to operate at Roosevelt.

Two further changes were made to the program prior to the 2001-02 school year. First, a so-called "thermostat" was added to the plan: The School District would cease to use the racial tiebreaker for the year at any school once its use had brought the school into racial balance. Second, the integration tiebreaker would be used only in determining the makeup of entering ninth grade classes, but would not be applied to assignments involving the limited number of students seeking to transfer high schools before the tenth, eleventh, or twelfth grades.

are white; and at Ballard, non-whites are admitted preferentially because they *are not* white.[7] Ultimately, the School District's use of this racial tiebreaker determines where about 10 percent of applicants will be admitted.

Once all students of the preferred racial category are admitted to an oversubscribed high school, any remaining "ties" are broken by resort to a third variable: distance. Quite simply, applicants are admitted on the basis of the mileage between their homes and the school to which they seek admission, with those who live closest admitted first. Although a fourth tiebreaker exists-a random lottery-it rarely is invoked because distances are calculated to one hundredth of a mile for purposes of the preceding tiebreaker.

B

Parents Involved in Community Schools ("Parents") is "a nonprofit corporation formed by parents whose children have been or may be denied admission to the high schools of their choosing solely because of race." It commenced this legal action in July of 2000, contending that the School District's use of the racial tiebreaker for high school admissions is illegal under both state and federal law. Specifically, Parents alleged that by using race to decide who will be admitted to the oversubscribed high schools, the School District engages in illegal racial discrimination prohibited by the Washington Civil Rights Act ("Initiative

7. Of course, this also means that at Franklin, non-whites are denied admission because they *are not* white; and at Ballard, whites are denied admission because they *are* white.

200"),[8] the Equal Protection Clause of the Fourteenth Amendment,[9] and Title VI of the Civil Rights Act of 1964.[10]

Both Parents and the School District moved for summary judgment on all claims; neither contended that genuine issues of material fact precluded summary judgment. In a published opinion dated April 6, 2001, the district court upheld the use of the racial tiebreaker under both state and federal law,

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8. Wash. Rev.Code § 49.60.400 ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

9. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

10. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI has long been held to be essentially co-extensive with the guarantees of the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Powell, J., concurring) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *id.* at 329, 98 S.Ct. 2733 ("Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies. . . .") (Brennan, White, Marshall, and Blackmun, JJ., concurring in part); *see also Alexander v. Sandoval*, 532 U.S. 275, 280-81, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

granting the School District's motion and denying the Parents's. *See Parents Involved I*, 137 F.Supp.2d at 1240. Parents timely filed an appeal in this court and, on April 16, 2002, we issued an opinion reversing the district court's decision. Acting "in our constitutionally ordained role as oracles of Washington law," *Parents Involved II*, 285 F.3d at 1243, we prophesied that the School District's use of the racial tiebreaker violated Initiative 200. *Id.* at 1244.[11] Simultaneously, we enjoined the School District from using the racial tiebreaker in its system of high school admissions pending further order from this court. *Id.* at 1257.

While the School District's petitions for rehearing and rehearing en banc were pending before us, it "bec[a]me clear that [we could not] provide a definitive [legal] answer before assignments [were to] be made for the 2002-03 year, and therefore, . . . that our sole reason for not certifying this question to the Washington Supreme Court ha[d] dissolved." *Parents Involved III*, 294 F.3d at 1086. Consequently, we granted the petition for rehearing, withdrew our opinion, and vacated our injunction. *See id.* Simultaneously, we entered an order certifying to the Supreme Court of Washington the question whether

> [b]y using a racial tiebreaker to determine high school assignments, [the] Seattle School District

11. Specially concurring in the court's decision, Judge Graber likewise divined that "the racial tiebreaker that Seattle School District No. 1 uses to assign some public high school students to desirable schools plainly 'grants preferential treatment' to those students on the basis of their race, in violation of Initiative 200." *Parents II*, 285 F.3d at 1253 (Graber, J., specially concurring).

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> Number 1 "discriminate[s] against, or grant[s] preferential treatment to, any individual or group on the basis of race, . . . color, ethnicity, or national origin in the operation of public education" in violation of Initiative 200. . . .?

Id. at 1087.

The Supreme Court of Washington accepted certification, heard oral argument in the matter, and on June 26, 2003 issued an opinion concluding that I-200 "does not prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 149 Wash.2d 660, 72 P.3d 151, 166 (2003). It therefore "return[ed] the case to the federal court for further proceedings consistent with [its] resolution of the questions of Washington law," *id.* at 167, and formally notified this court of its actions by delivery of a Certificate of Finality on September 8, 2003.

All state law issues having been definitively decided, the parties prepared sur plemental briefing on the remaining federal constitutional question in light of the Supreme Court's intervening decisions in the University of Michigan affirmative actions cases-*Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)-followed by reargument.

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II

As a preliminary matter, we must address whether the passage of time has mooted Parents's action. Article III's case-or-controversy requirement mandates that the parties to a federal court action must "continue to have a personal stake in the outcome of the lawsuit" at all stages of the proceedings. *United States v. Verdin*, 243 F.3d 1174, 1177 (9th Cir.2001) (internal quotation marks and citation omitted). "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-478, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). As with any jurisdictional inquiry-and notwithstanding the parties' unhesitating agreement that Parents's action remains a live controversy appropriately subject to federal adjudication on the merits-we are charged with an independent constitutional responsibility to verify our authority to resolve their litigation. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir.1999).

Initially, we have little doubt that the associational aspect of Parents's standing has not been mooted. At reargument, counsel for Parents informed us that several of the association's members have children who, over the course of the next several years, will be applying for admission to the School District's public high schools and who thus will be subject to the admissions policies established by the School Board. Because "some members of the [association] [c]ould [continue to] have . . . standing to bring this suit in their own right," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986), and because the passage of time has not called into question Parents's satisfaction of the other requirements for associational standing, *see Friends of the Ea[illegible] Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), we are satisfied that the associational aspect of Parents's standing has continued vitality.

Perhaps more troubling, however, is the disclosure that the School District is not currently employing-and has not since the 2001-02 school year employed-the racial tiebreaker that Parents challenge in this litigation. As noted earlier, we enjoined the School District's use of the racial tiebreaker with our initial disposition of this case. *See Parents Involved II*, 285 F.3d at 1257. And although we vacated that injunction with the withdrawal of our initial opinion, *see Parents Involved III*, 294 F.3d at 1086, the School District has voluntarily declined to reinstate its racial tiebreaker during the pendency of this litigation. With the passage of time, the

voters of Seattle have elected a new School Board,[12] and there is at least a remote possibility that the new Board will opt not to resume its use of the racial tiebreaker that prompted this lawsuit.

Nonetheless, it is beyond cavil that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is *'absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur.*' " *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (emphases added) (quoting *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693, with internal quotation marks and citations omitted). Indeed, in these circumstances, a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*" *Adarand Const., Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000) (emphasis in original) (internal quotation marks and citations omitted). The problem here, of course, is that *neither party* has asserted that this case is moot: When asked at oral argument about the possibility that we lack jurisdiction over Parents's action, counsel for the School District not only maintained that this controversy remains live, but questioned whether the Board would have him defend the racial

12. *See* Deborah Bach, *New School Board Must Work Together, Observers Say*, Seattle Post-Intelligencer, Nov. 6, 2003, at B1; David Postman, *Incumbents Hammered: 3 on Seattle School Board Out; 3 on Council Headed There*, Seattle Times, Nov. 5, 2003, at A1.

tiebreaker if it did not intend to reinstate the challenged policy in the future.[13]

Indeed, where a court must address *sua sponte* the possibility that the passage of time has mooted litigation *on alternative grounds* (for instance, that the associational aspect of a plaintiff's standing no longer satisfies Article III jurisdictional requirements), we find it hard to imagine that a defendant's *voluntary cessation* could *ever* operate itself to moot the underlying litigation. By virtue of the fact that neither party will have alleged mootness in the first instance, there is no one to "satisfy the heavy burden of persuasion" that well-established doctrinal precepts require *a party* to demonstrate before voluntary cessation can be held to moot a once live case or controversy. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). We therefore conclude that the present case remains live.

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13. We note further that the School District's 2004-05 secondary education "Enrollment Guide" continues to describe the operation of the racial tiebreaker as part of its open choice assignment program, explaining that "The integration positive tiebreaker has been *suspended for the 2004-2005 assignment period* due to the pendency of a lawsuit challenging its use." *See* Seattle Public Schools, *Middle and High School Choices 2004-2005: Enrollment Guide for Parents* 44, *available at* http:// www.seattleschools.org/area/eso/secondary_guide_04_05.pdf (last visited June 8, 2004) (emphasis added).

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III

We now turn to the heart of Parents's claim: that the School District's use of race to determine who will be admitted to its oversubscribed public high schools constitutes illegal racial discrimination in violation of both the Fourteenth Amendment and Title VI.[14]

A

Forged in the crucible of Reconstruction and "[p]urchased at the price of immeasurable human suffering," *Adarand Const., Inc. v. Peña*, 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Thomas, J., concurring), the Equal Protection Clause of the Fourteenth Amendment mandates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Because the Fourteenth Amendment

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14. Because "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI," we address Parents's twin challenges to the racial tiebreaker simultaneously. *See Gratz*, 539 U.S. at 276 n. 23, 123 S.Ct. 2411.

As with any grant or denial of summary judgment, the district court's resolution of cross-motions for summary judgment is reviewed *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003). Because "[n]either side contends that there are any genuine issues of material fact . . . , our task is to determine whether the district court correctly applied the relevant substantive law." *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir.2002). Such purely legal determinations are, of course, subject to *de novo* review on appeal.

'protects *persons*, not *groups*,' all governmental action based on race-a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited-should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325 (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943))) (emphasis in original); *see also Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir.1998) ("It is as a person that each of us has these rights that are so majestically secured."). Therefore, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand*, 515 U.S. at 224, 115 S.Ct. 2097; *see also Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702 ("The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification. . . . '[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race.' ") (quoting *Adarand*, 515 U.S. at 230, 115 S.Ct. 2097).

For race-based educational policies "[t]o withstand strict scrutiny analysis, respondents must demonstrate that the[ir] use of race in [their] current admission program employs 'narrowly tailored measures that further compelling governmental interests.' " *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411 (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097); *see also Hunter v. Regents of Univ. of Calif.*, 190 F.3d 1061, 1063 (9th Cir.1999) ("To meet the strict scrutiny test, *the*

Regents must demonstrate that . . . consideration of race/ethnicity is *narrowly tailored* to serve a *compelling governmental interest.*") (first emphasis added); *Ho, 147 F.3d at 865* ("Once the plaintiffs established the School District's use of racial classifications . . . the School District has the duty to justify them. . . . At trial, *the School District will bear the burden* of proving that [its use of race] is a 'narrowly tailored measure that furthers compelling government interests.' ") (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097) (emphasis added); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir.1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government."). Notwithstanding its remarkable assertions to the contrary, it is thus quite plainly the School District which bears the weighty burden of demonstrating that its use of the racial tiebreaker in its open choice admissions program satisfies the "most searching examination" demanded by strict scrutiny, *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411 (quotations and citations omitted): that is, that the racial tiebreaker is designed to further a compelling governmental interest, and that the manner in which it does so is narrowly tailored to achieve that interest.

B

In papers prepared for purposes of this litigation, the School District has proffered an array of interrelated and putatively compelling interests in pursuit of which it seeks to employ the racial tiebreaker in its open choice high school admissions program. These myriad interests include the School District's desires to achieve: "the educational benefits of attending a racially and ethnically diverse school";

"integration of schools which, as a result of housing patterns and the tendency of many parents to choose schools close to home, would otherwise tend to become racially isolated"; "ensuring that public institutions are open and available to all segments of American society"; "alleviating de facto segregation"; "increasing racial and cultural understanding"; "avoiding racial isolation"; fostering "cross-racial friendships"; and "reduc[ing] prejudice and increas[ing] understanding of cultural differences." Perhaps its most articulate statement supporting use of the racial tiebreaker is the School Board's policy "Statement Reaffirming [the] Diversity Rationale." It explains:

> Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.
>
> Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. It also fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours.
>
> Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school.

Appendix B

> The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

To the extent Parents once may have been able to make out a colorable claim that the only interest sufficiently compelling to justify the use of racial classifications is the remediation of past official discrimination,[15] such an

15. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) ("Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination.") (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *id.* at 524, 109 S.Ct. 706 (Scalia, J., concurring) ("[T]here is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.") (emphasis in original); *Fullilove v.*

(Cont'd)

argument no longer obtains. In *Smith v. University of Washington*, this court followed Justice Powell's solo

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Klutznick, 448 U.S. 448, 489, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Burger, C.J., joined by White and Powell, JJ.) ("That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the [contracting set-aside] program will be limited to accomplishing the remedial objectives contemplated by Congress. . . ."); *id.* at 530, 100 S.Ct. 2758 (Stewart, J., joined by Rehnquist, J., dissenting) ("Since the [set-aside] provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could."); *Ho*, 147 F.3d at 864 ("[T]he Supreme Court has not banished race altogether from our governmental systems. The concept, so long the instrument of governmental evil, so fraudulently promoted by pseudo-science, so corrosive of the rights of the person, may still be employed if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race. Deployed for that limited purpose. . . ."); *Monterey Mech.*, 125 F.3d at 713 ("For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification."); *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir.1991) ("Race-based classifications must be reserved strictly for remedial settings."); *see also Hopwood v. State of Texas*, 78 F.3d 932, 944 (5th Cir.1996); *Contractors Ass'n v. City of Phila.*, 91 F.3d 586, 596 (3d Cir.1996); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162-63 (6th Cir.1994); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1544 (11th Cir.1994); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 42[illegible].C.Cir.1992); *Podberesky v. Kirwan*, 956 F.2d 52, 56 (4th Cir.1992) (en banc); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437 (10th Cir.1990).

concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), observing that "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures." 233 F.3d 1188, 1201 (9th Cir.2000). And in its landmark 2003 opinion in *Grutter*, the Supreme Court settled any debate over the validity of employing racial preferences for non-remedial purposes by asserting that it had "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (O'Connor, J.).[16] Indeed, it expressly sanctioned the so-called "diversity rationale" articulated by the University of Michigan in support of employing such preferences in determining which applicants would be offered admission to its selective law school. *See id.* 328-33, 123 S.Ct. 2325. It is upon Justice O'Connor's elaboration of the diversity rationale that we now focus our attention.

1

In part due to a recognition that the diversity rationale had often been criticized as "amorphous," "abstract," "malleable," and "ill-defined," *see, e.g.*, *Metro Broad.*, 497 U.S. at 612, 110 S.Ct. 2997 (O'Connor, J., dissenting);

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16. *But cf. Metro Broad.*, 497 U.S. at 612-13, 110 S.Ct. 2997 (O'Connor, J., dissenting) (condemning the majority's decision to apply intermediate scrutiny to racial classifications on grounds that doing so "too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination"); *cf. also Croson*, 488 U.S. at 493, 109 S.Ct. 706 (plurality op. by O'Connor, J.).

Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir.1998); *Lutheran Church-Missouri Synod v. FCC, 141* F.3d 344, 354 (D.C.Cir.1998); *Johnson v. Bd. of Regents*, 106 F.Supp.2d 1362, 1371 (S.D.Ga.2000); *Tracy v. Bd. of Regents*, 59 F.Supp.2d 1314, 1321 (S.D.Ga.1999); *cf. Grutter*, 539 U.S. at 350 & 354 n. 3, 123 S.Ct. 2325 (Thomas, J., dissenting) (deriding the interest in "diversity" as "a faddish slogan of the cognoscenti" and describing the concept as being "more a fashionable phrase than it is a useful term"), the University of Michigan and its aligned amici mounted a concerted effort to bring much-needed clarity. In a remarkable series of briefs, these groups assembled both social scientific evidence and observational reports from business, industry, and military leaders regarding the "substantial" educational and societal benefits that flow from an educational institution's "enroll[ment of] a critical mass of minority students." *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (citation and quotation omitted).

Among the benefits attributed by the University and its amici to the enrollment of a minimal core of minority students, and embraced by the Court under the broad rubric of the diversity rationale, are the promotion of "cross-racial understanding," the "break[ing] down of racial stereotypes," and the fact that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (citations and quotations omitted). Justice O'Connor's opinion for the Court also explained that "student body diversity promotes better learning outcomes, and better prepares students for an increasingly diverse workforce and society," and noted "that

the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.*; *see also* Brief for Respondents at 11, *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (No. 02-516) ("Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings. As a result, most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. This separation . . . provides little opportunity to disrupt racial stereotypes. . . .").

Finally, the majority emphasized testimony that, in the absence of race-conscious admissions, "underrepresented minority students would have comprised 4 percent of the [school's] entering class in 2000, instead of the actual figure of 14.5 percent," *id.* at 320, 123 S.Ct. 2325, and that a principal aim of the program was to prevent racial isolation. *Id.* at 318 & 319, 123 S.Ct. 2325; *see also id.* at 380-81, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting) (noting that the university's focus on achieving a "critical mass" of minority students was premised on "enroll[ing] enough minority students to provide meaningful integration of its classrooms and residence halls" and reducing the effects of "isolat[ion] by racial barriers") (quoting Brief for Respondents at 5).

Recognizing that each of the School District's proffered interests in using its racial tiebreaker falls comfortably within the diversity rationale as that justification's aims and benefits were articulated to (and embraced by) the Court, *see supra* at 960-61, Parents and their amici seek to cabin *Grutter's* reach by contending that the Court's compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 330. We of course acknowledge that *Grutter* addressed the use of racial classifications in higher education, and that language in the Court's opinion reflects that factual underpinning.[17] But we cannot identify a principled basis for concluding that the benefits the Court attributed to the

17. *See, e.g., Grutter*, 539 U.S. at 322, 123 S.Ct. 2325 ("We granted certiorari to resolve . . . [w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.") (citation omitted); *id.* at 325, 123 S.Ct. 2325 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *id.* at 331, 123 S.Ct. 2325 ("[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all. . . ."); *id.* at 331-32, 123 S.Ct. 2325 ("[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. [N]owhere is the importance of such openness more acute than in the context of higher education.") (quoting Brief of the United States); *id.* at 332, 123 S.Ct. 2325 ("[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders.").

existence of educational diversity in universities cannot similarly attach in high schools. We simply do not see how the government's interest in providing for diverse interactions among 18 year-old high school seniors is substantially less compelling than ensuring such interactions among 18 year-old college freshmen. *Cf. Grutter*, 539 U.S. at 347, 123 S.Ct. 2325 (Scalia, J., dissenting) ("The 'educational benefit' that the University . . . seeks to achieve by racial discrimination consists, according to the Court, of 'cross-racial understanding,' and 'better preparation of students for an increasingly diverse workforce and society,' all of which is necessary not only for work, but also for good 'citizenship.' This is not, of course, an 'educational benefit' [but] the same lesson taught to . . . people three feet shorter and twenty years younger . . . in institutions ranging from Boy Scout troops to public-school kindergartens.") (quoting *Grutter*, 539 U.S. at 331, 123 S.Ct. 2325) (citations and alterations omitted).

3

At bottom, *Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions. In support of its racial tiebreaker, the School District invokes precisely the interest sanctioned by the Supreme Court: securing those benefits. Those benefits are as compelling in the high school context as they are in higher education. We therefore conclude that the District has satisfied its first burden under strict scrutiny: It has articulated

a compelling interest in pursuit of which it seeks to use a racial classification.[18]

C

Of course, to hold that the School District has invoked a compelling interest in pursuit of which it seeks to employ the racial tiebreaker is merely to begin our inquiry. Because " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,' " *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411 (quoting *Fullilove*, 448 U.S. at 537, 100 S.Ct. 2758 (Stevens, J., dissenting)), the School District also bears the burden of demo- 'rating that its use of the racial tiebreaker is narrowly-tailored to further that interest. *See Hunter*, 190 F.3d at 1063; *Ho*, 147 F.3d at 865. As with respect to compelling interest analysis, *Grutter* and *Gratz* shed much-needed light on the once crepuscular contours of the narrow tailoring test applicable to the non-remedial use of racial preferences in educational admissions. Careful attention to these decisions-and the ways they addressed the divergent undergraduate and law school admissions schemes at the University of Michigan-is especially warranted.

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18. We express no opinion on the extent to which the diversity rationale extends beyond the secondary educational context. *Cf. Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir.2004) (addressing the diversity rationale in the context of race-conscious promotions within a police department)."

Appendix B

1

As *Grutter* outlined, the admissions process at the University of Michigan Law School functions roughly as follows. Every completed application received by the Law School is both read and considered holistically by admissions officials. A significant focus of the decisionmakers is on an applicant's academic ability, as measured by his or her undergraduate grade point average and score on the Law School Admissions Test (LSAT). Even so, these "hard" measures are insufficient to resolve admissions decisions: Just as "the highest score does not guarantee admission[, neither] does a low score disqualify an applicant." *Grutter*, 539 U.S. at 315, 123 S.Ct. 2325. Instead, admissions officials must look beyond those measures to "soft" variables, including "the enthusiasm of the [applicant's] recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection," which in turn are used to help measure "an applicant's likely contributions to the intellectual and social life of the institution." *Id.* (internal quotations omitted).

This focus on "soft" variables aims to ensure that the Law School can " 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.' " *Id.* (quoting the Law School's written admissions policy). While recognizing that there are " 'many possible bases for diversity admissions,' " the admissions policy

> "reaffirm[s] the Law School's 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 . . . , who without this commitment might not be represented in our student body in meaningful numbers.' "

Id. at 316, 123 S.Ct. 2325 (quoting policy). Of note, the policy seeks to ensure the enrollment of a "critical mass" of underrepresented minority students through the use of a calibrated racial preference-in the absence of which such students would comprise just 4 percent of the law school's entering class, and thereby be less likely as a group fully to " 'make unique contributions to the character of the Law School.' " *Id.* (quoting policy). Crucially, "[t]he policy does not define diversity 'solely in terms of racial and ethnic status,' " *id.* (quoting policy), but rather gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337, 123 S.Ct. 2325.

Turning to the constitutionality of the program, Justice O'Connor immediately honed in on its core features: its flexibility and breadth. In concert with the baseline constitutional prohibition against quotas, *id.* at 334, 123 S.Ct. 2325 ("[A] race-conscious admissions program cannot use a quota system-it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.' ") (quoting *Bakke*, 438 U.S. at 315, 98 S.Ct. 2733 (Powell, J., concurring)), the law school "consider[s] race [and] ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every

applicant." *Id.* Moreover, she explained, the Law School's policy strenuously avoids evaluating individual applicants "in a way that makes [their] race or ethnicity the defining feature of [their] application." *Id.* at 337, 123 S.Ct. 2325. Conforming to the "paramount" constitutional requirement of truly "individualized consideration in the context of a race-conscious admissions program," *id.* at 337, 123 S.Ct. 2325, the Law School's admissions officers shun a "policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any 'soft' variable," and awards "no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.*

Quite in contrast, the school refuses to "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity," *id.* at 338, 123 S.Ct. 2325, and illustrates the strength of its commitment to that principle by highlighting a variety of non-racial criteria the institution considers valuable-for instance, that an applicant has lived or traveled abroad, speaks more than one language, has overcome personal adversity, or has a strong record of community service or even a prior career in a non-legal profession. *Id.* (discussing policy). And the Law School pays more than mere lip service to this commitment: It "actually gives substantial weight to diversity factors besides race," allowing those factors to "make a real and dispositive difference for nonminority applicants as well." *Id.* In short, the law school's admissions program "considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race," *id.* at 340, 123 S.Ct. 2325, and as a consequence, "does not unduly harm nonminority applicants." *Id.* at 341, 123 S.Ct. 2325.

Finally, the Court observed that the Law School has "sufficiently considered workable race-neutral alternatives," *id.* at 340, 123 S.Ct. 2325, and that periodic reviews (along with an eventual legal cutoff) ensure that the Law School's use of race will be time-limited, in concert with the Constitution's demand that any " 'deviation from the norm of equal treatment of all racial groups [be] a temporary matter, a measure taken in the service of the goal of equality itself.' " *Id.* at 342, 123 S.Ct. 2325 (quoting *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion)). In light of the policy's careful design and its adherence to the strict limits placed on the non-remedial use of race, the Court upheld the Law School's program as narrowly tailored.

2

At issue in *Gratz*, however, the undergraduate admissions program at the University's College of Literature, Sciences, and the Arts (LSA)-though purportedly pursuing the same benefits from diversity as the Law School-had structured its admissions program around such a crude racial classification that the school had not even come close to satisfying the narrow tailoring requirement.[19] Prior to its 1998 admissions cycle, LSA developed an admissions "selection index" that assigned each applicant a score of up to 150 points based on his or her grades, test scores, high school quality and curricular rigor, in-state residency, legacy status, personal

19. For present purposes, we focus on the University's post-1998 admissions program rather than its more troubling predecessors. *See Gratz v. Bollinger*, 122 F.Supp.2d 811, 831-33 (E.D.Mich.2000) (describing the myriad constitutional defects of the 1995-98 program).

essay, and personal achievement or leadership. The index was then divided into strict dispositional bands: students scoring 100-150 points were admitted; students scoring 95-99 points were either admitted or had consideration of their application postponed; students scoring 90-94 points either had consideration of their application postponed or were admitted; students scoring 75-89 points were delayed or postponed; and students scoring fewer than 75 points were delayed or rejected. *Gratz*, 539 U.S. at 255, 123 S.Ct. 2411.

Although the LSA system superficially appeared to provide for individualized consideration of each applicant-at least to the extent that each application was reviewed to ascertain the presence of various "soft" variables for mechanical scoring-such a rosy portrait was belied by the underlying reality of the policy. Tucked into a " 'miscellaneous' category, an applicant was entitled to 20 points based upon his or her membership in an under-represented racial or ethnic minority group." *Id.* Indeed, during 1999 and 2000, "every applicant from an underrepresented racial or ethnic group was awarded 20 points," *id.* at 256, 123 S.Ct. 2411, at least one-fifth of the points necessary to secure admission to LSA.[20]

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20. In actuality, LSA's mechanical award of 20 points may have been worth more than one-fifth of the points necessary to secure admission. In 1999, LSA also established a discretionary review process in which individual applications would be given special additional consideration from the Admissions Review Committee (ARC) if the applicant met a threshold selection index score (80 points for Michigan residents, 75 points for out-of-state residents) and was selected by an admissions officer. *Id.* at 256-57 & n. 8, 123 S.Ct. 2411. If chosen, ARC would consider whether the applicant "possesses a quality or

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It therefore is not surprising that the Court rejected LSA's program on narrow tailoring grounds. Put simply, the program provided no serious individualized consideration of the applicant's potential contributions to educational diversity. The LSA's policy automatically distributes 20 points to every single applicant from an 'underrepresented minority' group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.

Id. at 272, 123 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (Powell, J., concurring)); *see also id.* at 273, 98 S.Ct. 2733 ("[A]s the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted."). Having so easily concluded that the LSA policy was not narrowly tailored, the Court concluded by swiftly rejecting the University's lame suggestion that " 'the volume of applications and the

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characteristic important to the University's composition of its freshman class"-including race and ethnicity-and could then choose to admit such students outside the strictures of the normal selection index grid. *Id.* Thus, under LSA's plan, membership in an underrepresented racial group would secure an applicant at least one-fifth of the points necessary to ensure admission, as well as one-quarter of the points necessary for an individualized review that, by facilitating the double-counting of race, could lead to admission.

presentation of applicant information make it impractical' " to predicate admissions on individualized consideration. *Id.* at 275, 98 S.Ct. 2733 (quoting LSA's Brief). "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Id.* (citing *Croson*, 488 U.S. at 508, 109 S.Ct. 706).[21]

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21. Of some note, Justice O'Connor's concurrence (joined by Justice Breyer) highlighted key distinctions between the Law School and under-graduate programs:

> The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.

Gratz, 539 U.S. at 276-77, 123 S.Ct. 2411 (O'Connor, J., concurring, joined by Breyer, J.) (emphases in original).

From the Court's decisions in *Grutter* and *Gratz*-and drawing upon well-established narrow tailoring principles-we derive the following governing constraints. First, where an institution pursues non-remedial objectives, *racial quotas are strictly prohibited. Gratz*, 539 U.S. at 293, 123 S.Ct. 2411 (Souter & Ginsburg, JJ., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."); *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325.

Second, any consideration of race for non-remedial purposes must be *flexible;* an educational institution may not treat an applicant's race or ethnicity as the touchstone of his or her individual identity, but instead must meaningfully evaluate each applicant's potential diversity contributions in light of all pertinent factors. *Gratz*, 539 U.S. at 271-74, 123 S.Ct. 2411; *id.* at 279, 123 S.Ct. 2411 (O'Connor, J., concurring); *Grutter*, 539 U.S. at 337-39, 123 S.Ct. 2325; Bakke, 438 U.S. at 315 & 317-18, 98 S.Ct. 2733; *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 345 (4th Cir.2001) (Traxler, J., concurring); *Wessmann*, 160 F.3d at 798 & 800; *Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 132-33 (4th Cir.1999); *Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698, 707 (4th Cir.1999).

Third, it follows that an institution's use of race must be *neither mechanical nor conclusive. Gratz*, 539 U.S. at 271-72, 123 S.Ct. 2411; *id.* at 278-79, 123 S.Ct. 2411 (O'Connor, J., concurring); *Grutter*, 539 U.S. at 336-37, 123 S.Ct. 2325. After all, automatically awarding a fixed racial preference

to every single racially-preferred applicant signals an institutional disregard for the far broader array of diversity characteristics that produce the educational and social benefits deemed compelling by the Court. *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (Powell, J., concurring). And any racial preference that necessarily results in the admission of an applicant demonstrates the pursuit of prohibited racial balancing *simpliciter. See, e.g., Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 ("There is no policy, either *de jure* or *de facto*, of automatic acceptance. . . ."); *Wessmann*, 160 F.3d at 799; *cf. Eisenberg*, 197 F.3d at 131; Tuttle, 195 F.3d at 707.

Fourth, narrow tailoring demands that the institution seeking to employ racial preferences at the very least demonstrate an *earnest consideration of race-neutral alternatives. Grutter*, 539 U.S. at 339-40, 123 S.Ct. 2325; *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842; *Tuttle*, 195 F.3d at 706; *Podberesky*, 38 F.3d at 160-61.

Fifth, serious efforts must be made to *minimize the adverse impact* of racial preferences on non-preferred group members; a programmatic use of race should be no more potent than necessary to achieve the compelling interest being pursued. *Grutter*, 539 U.S. at 341, 123 S.Ct. 2325; *Wygant*, 476 U.S. at 287, 106 S.Ct. 1842 (O'Connor, J., concurring in part and dissenting in part); *Bakke*, 438 U.S. at 308, 311, 314-15, 98 S.Ct. 2733 (Powell, J., concurring); *Wessmann*, 160 F.3d at 798.

Sixth, and finally, any program of racial preferences, regardless of its ultimate aspirations, must be *time-limited. Grutter*, 539 U.S. at 342, 123 S.Ct. 2325; *Croson*, 488 U.S.

at 510, 109 S.Ct. 706 (plurality opinion by O'Connor, J.); *Hayes v. N. State Law Enforcement Ass'n*, 10 F.3d 207, 216 (4th Cir.1993).

4

The School District's racial tiebreaker fails virtually every one of the narrow tailoring requirements.

a

First (and second), in contrast to the "flexible, nonmechanical," evaluation of race employed by the University of Michigan Law School in the course of a "highly individualized, holistic review" which scrupulously "ensure [s] 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, 123 S.Ct. 2325, the School District's racial tiebreaker is virtually indistinguishable from a pure racial quota. As *Grutter* defined that forbidden fruit of non-remedial racial preferences, "Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the individual from comparison with all other candidates for the available seats." *Grutter*, 539 U.S. at 335, 123 S.Ct. 2325 (citations and quotations omitted). Yet this is almost precisely how the District *itself* has described the operation of its program-with a single variance: rather than impose a racial floor *or* ceiling, the School District's racial tiebreaker establishes both a floor *and* a ceiling. [I]f an oversubscribed school has fewer than 45 [percent] students of color/more than 55 [percent] whites, students of

color will be assigned ahead of white students who live closer to the school. Conversely, if an oversubscribed school has fewer than 25 [percent] white students/more than 75 [percent] students of color, white students will be assigned ahead of students of color who live closer.

b

Indeed, to an even greater degree than the University of Michigan's undergraduate admissions program, the School District-third-automatically and mechanically admits, using a computer algorithm designed to implement the ceilings and floors framing its racial tiebreaker, hundreds of white and non-white applicants solely because of their race. *Cf. Gratz*, 539 U.S. at 270, 123 S.Ct. 2411 ("[T]he University's policy, which automatically distributes . . . *one-fifth of the points needed to guarantee admission* . . . to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored. . . .") (emphasis added); *id.* at 271-72, 123 S.Ct. 2411 ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups."). Thus, in stark contrast to the program sanctioned by *Grutter*, the racial tiebreaker not only fails to "serious[ly] consider[ ] all the ways an applicant might contribute to a diverse educational environment," but is in fact a " *de jure* [policy] of automatic acceptance or rejection based on a[] single 'soft' variable." *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325. This the Constitution categorically forbids; such an impliably reflexive use of race "cannot be said to be

narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507, 109 S.Ct. 706 (plurality opinion).[22]

c

Fourth, although numerous alternative admissions structures have been proposed to solve the School District's oversubscription dilemma without so prominently featuring race in the equation, not all have been (or ever were) seriously considered by the Board.[23] Three such alternatives stand out.

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22. Although we admire the School District's use of a "thermostat" designed to curtail the deleterious impact of its racial tiebreaker once the requisite racial proportion is attained in a given school, the fact that it turns the tiebreaker on and off with such numerical precision ultimately helps confirm that the School District's aim is simple proportional representation by race. *Cf. Eisenberg*, 197 F.3d at 132 ("The fact that the . . . diversity profile for each school is reviewed and adjusted each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population.").

23. Indeed, when asked whether the District gave "any serious consideration to the adoption of a plan for the assignment of high school students that did not use racial balancing as a factor or goal," Superintendent Olchefske responded: "I think the general answer to your question is no. . . . I mean it's possible informal ideas were floated here or there, but I don't remember any significant staff work being done." When asked whether he could "ever recall the board considering any race neutral plans," John Vacchiery (who heads the (Cont'd)

Appendix B

i

First, the School Board has never seriously considered the use of a citywide high school admissions lottery. Though perhaps not palatable to the electorate-a consideration that cannot justify the use of race in its stead-a randomized lottery would necessarily produce levels of school diversity statistically comparable to (and perhaps even more proportional than) the District's racial tiebreaker. Yet, when asked about using a lottery to meet the District's diversity targets, Board member Barbara Schaad-Lamphere actually argued that a lottery would *not* result in racially proportional representation "because of probabilities, the law of probabilities." Let us be clear: We are not forcing the School District to *adopt* a random assignment lottery. But given its evident commitment to achieving diversity, there is no question but that the Board should have *earnestly appraised* such a program's costs and benefits. Whatever reasons there may be to reject a lottery, the demonstrably false pretext that "the law of probabilities" would render it ineffectual is not one.

The dissent takes us to task for suggesting that the School District must seriously consider using a lottery to achieve its diversity goals when *Grutter* itself explicitly rejected the plaintiffs' claim that Michigan's Law School should have

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District's Facilities, Planning, and Enrollment Department) answered simply "No." And responding to inquiries regarding the possibility of using a "system kind of similar to the one you have now but without race as a tiebreaker," Board member Don Nielsen replied that "It's never been considered."

considered a lottery. *See post* at 1009-1010. We find such criticism unavailing. *Grutter* rejected the plaintiffs' demand that the Law School consider a lottery because such a program would necessarily diminish the quality of its admitted students and might not produce adequate educational diversity due to potential under-representation of various (not necessarily racial) kinds of diversity in its limited applicant pool.[24] Yet as the dissent *itself* notes, the School District's adoption of a lottery is subject to neither of these potential pitfalls. *Post* at 1000 (noting that in this case "there is absolutely no competition or consideration of merit. . . . *All* high school students must and will be placed in a Seattle public school. The students' relative merit is irrelevant.") (emphasis in original). As a result, the District's unconstrained applicant pool is not subject to a possible demographic skew, and there is absolutely no possibility that a lottery would diminish the quality of admitted students. Thus, neither of *Grutter's* grounds for rejecting consideration of a lottery is present here.

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24. As the Court explained:

> The Law School[ ] . . . considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity.

Grutter, 539 U.S. at 340, 123 S.Ct. 2325.

Second, the School District could have considered adopting a diversity-oriented policy that does not rely exclusively on race, but which instead accounts for the wider array of characteristics that comprise the kind of true diversity lauded by Justice Powell in *Bakke* and by the Court in *Grutter* and *Gratz*. In this respect, we observe that-for purposes of its internal school funding formula-the School District already collects a much wider array of data on students and families than merely their racial and ethnic identities. Among that data is information on whether a child lives at home or in "an agency"; if she lives at home, with whom; whether the child's home and most proficient languages are English or some other language; and the child's eligibility for free or reduced price lunch. Yet, the District considers none of those factors in admissions, and although individual Board members have occasionally suggested using one or more of those factors as an alternative tiebreaker, the Board has declined even to study how such an alternative would impact school diversity.[25]

The dissent once again strays in its criticism of this suggestion. It first suggests that a programmatic focus on "true diversity" is no alternative at all "because it is not

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25. In particular, the School District's data expert, Morgan Lewis, testified that although Board member Don Nielsen once suggested instituting an income-based tiebreaker, "[t]hat particular proposal never went anywhere, in terms of assessing how you would implement it" and that School District staff was never asked to (and so never did) examine the effect that such a tiebreaker would have on the demographic composition of the District's high schools.

directed toward achieving the District's interest in a racially integrated learning environment." *Post* at 1008. But this claim is fundamentally mistaken. A programmatic focus on true diversity-within which race is one of many factors considered by the School District-*subsumes* the District's interest in achieving racial diversity: It does not *supplant* it. Indeed, such a focus may not only help the District achieve the racial diversity it desires, *see infra* at 1001 n. 26, but might actually serve the District's socialization interests to a far greater degree than its presently narrow focus on race alone. For, if the District's fundamental interest is, as the dissent characterizes it, "to prepare children to be good citizens-to socialize children and to inculcate civic values," *see post* at 992, and to achieve "a more democratic and inclusive experience for all citizens," *id.* at 991-92 n. 9 (quoting one of the District's expert witnesses), then accounting for factors other than race-like socioeconomic status-would bolster the District's "democratic" mission by fostering, for instance, cross-class (and not just cross-racial) interaction. *See* Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools Through Public School Choice (2001)* (documenting the civic and educational benefits of socioeconomically integrated schooling).

The dissent also errs in suggesting that "even though there has been no formal study of [this] proposal," the deposition testimony of a few Board members is sufficient to demonstrate "legitimate reasons why the majority of the Board rejected the use of poverty measures. . . ." *Post* at 1008. We disagree. The Board members' blithe dismissal of a sincerely presented proposal simply cannot satisfy the constitutional requirement that the government earnestly

appraise race-minimal alternatives prior to adopting race-conscious policies. Matters not formally evaluated cannot be "rejected" in a constitutionally-relevant sense: Such appraisal-whether with regard to the need for race-based action, or to the shape such action is to take-must be conducted "on the record." *See, e.g., Croson*, 488 U.S. at 498-511, 109 S.Ct. 706 (chronicling Richmond's failure adequately to document the basis for its use and design of a racial quota and stressing the constitutional demand that it do so); *see also Shaw v. Hunt*, 517 U.S. 899, 909-10, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Fullilove*, 448 U.S. at 533-35, 100 S.Ct. 2758 (Stevens, J., dissenting); *Rothe Dev. Corp. v. United States Dep't of Def.*, 262 F.3d 1306, 1322-28 (Fed.Cir.2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735-37 (6th Cir.2000) (Boggs, J.); *WH Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 217-19 (5th Cir.1999) (King, C.J.); *H.K. Porter Co. v. Metro. Dade County*, 975 F.2d 762 (11th Cir.1992).[26]

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26. Even beyond this evidentiary inadequacy, we observe that *the individual Board members'* post-hoc litigation rationales for *the Board's* allegedly having "rejected" the use of broader diversity considerations do not withstand even limited scrutiny. Whether it is "often inaccurate" to assume that poverty and race are "coextensive" and "insulting to minorities" to suggest they may be, *see post* at 1008, it is beyond dispute that despite remarkable racial progress during the past century, *see generally* Stephan and Abigail Thernstrom, *America in Black and White* (1997), race and socioeconomic status remain correlated, so that the latter *might* serve as a workable race-neutral alternative satisfying the District's interest in obtaining the benefits of enrolling an otherwise diverse student population. (Of course, we can only determine whether it *would* do so if the School District would evaluate it.) Likewise, it is beyond

(Cont'd)

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iii

Third (and at least for the moment, finally), acting in response to Parents's filing of this lawsuit, the Seattle Urban League convened a working group which included, among others, a representative from the NAACP, one of the Parents, a former member of the School Board, a retired high school principal, the then-current President of the Seattle Council Parent Teacher Student Association (PTSA), and a former PTSA President. In September 2000, they developed-and then formally proposed to the School Board-a comprehensive plan that would seek to enhance the quality of education in the City's schools by focusing on educational organization, teacher quality, parent-teacher interaction, raising curricular standards, substantially broadening the availability of

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(Cont'd)

dispute that any insult generated by recognizing the opportunity presented by this sad reality pales in comparison to the insult of rejecting an applicant solely because of the color of her skin (whether they are white *or minority*-as in this case, *see supra* at 955-56 & n. 7).

Finally, we find unsupportable the individual Board members' suggestion that socioeconomic integration would not result in appreciable socialization advantages because "implementation would be thwarted by high school students' reluctance to reveal their socioeconomic status to their peers." *Post* at 1008. For if the theory underpinning integrated schooling is (quite accurately) that it will foster cross-bounded friendships, it is inevitable that students of varying backgrounds will not only interact in the classroom, but outside it-where exposure to their peers' varying communities, families, and lifestyles will almost certainly reveal their divergent socioeconomic experiences.

specialized and magnet programs (which could attract a broader cross-section of students to undersubscribed schools), and supporting extra-curricular development.[27]

At the same time, their plan proposed decreasing the School District's reliance on race in the admissions process by adding a new, primary tiebreaker based on pairing neighborhoods with particular schools and structuring the scope and size of the component residential areas such that no single region would contain enough students to fill its linked high school to capacity. Under the plan, preferences initially would be given to students choosing a school in their paired region, and the existing racial tiebreaker would be dropped from second to third in the process of resolving any remaining oversubscription (and any residual racial concentration not already solved by improving the attractiveness of previously racially concentrated schools). Finally, the Urban League working group proposed that the School District add an eleventh public high school, and that it strenuously market to the public the existing (and proposed additional) specialty programs throughout the City's other high schools.[28]

We cannot know whether its proposed reforms would have been successful in achieving the working group's ambitious goals, but there is no doubt that the Urban League

27. As their report put the point, "With quality high schools throughout the city, assignment issues will disappear."

28. Of note, the report also concluded by discussing four additional alternatives that it ultimately declined to propose to the Board-but nonetheless deemed worthy of consideration.

presented the Board with an especially thoughtful proposal for addressing the dilemmas plaguing contemporary urban education[29] while simultaneously striving to attain educational diversity without unduly relying on the use of crude racial preferences. Yet, this proposal was never formally discussed at a Board meeting. Indeed, some members of the Board even refused to read it. Consider the following remarkable deposition testimony by Board member Michael Preston:

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29. Our nation's public schools, especially those in central cities, currently face a crisis of epic proportions. Although black and Latino students made substantial educational gains following the demise of legalized governmental segregation, the best data on educational attainment demonstrates that no further progress has been made in the past fifteen years-and indeed that the gap between white and Asian students' educational achievement and that of blacks and Latinos has actually *expanded* on some measures during that period. *See* Stephan Thernstrom & Abigail Thernstrom, *No Excuses: Closing the Racial Gap in Learning* 18-21 (2003); *see also* John E. Chubb and Tom Loveless, eds., *Bridging the Achievement Gap* 1-2 (2002); David Grissmer, Ann Flanagan, and Stephanie Williamson, *Why Did the Black-White Test Score Gap Narrow in the 1970s and 1980s?*, *in* Christopher Jencks & Meredith Phillips, eds., *The Black-White Test Score Gap* 185-91 (1998). As the Thernstroms poignantly observe:

> Racial progress on many fronts has been enormously heartening. But in a society committed to equal opportunity, we still have a racially identifiable group of educational have-nots-young African-Americans and Latinos whose opportunities in life will almost inevitably be limited by their inadequate education. . . . [Such] [o]ngoing racial inequality is not only morally unacceptable; it corrupts the fabric of American society and endangers our future.

Id. at 271-72.

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Q: Are you familiar with the plan proposed by the ad hoc work group of the Urban League?

A: Somewhat.

Q: Did you ever consider that plan as a viable alternative to the current assignment plan?

A: No.

Q: Why not?

A: I thought they hadn't done their homework. And yeah, they seemed too liberal and unbusinesslike. But it didn't recognize the legitimate concerns that the people of Ballard and Magnolia have about the school.

Q: What in particular do you believe are the shortcomings of that Urban League plan that caused you not to consider it to be a viable alternative?

A: That it came from the Urban League. Even though [Urban League President and CEO] James Kelly is a good friend of mine, the Urban League has not been a bastion of enlightened thought, in my view, historically.

Q: Did you read the proposal?

A: No. I heard it characterized and summarized.

Q: By whom?

A: By the superintendent. I have a copy of it. I chose not to read it. I'd rather play with my bass lunker fishing game.

Q: Than consider the Urban League's proposal?

A: Well.

Q: That might give some offense to the people who spent a good deal of time working that proposal up.

A: Okay.

Q: We don't need to show them a copy of the deposition transcript.

A: I'm sure it will eventually fall into their hands.

. . .

* * *

Q: Are you familiar with the broad outlines of how that proposal was structured?

A: Yeah.

Q: What's your understanding of that? Not necessarily the minutia, but what's your

understanding of the general way that the Urban League's proposal would have worked?

A: I don't understand the relevance of the Urban League's proposal, because it wasn't considered, it wasn't used. I don't understand what difference it makes.

Q: Well, I'm just-in all honesty, one of the issues in the case, as I see it, is what alternatives were available to the school board.

A: Well, that wasn't an alternative.

Q: Why is that?

A: Well, the Urban League is not the school board, it's not the administration, it's not the superintendent. . . .

Without belaboring the point, this is not exactly the stuff from which narrow tailoring is made. While it may be the case that educational institutions need not *exhaust* every conceivable alternative to the use of racial classifications to satisfy strict scrutiny, narrow tailoring at least demands that schools *earnestly consider* using race-neutral and race-limited alternatives in order to provide for the kind of diversity that, properly constituted, can further compelling educational and social interests. *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325. Given the tragic history of race in our country, the Constitution demands no less-our education

policymakers' enthusiasm for handheld electronically simulated "bass lunker fishing game[s]" notwithstanding.

d

Fifth, the School District's racial tiebreaker is not designed to minimize its adverse impact on third parties; the extent to which it uses race is not calibrated to the benefits sought. Over time, "the band," *see supra* n. 6, has ranged from as much as +/25 percent to as little as +/10 percent, and it currently sits at +/15 percent. And while such variances conceivably could be interpreted to suggest that the School District is carefully trying to optimize its realization of diversity's benefits, the record belies such an interpretation. In October 2000, School Superintendent Joseph Olchefske formally recommended that the band be expanded from +/10 percent to +/20 percent because "[a]fter review and 2 years experience, there was not strong evidence that utilizing a +/10 [percent] band provided a materially better educational experience than would a band of +/20 [percent]. Accordingly, in order to fulfill our narrow tailoring obligation, staff is recommending a +/20 [percent] band."[30] Yet, even after its chief educator and his staff twice had reported that twice as much of an adjustment would have no adverse impact on the diversity payoff, the Board adjusted the band by just 5 percentage points. This is not the measure of tailored proportionality. Instead, it represents a stubborn adherence to the use of race for race's sake, with the effect that some non-preferred student applicants will be displaced solely

30. Indeed, Olchefske also recommended expanding the band in 1999.

because of their racial and ethnic identities-to no benefit at all.[31]

Taken alone, any of these shortcomings would doom the School District's program. Together, they reveal an unadulterated pursuit of racial proportionality that cannot possibly be squared with the demands of the Equal Protection Clause.[32]

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31. The dissent suggests that even though schools "may well have been sufficiently diverse to promote interaction across the white/nonwhite axis and to prevent the tokenization of nonwhite students" had the District used a 20 percent band (or, in something of a surprising concession, had it used no integration tiebreaker at all), *see post* at 1006-1007 & 1011, the District's selection of a 15 percent band was appropriate because it would facilitate greater movement of students between the south end of the District and the north. *Id.* Given Superintendent Olchefske's statement that the District's interests in the tiebreaker would *not* be served by setting the band at 15 percent instead of 20 percent, we find it hard to credit the assertion that those interests must have included such movement of students. In any event, we hardly think that non diversity-enhancing north-south integration is sufficiently compelling to justify the use of a racial classification.

32. The only narrow tailoring requirement the School District's racial tiebreaker even arguably satisfies is the final one-that the institutional use of race be time-limited. Addressing temporal limitations in *Grutter*, the Court explained that "[i]n the context of higher education, the durational requirement can be met by sunset provisions *in* race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342, 123 S.Ct. 2325 (emphases added). Yet, notwithstanding the conjunctive nature of (Cont'd)

In an effort to evade the clear import of the narrow tailoring analysis applied by *Grutter*, *Gratz*, and their progenitors, the School District argues that such analysis simply does not apply in the K-12 context: "[T]he Michigan decisions have meaning only in the context of selective admissions and other 'zero sum' programs. . . . [The] argument that race may be considered [only] in a holistic individualized review as one factor among many contributing to diversity is not applicable to non-selective school

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(Cont'd)
its stated requirements and in spite of the fact that Michigan's policy did not *itself* contain a sunset provision, the Court held the policy to be adequately limited after unhesitatingly crediting the University's pledge "that it would like nothing better than to find a race-neutral admissions formula," *id.* (quotation omitted), and stating that "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343, 123 S.Ct. 2325. Whether that vague assertion represented a "holding that racial discrimination in higher education admissions will be illegal in 25 years," *id.* at 351, 123 S.Ct. 2325 (Thomas, J., dissenting), or merely a "hope, but not [a] firm [ ] forecast, that over the next generation's span, progress . . . will make it safe to sunset affirmative action" in accordance with the ever-powerful "international understanding of the office of affirmative action," *id.* at 344 & 346, 123 S.Ct. 2325 (Ginsburg, J., concurring), we cannot say. But the School District's annual review of the racial tiebreaker and the at least theoretical availability of a judicially-enforceable end-point to the School District's racially discriminatory admissions program may well bring the policy into line with the durational limits required by strict scrutiny.

assignments."[33] Indeed, they argue, the use of racial classifications in their allegedly "non-zero sum" open choice high school admissions process "is narrowly tailored, as a matter of law."

For support, they unearth language from *Associated General Contractors of California v. San Francisco Unified School District*, a 1980 case in which we addressed a challenge to a School Board policy requiring that "bidders for construction contracts . . . must be minority general contractors or must utilize minority subcontractors for 25 [percent] in dollar volume of the contract work." 616 F.2d 1381, 1383 (9th Cir.1980). At the heart of their challenge, the contractors asserted that the quota violated California law requiring that all school contracts (except those involving *de minimis* expenditures) be awarded solely to "the lowest responsible bidder." *Id.* at 1385 (discussing and quoting Cal. Educ.Code § 39640). In defense, the School Board asserted not only that its policy was *permissible*, but that the policy was *required* in order to remedy past discrimination-and therefore that insofar as it would prevent maintenance of such a policy, California's low-bid law violated the Supremacy Clause, U.S. Const. art. VI, § 2. *Id.* at 1386.

We flatly rejected that argument, drawing a distinction between "reshuffle programs" and "stacked deck programs,"

33. Of course, the School District makes this bold assertion only when pressed by the full gravity of the Court's pronouncements. Where otherwise convenient, the School District argues that "the Michigan decisions do provide crucial guidance to this Court," and claims that beyond illuminating the contours of the compelling interest test, those decisions "also provide considerable assistance in applying the narrow tailoring element of strict scrutiny."

id. at 1386, and placing the Board's quota in the latter category of race-based policies. We explained the central difference between these two categories as follows: While reshuffle programs "neither give[ ] to nor withhold[ ] from anyone any benefits because of that person's group status, but rather ensure[ ] that everyone in every group enjoys the same rights in the same place," so-called stacked deck programs "specifically favor[ ] members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all." *Id.* In passing, we twice suggested that programs designed to desegregate schools are reshuffle programs, *see id.* at 1386 & 1387, and elsewhere stated "that 'stacked deck' programs trench on Fourteenth Amendment values in ways that 'reshuffle' programs do not." *Id.* at 1387.

Ultimately, we held simply that although "the state has an affirmative constitutional duty to use 'reshuffle' programs to cure the effects of past or present *de jure* segregation . . . , there is no constitutional duty to engage in 'stacked deck' affirmative action." *Id.* Of particular import, we never reached the Fourteenth Amendment question squarely implicated by this case: whether notwithstanding the absence of an obligation to adopt such a policy, its implementation of such a program was permissible. Instead, given our resolution of an underlying state law question, our assessment of that law's constitutionality, and the fact that the Court recently had granted certiorari in *Fullilove*, we *explicitly* declined to "test the policy itself against the standard of the United States Constitution." *Id.* at 1391.

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Although it might seem obvious that a case cannot control the resolution of an issue it expressly declined to confront, the School District nonetheless grasps at *Associated General's* furtive references to school desegregation.[34] It argues that its racial classification is equivalent to the programs arguably favored by *Associated General*, and thus (reading that opinion at the highest level of generality) not violative of the Fourteenth Amendment.[35] We disagree.

Let us begin with two interrelated observations. First, *Associated General* addressed neither school desegregation nor the use of race in educational admissions; it assessed a mechanical set-aside governing distribution of construction projects. Second, *Associated General* did not even purport to apply strict scrutiny to a particular racial classification (or, more specifically, an actual school desegregation program). Its Fourteenth Amendment analysis assessed only whether the use of certain types of classifications is required to remediate prior official race discrimination-not whether constitutional limits circumscribe the use of such

34. To its credit, the dissent declines to follow the School District's lead.

35. We emphasize the District's over-reading of *Associated General* at the outset because-even beyond our *express* failure to address the issue joined here-it is not clear that *Associated General implicitly* suggested that reshuffle programs do not violate the Constitution. There is a world of difference between stating that "'stacked deck' programs trench on Fourteenth Amendment values *in ways that* 'reshuffle' programs do not," *Associated General*, 616 F.2d at 1387 (emphasis added), and holding that reshuffle programs designed to integrate schools cannot violate the Fourteenth Amendment at all.

classifications for non-remedial purposes, what those limits might be, and how they might affect the constitutionality of a particular policy.

Two conclusions follow. First, *Associated General* sheds no light on how we are to apply the narrow tailoring analysis rendered applicable to *any* racial classification by *Croson*, 488 U.S. at 493-95, 109 S.Ct. 706, *Adarand*, 515 U.S. at 224, 115 S.Ct. 2097, *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325, and *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411,[36] to the tiebreaker at issue in this case. And second, *Associated General's* assertions about the nature of school desegregation programs are-however one defines the term-*obiter dicta*.[37]

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36. *See also Shaw v. Hunt*, 517 U.S. 899, 904-05, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Miller*, 515 U.S. at 904, 115 S.Ct. 2475; *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

37. *Compare Miller v. Gammie*, 335 F.3d 889, 902 (9th Cir.2003) (en banc) (Tashima, J., concurring) (citing *Best Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir.2002), for the proposition that "dictum [i]s a statement made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.") (citations and quotations omitted) *with Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir.2003) (per curiam) ("'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'") (*quoting United States v. Johnson*, 256 F.3d 895, 914 (9th Cir.2001) (Kozinski, J., concurring)) *with United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir.1988)

(Cont'd)

Appendix B

Insofar as the School District argues that because reshuffle programs may be less invidious than stacked deck programs and thus, as a constitutional matter, somehow not subject to the stringencies of the narrow tailoring requirement-a proposition never embraced by this court[38] and

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(Posner, J.) (suggesting that rather than define *dicta*, courts should look to the "reasons there are against . . . giving weight to a passage found in a previous opinion[:] One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential. . . . A closely related reason is that the passage was not an integral part of the earlier opinion-it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion. . . . Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation. All these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement. . . .").

38. In our intervening 24 years of jurisprudence addressing the use of race, we have referenced *Associated General* just once for the proposition that reshuffles are less suspect than stacked deck programs, and we did so only in discussing the interaction between a state ballot initiative and the Court's political structure doctrine, *see Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982); *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), rather than in applying the narrow tailoring requirement of the Fourteenth Amendment to a particular race-based program. *Coalition*, 122 F.3d at 707 n. 16. To the limited extent that *Coalition's* passing reference to school desegregation

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certainly not one reconcilable with binding Supreme Court holdings[39]-it misapprehends the concept of narrow tailoring. The contours of narrow tailoring do not turn on the importance of the interest supporting the government's use of a racial classification (though such analysis, whatever its shape, surely is triggered by use of a racial classification in pursuit of a compelling interest), nor on the asserted degree of the intrusion that a particular use of race might render. The personal right to equal treatment is implicated any time the government employs race for any reason. *See Coalition*, 122 F.3d at 702 (quoting *Adarand*, 515 U.S. at 230, 115 S.Ct. 2097).

(Cont'd)
programs might bear on the Equal Protection inquiry at issue here, we note simply that-among other crucial differences-the desegregation program referred to in the *Coalition* footnote "bas[ed] student assignments on attendance zones rather than on race," *Seattle*, 458 U.S. at 461, 102 S.Ct. 3187, and thus would not even be necessarily subject to the tailoring analysis we must apply here (and to the use of all racial classifications). *Adarand*, 515 U.S. at 224, 115 S.Ct. 2097; *Croson*, 488 U.S. at 493-95, 109 S.Ct. 706.

39. We recognize that more than 30 years ago the Court-in what is well recognized as *dicta*, *see, e.g.*, *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 750 (2d Cir.2000)-suggested that school districts may pursue a measure of racial balance independent of constitutional requirements to remedy past discrimination. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In contrast to the dissent, which recognizes that "these statements must be considered in the light of the Court's later decisions. . . establish[ing] that the government may not act in furtherance of racial balance without a compelling nonracial reason" but then declines to so read those statements, we do not feel free to privilege a gratuitous statement over the Court's clear holdings.

Instead, narrow tailoring analysis focuses only upon the fit between the ends in pursuit of which a racial classification is used, the particular way in which the policy at issue uses that racial classification, and the baseline legal limits placed upon the use of racial classifications-and it does so because any policy using race, for any reason and in any way, is "inherently suspect," "by [its] very nature odious to a free people," and simply "too pernicious to permit any but the most exact connection between justification and classification." *Adarand*, 515 U.S. at 223, 115 S.Ct. 2097 (quoting *Fullilove*, 448 U.S. at 523, 100 S.Ct. 2758 (Stewart, J., dissenting)); *id.* at 224, 115 S.Ct. 2097 (quoting *Hirabayashi*, 320 U.S. at 100, 63 S.Ct. 1375); *id.* 229, 115 S.Ct. 2097 (quoting *Fullilove*, 448 U.S. at 537, 100 S.Ct. 2758 (Stevens, J., dissenting)). It is for those reasons that, as Judge Selya-in typically perspicuous fashion-has observed, a court applying strict scrutiny must focus on "whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details." *Wessmann*, 160 F.3d at 798. Under strict scrutiny, no racial classification, no matter its context and no matter the nature or strength of the interest it serves, is exempt from the strictures of narrow tailoring, and this program plainly fails to satisfy them.

Finally, even if were we to accept that *Associated General* bears on this case, we observe that the School District's racial tiebreaker operates as a "stacked deck" program. Quite simply, it "specifically favors members of [some races] in the competition with members of [other races]

for benefits that the state can give to some citizens but not to all," *Associated General*, 616 F.2d at 1386-here, of course, admission to particular high schools.[40] As noted earlier, operation of the tiebreaker at Franklin causes whites to be admitted preferentially because they *are* white, and its operation at Ballard causes non-whites to be admitted preferentially simply because they *are not* white. To the argument that this program is "non-selective," we can only express bewilderment: The racial tiebreaker is used to determine student admissions solely to oversubscribed- *and thus necessarily selective*-schools.[41] Whatever *Associated*

40. Although *Associated General* describes stacked deck programs as "specifically favor[ing] *members of minorities* in the competition with *members of the majority*,"*616 F.2d at 1386*, it is beyond any serious dispute that such a distinction is utterly bereft of force in the post- *Croson*, post- *Adarand* world-where our focus is on the use of racial classifications *per se*, rather than upon the race of those who are benefitted or burdened by the operation of the classification. *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325; *Gratz*, 539 U.S. at 270, 123 S.Ct. 2411; *Adarand*, 515 U.S. at 224, 115 S.Ct. 2097; *Croson*, 488 U.S. at 493-95, 109 S.Ct. 706; *see also Shaw II*, 517 U.S. at 904-05, 116 S.Ct. 1894; *Miller*, 515 U.S. at 904, 115 S.Ct. 2475; *Shaw I*, 509 U.S. at 643, 113 S.Ct. 2816; Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 434 ("The critical holding of *Adarand* was that all laws employing a racial classification must undergo strict scrutiny, with no exception made on the basis of allegedly benign intentions. The classification itself is the constitutionally suspect feature of the law, the feature that triggers heightened scrutiny, regardless of which race happens to be burdened, and regardless of the particular burdens imposed.").

41. Indeed, the oversubscribed Seattle high schools to which children of the Parents members seek admittance are "selective" in

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General says about school desegregation programs, this is not the programmatic design that we had in mind.

Having accepted the School District's invocation of *Grutter* and *Gratz* in support of the proposition that racial and ethnic diversity can generate constitutionally compelling benefits within the educational setting itself and our society at large, we ultimately are compelled to reject the School District's strained efforts both to eat its cake and have it too. Its racial tiebreaker-though enlisted in the service of admittedly worthy ends-plainly fails the narrow tailoring component of the Constitution's strict scrutiny test.[42]

IV

Approaching this case from a fundamentally divergent perspective, the dissent offers a spirited and thoughtful defense of the School District's racial tiebreaker. Although we have responded to a few of its more specific criticisms, we see little to gain from the kind of note-by-note combat so

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precisely the same way as the University of Michigan: Due to the quality of the education they provide, the availability of special academic programs, and their location, more students than can be accommodated seek admission-and the District must therefore determine which applicants will be offered a coveted seat in a more desirable school. We simply disagree with the dissent's assertion, *post* at 1012-1013, that school quality exists in some objective vacuum distinct from market assessment.

42. We further hold that the School District's racial tiebreaker violates Title VI. *See Gratz*, 539 U.S. at 275 & n. 23, 123 S.Ct. 2411.

pervasive in modern judicial opinions. Rather, given the thoroughness with which we have articulated our respective analyses of the racial tiebreaker, we think there is more to gain by elucidating the core foundations of our dispute. We perceive three significant points of departure, and address each in turn.

A

The dissent repeatedly suggests that we should simply defer to the School District's decision to employ its tiebreaker in pursuing racial proportionality. *Post* at 993-94 n. 13, 995-96, 996-98 & 1007-1008. Indeed, the dissent gradually shifts from noting how "compelling" the District's policy is to focusing on its "reasonable[ness]," "legitima[cy]," and "permissi [bility]." *Id.* at 993-94 n. 13, 1005, 1008, 1008, 1009, 1013. We believe such unfettered deference is inconsistent with our obligations under strict scrutiny-and, contrary to the dissent, that it is especially inconsistent with constitutional demands in this context. Because *Grutter's* decision to accord universities a measure of deference occasioned a sharp debate over this issue, careful attention to its rationale for doing so is in order.

1

After identifying the Law School's "compelling interest in attaining a diverse student body," *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325, the Court promptly stated:

> The Law School's *educational judgment* that such diversity is essential to its educational mission is

> one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex *educational judgments* in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's *academic decisions*. . . .

Id. at 328-30, 123 S.Ct. 2325 (citations omitted) (emphases added).

In developing its rejection of the dissenting Justices' charge that such deference was indeed at odds with strict scrutiny, *see id.* at 379-86, 123 S.Ct. 2325 (Rehnquist, J., dissenting); *id.* at 387-94, 123 S.Ct. 2325 (Kennedy, J., dissenting); *id.* at 362-67, 123 S.Ct. 2325 (Thomas, J., dissenting), the Court began by reiterating its "long recogni[tion] that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.* at 330, 123 S.Ct. 2325. It then expressly sanctioned Justice Powell's statement in *Bakke* that, given these unique First Amendment interests, universities have a "right to select those students who will contribute the most to the 'robust exchange of ideas.'" *Id.* (quoting *Bakke*, 438 U.S. at 313, 98 S.Ct. 2733 (Powell, J., concurring)).

Deference thus was due to the University not because its interest was "simply to assure within its student body some specified percentage of a particular group merely because of

its race or ethnic origin . . . but [because it] was defined by reference to the educational benefits that [such] diversity is designed to produce," *id.* (quotations and citations omitted)-and of crucial importance, because *those* "educational benefits" were not merely socially compelling, *id.* at 330-33, 123 S.Ct. 2325, but fundamentally *internal* to the university's "academic" mission. *Id.* at 328, 123 S.Ct. 2325. The Court emphasized: "The benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (quotations and citations omitted).

2

Beyond the fact that *Grutter* deferred only to the Law School's identification of its interests as compelling-and, contrary to the dissent here, not to its tailoring analysis-neither of *Grutter's* grounds for affording deference is present here. First, secondary schools do not occupy the same "special niche in our constitutional tradition" as higher education, and the Court has never held they possess a similar First Amendment right of academic freedom. Indeed, while the Court has been willing to afford secondary schools some limited leeway to enable them to meet their most basic need (preserving the orderly school environment necessary to enable academic learning[43]), the Court has never suggested

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43. *See generally* Abigail Thernstrom, *Where Did All the Order Go? School Discipline and the Law*, *in* Diane Ravitch, ed., *Brookings Papers on Education Policy: 1999*, 299-314 (1999).

that public secondary schools have a constitutional right to select their student body, much less that such a right entails selecting students based solely on their race-a power that not even universities enjoy, despite *their* uniquely privileged status. Quite in contrast, the Court has repeatedly condemned racial balancing, held that a State's creation of a system of compulsory public education endows *students* (not schools) with a constitutionally-protected interest, and has pointedly reminded school authorities that "'[t]he Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures-Boards of Education not excepted.'" *Goss*, 419 U.S. at 574, 95 S.Ct. 729 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)); *see also Grutter*, 539 U.S. at 330 & 336, 123 S.Ct. 2325.

Second, the principal benefits the School District seeks through its pursuit of racial proportionality are neither internal to the school environment nor within the special expertise of school administrators. For although the District's asserted interests in the educational and societal benefits derivable from diverse schools mirror those embraced by *Grutter*, *see supra* at 960-65, the dissent quite properly notes that the School District has an appreciably different focus. Rather than primarily seeking the *internal academic benefits* of diversity, the District's chief focus is on the *broader social benefits* diversity can stimulate. *See post* at 991-92.

We do not believe this divergent emphasis changes the nature of the District's interests; they remain compelling, and thus can justify an appropriately limited use of race. *See supra* Sections III.B.3 & III.C.3. But it does affect the

degree to which the District can claim deference. With regard to its secondary pursuit of diversity's internal academic benefits, we believe that while limited deference to educational institutions arguably could be due when they pursue core goals, such deference is entirely unwarranted when they court tangential ones. Having proceeded from the premise that the internal academic benefits of diversity are secondary to the District's socialization mission, it is at best curious that the dissent nonetheless maintains we should defer to the District's particularly crude use of a most disfavored classification in their pursuit.[44]

Far more important, we see a crucial difference between a school's pursuit of the internal academic benefits of diversity and its pursuit of diversity's external social benefits. For although the former manifest within the District's schoolhouses, and thus are susceptible to ready appraisal exclusively by education policymakers, the "democratic" benefits attributable to classroom diversity are diffuse, manifest long after students leave the classroom, do so in contexts not subject to the exclusive oversight of teachers, and cannot be measured with skills possessed uniquely by educators. That is to say: While it is clear that educators are uniquely positioned to gauge how classroom discussions respond to shifts in classroom racial composition, they are not similarly well-positioned to assess how marginal changes in schoolhouse racial demographics affect how students interact with each other years after they leave school for the "real world." And to the limited extent they may have such

44. We offer another basis for declining to defer to the District's pursuit of racial proportionality in seeking diversity's benefits, *infra* at 984 n. 49.

insight, the record does not suggest the District *ever* sought to appraise the long-term social effects of engineering proportional demographic changes in connection with its design of the tiebreaker.

B

Beyond the dissent's unfettered deference to the School District-a constitutional departure that we think undermines its supposed "strict scrutiny" of the tiebreaker-one of its most striking features is its lack of focus on the data. For if it is true that a picture is worth a thousand words, there are times when statistics give Proust a run for his money.[45]

1

The dissent simply seems to assume that absent the racial tiebreaker, Seattle's public high schools would be "racially concentrated, or racially isolated," and thus unable to attain diversity's benefits. *Post* at 993; *id.* at 1001-1002, 1009-1010, 1011 & n. 39. The record belies its assumption. Uncontroverted data produced by the School District during this litigation and contained in the record indicate that, in the absence of the racial tiebreaker, 2000-2001 school year enrollments at Seattle's public schools would have been as follows:

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45. *See* Marcel Proust, *À la recherche du temps perdu* [*Remembrance of Things Past*, or *In Search of Lost Time*] (1913-27).

Table 1: 2000-2001 Demographics

Without Racial Tiebreaker

School	Asian	Black	Latino	Native American	White	Non-White Overall
Ballard	14.7%	8.9%	9.6%	4.3%	62.5%	37.5%
Chief Sealth	27%	18%	21%	3%	32%	68%
Cleveland	43%	35%	10%	2%	10%	90%
Franklin	39.3%	34.6%	5.5%	0.8%	19.8%	80.2%
Garfield	12.5%	34.7%	4.4%	1.1%	47.2%	52.8%
Ingraham	38%	19%	9%	4%	30%	70%
Nathan Hale	17.4%	12.1%	6.4%	3.3%	60.8%	39.2%
Rainier Beach	30%	52%	8%	2%	8%	92%
Roosevelt	26.8%	6.7%	8.7%	3.0%	54.8%	45.2%
W. Seattle	26%	15%	10%	2%	46%	54%

Appendix B

Far from revealing "racially concentrated" or "racially isolated" student bodies, these figures demonstrate that each of the District's schools would enroll a vibrant array of students *without considering race at all.*[46] (Only by indulging the fallacious proposition that inter-ethnic diversity is irrelevant to the District's putative democratic mission could one conclude otherwise.)[47] It is thus particularly hard to credit the dissent's assumption that the tiebreaker is necessary to

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46. The same picture emerges from 2002-03 school year data contained in the School District's "Individual School Profiles" report, submitted as an appendix to the supplemental amicus brief of Pacific Legal Foundation et al.

47. Indeed, as one dissenting Board member noted in deposition testimony, "What we've done is we've defined ourself [*sic*] a problem by lumping all minorities together. . . . [O]ne of the things that the [D]istrict still hasn't come to grips with is that minorities are quite different among and between themselves and sometimes have vast differences." It is in part for this reason that the history of racial conflict in this country is not one limited to tensions among whites and non-whites. *See, e.g.*, Bill Ong Hing, *In the Interest of Racial Harmony*, 47 Stan. L.Rev. 901 (1995) (discussing tensions between the African-American and Asian communities). Inter-ethnic tensions persist even within diverse high schools. *See, e.g.*, Carl Campanile, *Now It's a Federal Case*, N.Y. Post, Aug. 23, 2001, at 2 (detailing a series of incidents at Brooklyn's Lafayette High School between African-American students and Asians); Elissa Gootman, *City to Help Curb Harassment Of Asian Students at High School*, N.Y. Times, June 2, 2004, at B9 (describing a recent consent decree designed to address these incidents, and noting the diversity of Lafayette's student population). Surely helping resolve these tensions is just as crucial to the District's mission as addressing tensions between whites and non-whites.

the District's fulfillment of its diversity oriented goals.[48] &[49]

Such an assumption becomes even less tenable in light of the tiebreaker's limited effect where it does operate. Indeed, the data demonstrate that the tiebreaker produces only the most trivial annual changes in school demography.

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48. While we do not mean to suggest that better-calibrated pure racial balancing would be constitutionally permissible, it bears note that the tiebreaker does not even operate to correct "racial imbalance" at the two schools where the white/non-white student ratio is most out of line with the District demographics (Rainier Beach and Cleveland). *Supra* at 955-56 n. 6; *post* at 993-94 n. 13. Taking the dissent on its own terms, it is thus that much harder to credit its claim that the tiebreaker is adequately designed to address the "flip side" of the District's interest-ensuring that "'[n]o student ··· attend a racially concentrated school.' " *Post* at 993-94 (alteration in original); *see also id.* at 1011.

49. We further note that these numbers show the District's high schools would enroll a proportion of underrepresented minority students already recognized by the Court as adequate to spur the internal educational benefits of diversity. This fact further counsels against deferring to the District's decision to use a racial classification here. *Cf. Grutter*, 539 U.S. at 320, 123 S.Ct. 2325 ("[A] race-blind admissions system would have a very dramatic, negative effect on underrepresented minority admissions. . . . [U]nderrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.") (quotation omitted).

Table 2: 2000-2001 Demographic Impact of the Racial Tiebreaker

School	Asian	Black	Native Latino	Native American	White
Ballard	+ 2.8%	+ 1.9%	+ 1.1%	+ 0.3%	- 6.1%
Franklin	- 2.5%	- 2.4%	- 0.3%	- 0.1%	+ 5.3%
Nathan Hale	+ 0.5%	+ 1.2%	+ 0.6%	+ 0.1%	- 2.4%
Roosevelt	+ 2.3%	+ 1.0%	+ 0.2%	+ 0.1%	- 3.7%

Appendix B

Given enrollment totals at these schools, the tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools-about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes substantially further its interests,[50] much less that they outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin.[51]

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50. Asked whether she was aware of any studies suggesting that the District's goals were better achieved by shifting enrollment proportions by "three, four, or five percentage points," Board Member Schaad-Lamphere said she was not aware of any such evidence and that she "ha[d] not used research to base [her] decisions on."

51. It is not even clear that the tiebreaker itself is fully responsible for this trivial shuffling of students. The dissent, post at 10011 n. 40, observes that among students who were denied admission to any school of their choice by operation of the tiebreaker, some 35 percent were assigned to the same school they would have been assigned to had the tiebreaker not operated. As a consequence, the numbers in Table 3 likely overestimate substantially the demographic impact of the tiebreaker-and thus cast further doubt over its usefulness.

In turn, the fact that these changes are so marginal dovetails our holding that the District was obligated to seriously consider whether alternative arrangements could have met its goals. *See supra* at 970-75. Race-neutral alternatives not only may have produced equivalent levels of diversity in the District's schools, but far greater diversity than the tiebreaker.

Beyond casting serious doubt on the School District's need to use its racial tiebreaker, the numbers undermine the dissent's assessment of its efficacy-and yet again, on the dissent's own terms. For present purposes, we take at face value the dissent's identification of the District's primary interest as ensuring "that children learn to interact with peers of different races," *post* at 1001; *see also post* at 992-93, and accept *arguendo* its claim that "when a racially integrated school system is the goal . . . , there is no more effective means than a consideration of race to achieve a solution." *Post* at 1001, 1010. We credit for the moment its assessment that it is appropriate to "link [ ] the integration tiebreaker to the racial demographic of the District's population [because] the District is trying to teach its students to be effective participants *in the racially diverse environment in which they exist*," *post* at 1010-1011 (emphasis added), and we ignore both that the tiebreaker does not operate where it would be most needed to meet the dissent's articulation of the District's goals *and* that its demographic impact is trivial where it does operate. Yet even then, it is clear to us that the School District's racial tiebreaker falls well short.

Because the tiebreaker relies on a crude white/non-white metric of racial identity, representation of particular minorities varies widely within the schools where it operates (indeed, throughout the school system). Once again, consider data produced by the School District and contained in the record:

Table 3: 2000-2001 Demographics with Racial Tiebreaker

School	Asian	Black	Native Latino	Native American	Non-White White	Overall
Ballard	17.5%	10.8%	10.7%	4.6%	56.4%	43.6%
Franklin	36.8%	32.3%	5.2%	0.7%	25.1%	74.9%
Nathan Hale	17.9%	13.3%	7%	3.4%	58.4%	41.6%
Roosevelt	29.1%	7.7%	8.9%	3.1%	51.1%	48.9%

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Given that the demographic impact of the tiebreaker during the 2000-2001 school year was merely to shift overall white/ non-white student ratios by at most 6.1 percent at the schools where it operated, *supra* at 984, Table 2, these are truly enormous variations. The range in representation of Asians at the tiebreaker schools (19.3 percent, as Asian representation ranged from just 17.5 percent of students at Ballard to a whopping 36.8 percent of students at Franklin) was more than 3 times the size of the tiebreaker's *maximum* annual impact on overall white/non-white ratios; and the range in black representation (24.6 percent, ranging from 32.3 percent of students at Franklin to just 7.7 percent of students at Roosevelt) was more than 4 times the *maximum* annual white/non-white impact.[52] & [53]

These representational variances cut to the core of the dissent's defense of the tiebreaker's design. For if the tiebreaker's goal is (as the dissent characterizes it) to assure every student the opportunity to interact with the right ratio of different-looking peers in order to prepare them for life in

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52. Likewise, while Latinos accounted for less than one-tenth of the students at these schools, and Native Americans less than one-twentieth of students, representational ranges for those student populations were, respectively, almost as large as the maximum effect and more than half the size of the maximum effect.

53. The point holds even using the dissent's preferred metric (ninth grade-rather than overall-enrollment changes): Individual inter-ethnic disparities either trump or rival overall white/non-white enrollment variances attributable to the tiebreaker's operation, and the schools continue to enroll widely diverse ninth grade classes-a point essentially conceded by the dissent. *Post* at 1006-1007 & 1011.

our diverse society, the program plainly fails huge numbers of students. Consider: Roughly 600 black students at Garfield during the 2000-2001 school year were deprived of the chance to interact with a sufficient number of Asian students (12.5 percent of Garfield students versus 27.5 percent of students in the school population at large); more than 100 Latino students at Roosevelt were denied a chance to interact with an adequate number of African-American peers (7.1 percent of Roosevelt students versus 22.8 percent of the student population at large); 600 Asian students at Franklin were unable adequately to interact with Native American students (0.8 percent of Franklin students versus 2.5 percent of the student population at large). And thousands of other students left their schools not having been *inadequately exposed* to interaction with certain racial minorities, but rather having been *overexposed* to them-and thus likewise *not* having been readied "to be effective participants in the racially diverse environment in which they exist." *Cf. post* at 1010-1011. Even taking at face value the dissent's embrace of racial balancing, these data indicate the tiebreaker does not even rationally further the impermissible ends the dissent trumpets.

C

The final major point of departure between our opinion and the dissent is perhaps the most significant: We believe the dissent errs in failing to recognize the injury rendered by the tiebreaker. We have already explained that the individual right to equal treatment is implicated any time government uses race to apportion benefits or burdens. Here, in determining where some 300 students will attend high school, the School District crudely approximates the shades of their

skin and assigns them to schools accordingly. Nonetheless, the dissent surprisingly suggests that not one of those students suffers a legally cognizable injury (whether such an injury can be justified or not) because the constitutional prohibitions against determinative racial preferences and quotas do not apply to secondary education, and because each of those students will get a basic education anyway. We address these claims in turn.

1

The dissent suggests that the constitutional prohibitions against determinative racial preferences and quotas do not apply within the secondary educational context because secondary schools do not employ race as a proxy for merit, and thus pose little risk of stigmatizing or stereotyping those they putatively benefit. *Post* at 999-1002. Its analysis cannot be squared with precedent.

The Court has long prohibited the use of outright quotas in contexts where merit and qualification are-as the dissent asserts them to be here-completely irrelevant. Thus, *Croson* rejected Richmond's racial quota for construction contracts on grounds that the "quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507, 109 S.Ct. 706. Of course, when dealing with contracting, the only "qualification" or indicum of "merit" is submission of a low bid. *Croson's* constitutional objection to the City's use of a quota was thus not that it threatened to stigmatize minorities: It was that quota-driven racial balancing is flatly at odds with the Fourteenth Amendment's " 'ultimate goal' of 'eliminat[ing] entirely from

governmental decisionmaking such irrelevant factors as a human being's race." *Id.* at 500, 109 S.Ct. 706 (quoting *Wygant*, 476 U.S. at 320, 106 S.Ct. 1842 (Stevens, J., dissenting)) (alteration in original).

Likewise, courts have rejected the use of race-based quotas in legislative redistricting. As the Fifth Circuit has put the point, "[D]istricters are not bound-or allowed-to sacrifice traditional districting concerns to meeting quotas of diversity, just as they are not allowed to do so in order to meet quotas of racial concentration." *Chen v. City of Houston*, 206 F.3d 502, 511 (5th Cir.2000); *see also Easley v. Cromartie*, 532 U.S. 234, 241 & 257, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (recognizing that race may not be the predominant factor in legislative districting, and noting that an email referencing "racial balance" constituted evidence of such an "improper[ ]" use of race). But surely redistricting involves no "competition" or "consideration of merit," and of course "no stigma results from any particular [districting] assignment." *Cf. post* at 1000. At bottom, the problem with the imposition of a racial quota and the use of inflexibly mechanical racial preferences is not simply that they impermissibly conflate skin color with merit or qualification; it is that, more than any euphemistic "thumb on the scale," they breed deep-seated cross-racial resentment and do violence to the constitutional principle that "we are just one race here. It is American." *Adarand*, 515 U.S. at 239, 115 S.Ct. 2097 (Scalia, J., concurring).[54]

54. The dissent's assertion that the constitutional requirement of holistic review does not apply in this context fails for the same reason. *Grutter* and its progenitors require that one's race be (Cont'd)

Even more baffling is the dissent's claim that because the District ultimately assigns each student to a "quality" high school offering a "baseline . . . education," no applicant rejected on the basis of his or her race "suffers a constitutionally significant burden" from the tiebreaker's operation. *Post* at 1000-1001, 1012-1013.

We certainly agree with the dissent's observation that no student has a right to attend the school of his or her choice or to attend a school offering anything more than the standard education mandated by state law. *Post* at 1012-1013. What the dissent seems to overlook is that individuals likewise have no right to welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), *overruled on other grounds by Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), a tax exemption,

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considered only as one among many factors not because "holistic review . . . provides a closer fit with a university's interest in viewpoint diversity," *post* at 1000-01, but because any interest in race alone is unconstitutional: "Outright racial balancing . . . is patently unconstitutional. . . . Racial balance is not to be achieved for its own sake." *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (quoting *Freeman*, 503 U.S. at 494, 112 S.Ct. 1430, and citing *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733). Given such a clear-and oft-repeated-condemnation of the practice by the Supreme Court, it is hard seriously to credit the dissent's peculiar assertion that we misread the case law's *per se* ban on racial balancing. *See post* at 999-1000 n. 22.

Sherbert, 374 U.S. at 406, 83 S.Ct. 1790 (discussing *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)), or a public job, *Perry v. Sindermann*, 408 U.S. 593, 597-98, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Yet no one would seriously maintain that, as a result, states or localities could condition the distribution and extent of such benefits on the basis of race.[55]

The dissent's appeal to the rights/privileges distinction in this context is particularly ironic because it readily parallels arguments long ago repudiated in this context. Indeed, it quite unintentionally evokes the State of Missouri's argument that because it had no duty to supply legal education, and there was therefore no personal "right" to a legal education, no one could suffer a legally cognizable injury from the University of Missouri Law School's use of a racial classification in admissions. Yet as the Court explained in rejecting that claim, "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50, 59 S.Ct. 232, 83 L.Ed. 208 (1938).

Likewise, we think the issue here is not whether students have a right to attend the school of their choice, or one of significantly above-average quality. It is whether having made available a choice-based system of public education the

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55. Recall the undisputed fact that the gap in average SAT scores between students at Garfield and Cleveland is nearly 400 points. *See supra* at 953-54 n. 1.

District may use race to circumscribe parental choices in the way it has. The dissent's suggestion that it may do so because all are "*equally* subject" to such discrimination, *post* at 1012 (emphasis in original), cannot be correct: Across-the-board wrongs do not, as the dissent reasons, make a right.

D

Unfortunately, the dissent's thin scrutiny of the District's racial tiebreaker strays far from constitutional norms-and it inadvertently threatens to entrench a permanent regime of racial discrimination. For if public education's most compelling mission really is to prepare children to interact with those who look different by balancing each school's racial profile, then the Constitution's promise of equal justice will remain unfulfilled for the inestimable number of future generations during which race inevitably will be perceptible.

V

Because the School District's use of the racial tiebreaker violates the equal protection mandate of the Fourteenth Amendment, we REVERSE the decision of the District Court and REMAND with instructions to ENJOIN the School District from using the racial tiebreaker, as most recently constituted, in making future high school assignments.

Appendix B

GRABER, Circuit Judge, dissenting:

Fifty years after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), required the integration of public schools "with all deliberate speed," 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), segregated schools remain in many communities, often as a result of segregated housing patterns.[1] Seattle has been no exception to the struggle to achieve and maintain integrated schools. After decades of more coercive efforts to counteract the effects of segregated housing patterns, Seattle School District No. 1 ("the District") in 1998 adopted a high school assignment plan ("the Plan") to maximize school choices for students and their families while continuing to ensure that integrated public schools are available to all. I respectfully dissent from my colleagues' conclusion that the Plan is unconstitutional.[2] When understood in context, the Plan is narrowly tailored to serve a compelling governmental interest in ensuring that all students in Seattle's public high schools receive the educational benefits of an integrated learning environment.

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1. *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 4 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http:// www.civilrightsproject.harvard.edu/research/ reseg03/AreWeLosingtheDream.pdf., *cited in Gratz v. Bollinger, 539 U.S. 244, 299 n. 4, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)* (Ginsburg, J., dissenting).

2. I agree with the majority's conclusion that the case is not moot. Maj. op. at 957-60.

Appendix B

The Supreme Court of the United States has never decided a case involving the consideration of race in a voluntarily imposed school assignment program that is intended to promote integrated secondary schools. The Court's recent decisions regarding the consideration of race in selective admissions to institutions of higher learning do not control in the secondary-school context, but they provide several guiding principles. First, the Court in *Grutter v. Bollinger*, 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), clarified that remediation of past official or de jure discrimination is not the only permissible reason for a government to use racial classifications; one permissible reason for considering race is to achieve the educational benefits of diversity. Second, as the Court reminded us in *Grutter:*

> Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for c refully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

Id. at 327, 123 S.Ct. 2325.[3] Finally, the Court emphasized that "narrow tailoring" is a fact-based analysis, noting that the inquiry in *Grutter* had to be "calibrated to fit the distinct

3. In other words, strict scrutiny is a tool that we use to root out the improper prejudices and stereotypes that are the baseline concern of the Equal Protection Clause. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (stating that the aim of strict scrutiny is to determine "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

issues raised by the use of race to achieve student body diversity in public higher education." *Id.* at 334, 123 S.Ct. 2325.

In order to calibrate *our* inquiry to fit the distinct issues raised by the use of race as a factor in a school assignment program in a public school district, I believe it is necessary, first, to understand the governmental interests that the District is trying to further and, second, to employ a narrow-tailoring analysis that is appropriate to the secondary-school setting and to the process of assigning every student to a high school. Doing so leads me to conclude that the Plan is narrowly tailored to serve compelling governmental interests.[4]

I. *The District's interests in employing a race-conscious classification are compelling, but are not identical to those asserted in* Grutter *and Gratz v. Bollinger, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).*

As the majority rightly notes, "diversity" can be an amorphous concept. Maj. op. at 962. Indeed, the compelling interest that the Court recognized in *Grutter* is not "diversity" per se but, rather, promotion of the specific educational and societal benefits that flow *from* diversity. *See Grutter*, 539 U.S. at 329-30, 123 S.Ct. 2325 (noting that the law school's concept of critical mass must be "defined by reference to the

4. I agree with the majority that the rights afforded by Title VI are coextensive with those guaranteed by the Equal Protection Clause. Maj. op. at 956-57 n. 10, 959-60 n. 14. I therefore conclude that the Plan does not violate Title VI. *See Grutter, 539 U.S. at 343, 123 S.Ct. 2325* (concluding that the university's admissions policy did not violate Title VI).

educational benefits that diversity is designed to produce"). In evaluating the relevance of diversity to higher education, the Court focused principally on two benefits that a diverse student body provides: (1) the learning advantage of having diverse viewpoints represented in the "robust exchange of ideas" that is critical to the mission of higher education, *id.* at 329-30, 123 S.Ct. 2325; and (2) the greater societal legitimacy that institutions of higher learning enjoy by cultivating a cadre of national leaders who are representative of our country's diversity, *id.* at 331-33, 123 S.Ct. 2325. The Court also mentioned the role of diversity in challenging stereotypes. *Id.* at 330, 333, 123 S.Ct. 2325; *see also* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L.Rev. 113, 175-76 (2003) (observing that the diversity interest recognized in *Grutter* has "three important elements . . .: diversity is pedagogical and dialogic; it helps challenge stereotypes; and it helps legitimate the democratic mission of higher education" (footnotes omitted)). The Court explicitly deferred to the law school's "educational judgment that such diversity is essential to its educational mission." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

Because strict scrutiny requires us to evaluate the "fit" between the government's means and its ends, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), it is critical to identify precisely the governmental interests-the ends-to which the government's use of race must be fitted. *See United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (noting that, in order to determine whether an order was narrowly

tailored, "we must examine the purposes the order was intended to serve"). In other words, before we assume that the District shares the interest identified in *Grutter*, we must consider carefully the interests the District asserts and then determine whether the District's interests are compelling.

The District's interests are connected. First, the District seeks the affirmative educational benefits that flow from racial diversity (which, as I will discuss below, are different in K-12 education than in higher education). Second, and related, is the District's interest in preventing its school assignment system from replicating Seattle's segregated housing pattern;[5] that is, the District has an interest in ensuring that each one of its students has access to the educational benefits of an integrated school environment.

A. *The District has a compelling interest in the educational benefits of racial diversity in secondary education.*

The District has established that racial diversity produces compelling educational benefits in secondary education.[6]

5. A map created by the District's planners shows a striking pattern: Between 70 and 100 percent of the students who live in the various elementary-school "reference areas" in the south and southeast areas of the city are nonwhite, compared with 20 to 50 percent in the northern half of the city.

6. The Plan under consideration here involves only high school assignments. However, because the District adopted the high school assignment Plan as part of a process of redesigning its school (Cont'd)

Because the educational benefits that the District seeks are materially different from those sought by the university in *Grutter*, however, the type of diversity required to produce those benefits is also different.

The university sought to further the academic and professional development of its students through the "livelier, more spirited, and simply more enlightening and interesting" classroom discussions that result when students have "the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (internal quotation marks omitted). Aggrieved applicants accused the university of using race as an impermissible proxy for particular viewpoints and perspectives, but the Court disagreed, holding that racial diversity added to the mix of diversity factors by representing the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Id.* at 333, 123 S.Ct. 2325.

Although secondary-school educators share the university's academic goals to some extent,[7] achieving

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assignment system for all grade levels, the District understood its interest in diversity to span the K-12 system. Accordingly, when I discuss the details of "the Plan," I refer only to high school assignments; my discussion of the District's compelling governmental interests, however, encompasses the K-12 context as a whole.

7. The Board explained that "[d]iversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process." Maj. op. at 961. The District's
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diversity of viewpoint and background is not the sole-or even the primary-reason for promoting an integrated secondary-school environment. *Cf. Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F.Supp.2d 328, 381 n. 90 (D.Mass.2003) ("The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships.").[8]

The District begins its own explanation of its interest in classroom diversity by noting the socialization and citizenship advantages of racially diverse schools. *See* maj. op. at 960-61 (quoting the School Board's "Statement Reaffirming [the] Diversity Rationale"). Indeed, courts have recognized that the fundamental goal of K-12 education is to prepare children to be good citizens-to socialize children

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expert noted that, in racially diverse schools, "both white and minority students experienced improved critical thinking skills-the ability to both understand and challenge views which are different from their own."

8. *Comfort* involved an elementary-school assignment plan, in which the school district allowed students to transfer from their assigned neighborhood schools only if the transfer would further the district's desegregation goals. 283 F.Supp.2d at 347-48. I agree with the court's statement in *Comfort* that, "[w]hile a high school's mission is surely more academic-oriented than that of the elementary schools, citizenship training is still part and parcel of the enterprise." *Id.* at 375 n. 84.

and to inculcate civic values.[9] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (stating that the inculcation of civic values is "truly the work of the schools" (internal quotation marks omitted)); *Plyler v. Doe*, 457 U.S. 202, 221-23, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (noting that public education perpetuates the political system and the economic and social advancement of citizens); *Ambach v. Norwick*, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (observing that public schools transmit to children "the values on which our society rests," including "fundamental values necessary to the maintenance of a democratic political system"); *Brown*, 347 U.S. at 493, 74 S.Ct. 686 ("[Education] is required in the performance of our most basic public responsibilities. . . .

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9. The District's expert explained the civic benefits of diverse schools this way:

> The research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more democratic and inclusive experience for all citizens. More specifically, these benefits include more cross-race friendliness, reduction in prejudicial attitudes and increases in cross-race understanding of cultural differences. Recent research has identified the *critical role of early school experiences* in breaking down racial and cultural stereotypes. The research further shows that *only a desegregated* and diverse *school can offer such opportunities and benefits*. The research further supports the proposition that these benefits are long lasting.

(Emphasis added.)

It is the very foundation of good citizenship."); *see also Comfort*, 283 F.Supp.2d at 381 n. 90 ("[A]t the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction.").[10] In Washington, such civic training is mandated by the state constitution: "Our constitution is unique in placing paramount value on education for citizenship." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wash.2d 660, 72 P.3d 151, 158 (Wash.2003).

In our society, in which "race unfortunately still matters," *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325, the "goals of teaching tolerance and cooperation among the races[ ] [and] of molding values free of racial prejudice . . . are integral to the mission of *public schools*," *Parents Involved*, 72 P.3d at 162.[11] Achieving those teaching goals requires the presence

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10. The Supreme Court in *Grutter* also recognized the importance of higher education in "preparing students for work and citizenship." 539 U.S. at 331, 123 S.Ct. 2325. For the Court in *Grutter*, this point related less to the academic benefits of diversity and more to the Court's second rationale: ensuring open access to selective institutions of higher education in order to maintain their democratic legitimacy. *See id.* at 331-33, 123 S.Ct. 2325.

11. Although it has not decided whether the state constitution requires integrated schools, the Supreme Court of Washington has written:

> [I]f it is determined that in a contemporary setting de facto segregated schools cannot provide children with the educational opportunities necessary to equip them for their

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of a racially diverse student body. *See Comfort*, 283 F.Supp.2d at 376-77 ("If the compelling goal of the Plan is to train citizens to function in a multiracial world, actual intergroup racial contact is essential."). The District has emphasized the importance of interaction with peers of other races in educating students for citizenship; school officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. Even Plaintiff's expert admitted that students are widely perceived to benefit from the information that they gain from increased contact with children of other races.[12] *See also Boston's Children First v. City of Boston*, 62 F.Supp.2d 247, 259 (D.Mass.1999) ("Diversity may well be more important at this stage than at any other-[because elementary school] is where first friendships are formed and important attitudes shaped. . . ."). As the United States Supreme Court has noted, this educational goal is relevant for the entire community:

> Attending an ethnically diverse school may help accomplish this goal by preparing minority

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> role as citizens, then the state constitution would most certainly mandate integrated schools.

Parents Involved, 72 P.3d at 162-63.

12. Academic research has shown that intergroup contact reduces prejudice and supports the values of citizenship. *See* Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes, 80 N.C. L.Rev. 923, 951-52 (2002)* (collecting academic research demonstrating that interpersonal interaction in desegregated schools reduces racial prejudice and stereotypes, improving students' citizenship values and their ability to succeed in a racially diverse society in their adult lives).

> children for citizenship in our pluralistic society while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982) (citations and internal quotation marks omitted).

The majority misperceives the distinction between the interest recognized in *Grutter* and the one that I would recognize here. *See* maj. op. at 982-83. The District's socialization and citizenship training is no more tangential or external to the educational experience of a secondary school than is academic training to the educational experience offered by a law school. The University of Michigan wanted to promote a stimulating academic environment so that its graduates would become accomplished and well-rounded members of the legal profession; the District wants to encourage integrated schools so that its graduates will become tolerant, productive, and well-adapted members of this racially diverse society. In both cases, although the benefits are external and long-term, the teaching occurs-and can be observed and evaluated-within the school environment.

In short, the District has a compelling interest in educating all students in a racially diverse learning environment, to educate them effectively to take their places in a racially diverse society.

Appendix B

B. *The District has a compelling interest in reducing racial isolation and ameliorating de facto segregation.*

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated, or racially isolated, schools. In particular, the District is concerned with making the educational benefits of an integrated school environment available to all its students. Thus, in addition to striving for better academic and social outcomes across the board, the District has been motivated by its belief that "[n]o student should be required to attend a racially concentrated school."[13] In other words, the Plan strives to ensure that patterns of residential segregation are not repeated as patterns of educational segregation that would be "determinative of a child's opportunity." *Comfort*, 283 F.Supp.2d at 384.

This "flip side" makes the District's interest different from any that could have been posited in *Grutter*. Universities (like most other entities that select a few from among a pool of competitive applicants) are not, in any direct sense,

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13. Seattle's Cleveland and Rainier Beach High Schools, located in the minority-dominated southeast area of the city, enrolled 90 and 92 percent nonwhite students, respectively, in the 2000-2001 school year. The District's view that these schools are racially concentrated is, at the very least, reasonable, if not compelled by the evidence. *See* 34 C.F.R. § 280.4(b) (defining "[m]inority group isolation, in reference to a school, [as] a condition in which minority group children constitute more than 50 percent of the enrollment of the school"); *see also infra* pp. 1005 (discussing the majority's assertion that "inter-ethnic diversity" obviates the District's need for pro-diversity and pro-integration policies, maj. op. at 983-84).

responsible for the welfare of the entire universe of their applicants. That is, so long as all applicants are treated fairly in the competition for access to the limited government benefit, a university may design a class of students that satisfies its academic objectives without worrying about the effect that its admissions decisions have on rejected applicants.[14] Public school districts, on the other hand, must consider not only the affirmative effect that a student's assignment to a particular school will have on the level of diversity in that school, but also the concomitant effect of that assignment on the entire school system.

As the district court did in this case,[15] several courts have conceived of a school district's voluntary reduction or prevention of de facto segregation as a compelling interest. *See Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir.2000) (holding that "a compelling interest *can* be found in a program that has as its object the reduction of racial isolation and what appears to be de facto segregation"),

14. There are at least two exceptions to this general proposition. First, public university systems can be ordered to desegregate to remedy the effects of past intentional or de jure segregation, as in *United States v. Fordice*, 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). Second, the Court in *Grutter* recognized that universities do exist in, and affect, the society as a whole and that they have a compelling interest in taking into account the effects of their admissions policies on that society. 539 U.S. at 332-33, 123 S.Ct. 2325.

15. The district court held that" [p]reventing the re-segregation of Seattle's schools is . . . a compelling interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224, 1237 (W.D.Wash.2001); *see also id.* at 1233-35.

superseded on other grounds as stated in Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n. 7 (2d Cir.2001); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 579 (2d Cir.1984) ("[W]e held that the Board's goal of ensuring the continuation of relatively integrated schools for the maximum number of students, even at the cost of limiting freedom of choice for some minority students, survived strict scrutiny as a matter of law.") (citing *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 717-20 (2d Cir.1979)); Comfort, 283 F.Supp.2d at 384-86 (holding that a school district had a compelling interest in ameliorating the effects of de facto residential segregation); *Hampton v. Jefferson County Bd. of Educ.*, 102 F.Supp.2d 358, 379 (W.D.Ky.2000) (noting that "voluntary maintenance of the desegregated school system should be considered a compelling state interest," such that a district may consider race in assigning students to comparable schools).

None of the school districts in the above-cited cases was subject to a court-ordered desegregation decree nor, with one exception, did the schools face an imminent threat of litigation to compel desegregation.[16] Like the Seattle School District, they may have been vulnerable to litigation in

16. The *Andrew Jackson* cases arose out of an action by minority students seeking compulsory desegregation, but the school district was held not to have engaged in intentional or de jure segregation and therefore could not be ordered to remedy the de facto racial imbalance that existed. 598 F.2d at 715. The court then addressed the question whether the district's voluntary plan itself violated equal protection, *id.* at 717, holding that it did not, *id.* at 718-19.

decades past,[17] but the districts' voluntary desegregation measures today would make it difficult to make the required showing that the districts *intended* to create segregated schools. *See, e.g., Comfort*, 283 F.Supp.2d at 390 (explaining that the district's vulnerability to litigation had been "headed off by the very Plan in contention here"). It is well established that school districts have no *obligation* to remedy de facto (as distinct from de jure) segregation. *Freeman v. Pitts*, 503 U.S. 467, 495, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Nevertheless, several courts have pointed out the irony of a conclusion that a measure that could be required to remedy segregation could not be adopted voluntarily to prevent segregation. *See, e.g., Comfort*, 283 F.Supp.2d at 384-85 ("It would make no sense if [school] officials were obliged to take responsibility for addressing these adverse consequences [of segregated schools] but at the same time were constitutionally barred from taking voluntary action aimed at nipping some of these effects in the bud."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d 1224, 1235 (W.D.Wash.2001) ("[I]t would defy logic for this court to find that the less intrusive programs of today violate the Equal Protection Clause while the more coercive programs of the 1970's did not."); *Hampton*, 102 F.Supp.2d at 379 ("It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.").

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17. As I will discuss below, the District voluntarily adopted its first mandatory desegregation plan in 1977, in order to forestall legal action by the NAACP and the ACLU, who alleged that the District had acted to further de facto segregation.

In essence, what these courts have recognized is that school districts have a prospective, even if not a remedial, interest in avoiding and ameliorating real, identifiable de facto racial segregation. Support for this conclusion comes from statements in the Supreme Court's school desegregation cases, which repeatedly refer to the voluntary integration of schools as sound educational policy within the discretion of local school officials. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (stating that school authorities "are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *Bustop, Inc. v. Bd. of Educ. of L.A.*, 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (Rehnquist, Circuit Justice 1978) (denying a request to stay implementation of a desegregation plan and noting that there was "very little doubt" that the Constitution at least *permitted* its implementation); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 242, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) (Powell, J., concurring in part and dissenting in part) ("School boards would, of course, be free to develop and initiate further plans to promote school desegregation. . . . Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."); *Seattle Sch. Dist.*, 458 U.S.

at 480, 487, 102 S.Ct. 3187 (reinstating the Seattle School District's authority to use mandatory busing to correct de facto segregation).

Of course, these statements must be considered in the light of the Court's later decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (holding that "outright racial balancing" did not constitute a permissible reason to establish a quota for awarding construction contracts); *Freeman*, 503 U.S. at 494, 112 S.Ct. 1430 (holding that, in the absence of a constitutional violation, the district *court* had no power to *order* "[r]acial balance . . . for its own sake"); and *Grutter*, 539 U.S. at 329-30, 123 S.Ct. 2325 (stating that the law school's concept of "critical mass" was permissible only because it was not "outright racial balancing," but rather was "defined by reference to . . . educational benefits"). Those decisions establish that the government may not act in furtherance of racial balance without a compelling nonracial reason. Unless and until the Supreme Court says otherwise, however, I would heed its repeated statements that the voluntary integration of public schools, in response to specific conditions of de facto segregation and in furtherance of legitimate educational policies, can be a constitutionally permissible interest.

In sum, I would hold that the District has a compelling interest in structuring its assignment policies to prevent a return to the era in which Seattle's undisputedly segregated housing pattern was the exclusive determinant of school assignments to neighborhood schools.

Appendix B

C. *Deference to administrators' expertise in education policy is warranted.*

In addition to signaling specifically its approval of voluntary measures to promote integrated schools, the Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy. *See generally* Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 Wm. & Mary L.Rev. 1691 (2004). Local control over public education has animated Supreme Court jurisprudence from the dawn to the apparent twilight of federal-court involvement in the desegregation of public schools. *See, e.g., Brown*, 349 U.S. at 299, 75 S.Ct. 753 (directing local school officials, with court oversight, to devise remedies for segregation in the light of "varied local school problems"); *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *Freeman*, 503 U.S. at 490, 112 S.Ct. 1430 ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'") (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977)). In the context of a challenge to a school-funding system, the Court was motivated, in part, by concerns about the judiciary's lack of competency in the area of educational policy. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (stating, in its rational-basis review of

a school-funding system, that "this case . . . involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels").[18] Thus, although I agree that public secondary schools do not have "a constitutional right to select their student body," maj. op. at 981-82,[19] they have been given considerable discretion to devise school assignment policies, even in the face of adjudicated constitutional violations.

The Supreme Court also has shown solicitude toward the educational objectives of public school administrators in balancing those educational objectives with students' First Amendment rights. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding that educators may censor student speech in school-sponsored forums for valid educational reasons and noting that "[t]his standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *see also Comfort*, 283 F.Supp.2d at 374 & n. 83 (citing Supreme

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18. The logical corollary to this concern about the judiciary's lack of competency is a recognition that public school educators are, in fact, trained in and qualified to assess educational policies and their outcomes.

19. Indeed, as I will argue below, a fundamental difference between the university and the public school settings is that public schools generally do not "select" their students at all. Rather, they are obliged to educate *all* students in the relevant district.

Court cases involving the balancing of schools' curricular needs against students' rights under the First, Fourth, and Eighth Amendments, as well as the Due Process Clause of the Fourteenth Amendment). This deference recognizes not merely a school's need to preserve order so as to promote pure "academic" learning, as the majority suggests, maj. op. at 982, but also to teach students that certain kinds of discourse are "wholly inconsistent with the 'fundamental values' of public school education," *Bethel Sch. Dist.*, 478 U.S. at 685-86, 106 S.Ct. 3159.

These Supreme Court decisions suggest that secondary schools, like universities, occupy a "special niche" in our constitutional tradition, albeit one that owes more to the values of federalism and to the public schools' broad educational mission than to a desire to safeguard academic freedom. For this reason, I would afford some deference to the District's judgment that integrated schools are essential to its educational mission and would extend to the District's identification of its core values a deference similar to that which the *Grutter* Court afforded the university. *See Grutter*, 539 U.S. at 328, 123 S.Ct. 2325; *cf. Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir.2003) (extending deference, pursuant to *Grutter*, to the "views of experts and Chicago police executives that affirmative action was warranted to enhance the operations" of the Chicago Police Department), *cert. denied*, 541 U.S. 1074, 124 S.Ct. 2426, 158 L.Ed.2d 984 (2004).

In sum, I am convinced by the record, as well as by deference to the District's expertise in educational policy, that the District's interests in obtaining the educational

benefits of diversity in secondary education and in ameliorating the de facto segregation caused by Seattle's segregated housing pattern are compelling as a matter of law.

II. *The District's Plan is narrowly tailored to achieve its compelling governmental interests.*

The narrow-tailoring inquiry is intended to "'smoke out' illegitimate uses of race" by ensuring that the government's classification is closely fitted to the compelling goals that it seeks to achieve. *Croson*, 488 U.S. at 493, 109 S.Ct. 706. As discussed above, the analysis must fit the context of the challenged governmental action. *Grutter*, 539 U.S. at 327, 333-34, 123 S.Ct. 2325. For example, the factors that the Court uses to assess narrow tailoring in the employment context, *Paradise*, 480 U.S. at 171, 107 S.Ct. 1053,[20] must be modified for use in the context of higher education. *See Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1252 (11th Cir.2001) ("We do think, however, that the

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20. In an oft-quoted sentence, the Court described the analysis as follows:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 480 U.S. at 171, 107 S.Ct. 1053.

Paradise factors should be adjusted slightly to take better account of the unique issues raised by the use of race to achieve diversity in university admissions."). Likewise, some of the factors used to assess programs related to employment or higher education are of doubtful relevance in the context of K-12 school assignment plans. *See Hampton*, 102 F.Supp.2d at 380 ("The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education. . . ."). We must consider which narrow-tailoring factors are appropriate to this context; our inquiry pivots not merely on the fact that race is used in a school plan, but how it is used, in what settings, for what purposes, whether it is race conscious or race preferential, whether it involves an examination school (or a college or law school) for which there are significant qualifications, or an elementary school, for which there are not, whether the use of race excludes or simply affects the distribution of a benefit. . . . *Boston's Children*, 62 F.Supp.2d at 259.

Because of the differences in setting, several of the narrow-tailoring factors employed by the Supreme Court in *Grutter* and *Gratz*-and by the majority in this case-have no logical relevance to the evaluation of secondary-school assignment plans like the District's. After fashioning an appropriately contextualized narrow-tailoring analysis, I will consider the Plan in its broader historical and factual context and conclude that the Plan satisfies strict scrutiny.

Appendix B

A. *Narrow-tailoring factors involving "holistic review" and "quotas" have no relevance in the context of assigning students to secondary schools.*

For two reasons, cases involving selective admissions to institutions of higher learning do not provide a proper "narrow tailoring" model for this case.[21] First, they involve situations in which a school grants or denies access to a limited government benefit based on the school's evaluation of a particular applicant's merit; using race as a proxy, or as a substitute, for merit in awarding this benefit raises problems of stereotyping and stigma that are absent from the District's Plan. Second, the institutions involved in those cases seek the "true diversity" befitting their advanced academic orientations; as I have discussed, the diversity interest in the K-12 context involves different educational benefits and, like the District's related interest in ameliorating de facto segregation, is more appropriately achieved through an explicit consideration of racial diversity.

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21. The same is true of selective admissions to special high school programs, as in *Wessmann v. Gittens*, 160 F.3d 790, 799-800 (1st Cir.1998) (employing a "true diversity" analysis in the context of *competitive* admissions to a prestigious examination high school); and *Hampton*, 102 F.Supp.2d at 380-81 (noting that admissions to *magnet* schools, unlike basic school assignments, have "vertical effects"). *See Brewer*, 212 F.3d at 752-53 (distinguishing *Wessmann* because it was a selective admissions case in which "true diversity" was the compelling interest). I disagree with the majority's reasoning that the District's plan is "necessarily selective" merely because some schools are oversubscribed or more popular. *See* maj. op. at 979-80. Under this logic, assignment between two first-grade classrooms in a single school-classrooms that are equivalent but for the popularity of the teacher-could be considered "selective."

Appendix B

1. *Where competition for a limited government resource is absent, rules about how competition may be conducted are irrelevant.*

In *Grutter*, the Supreme Court "define[d] the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs." *See Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. In the context of university admissions, where applicants compete for a limited number of spaces in a class, the Court focused its inquiry on what role race may play in judging an applicant's qualifications. The Court's underlying concern is for fair competition-to prevent race from being used as an outright substitute for merit in the competition for access to a limited government resource, in part because of the stigma that may attach. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Powell, J., concurring) (stating that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth"); *Croson*, 488 U.S. at 493, 109 S.Ct. 706 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see also Gratz*, 539 U.S. at 272-73, 123 S.Ct. 2411 (applying the narrow-tailoring inquiry to ensure that applicants of all races have the opportunity to prove their merit based on a broad range of criteria). In *Grutter*, the Court discussed two specific rules to ensure fair competition. 539 U.S. at 334, 123 S.Ct. 2325. The first prohibits "quotas," which insulate applicants from certain groups from competition with

applicants from other groups for some portion of the available slots.[22] *Id.* at 335, 123 S.Ct. 2325. The second rule prevents

22. I use the term "quota" here, as I believe the Court did in *Grutter*, 539 U.S. at 335, 123 S.Ct. 2325, to mean "a fixed number or percentage of minority group members who may be admitted into some activity or institution"-not to mean, more generally, "a proportional part." Webster's Third New Int'l Dictionary 1868 (unabridged ed.1993). Quotas, as I understand them, are not at issue here because no student is preferentially admitted to, or turned away from, the Seattle public high schools. Thus, the District does not run afoul of this aspect of the Court's narrow-tailoring analysis.

The majority seizes upon the more general sense of the word "quota"-as meaning "proportion"-and argues that "racial balancing" is per se unconstitutional. *See* maj. op. at 986-87. The cited cases do not support the majority's sweeping statements.

First, the Court in *Croson* held that a minority set aside was prohibited because the government could not prove that past discrimination provided a compelling reason for the program, not because "racial balancing" as a mechanism for achieving a compelling state interest would necessarily be inconsistent with the Fourteenth Amendment. Second, states are prohibited from making race the *predominant* factor in drawing legislative districts because of the impermissibility of racial stereotyping (that is, using race as a proxy for political characteristics), not because any consideration of a district's racial proportions is per se improper. *See Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality); *see also id.* at 958, 116 S.Ct. 1941 (noting that redistricting may be performed with "consciousness of race"). These cases do not establish that the District is per se prohibited from linking its assignment practices to the racial make-up of its student enrollment, especially where student choices, not fixed proportions, are the principal determinant of student assignments. I simply cannot

(Cont'd)

race from being used as a mechanical proxy for merit by requiring individualized consideration of the merit of each applicant, across a broad range of factors (of which race may be but one). *Id.* at 336-37, 123 S.Ct. 2325.

Neither of those requirements, which concern how universities are permitted to evaluate merit, is relevant in a situation where there is absolutely no competition or consideration of merit at issue. *All* high school students must and will be placed in a Seattle public school. The students' relative merit is irrelevant. There are no special qualifications for assignment to any school, so no stigma results from any particular school assignment.[23] The dangers of substituting racial preference for fair, merit- or worth-based competition are absent here. Justice Powell recognized this very fact in his landmark opinion *Bakke*, which reasoned that the use of racial classifications to desegregate schools was fundamentally different from the selective admissions context because, in the school assignment context, "white students [were not] deprived of an equal opportunity for education." *Bakke*, 438 U.S. at 301 n. 39, 98 S.Ct. 2733.

(Cont'd)

agree that we have reached the majority's promised land: Our governments, schools, and courts may yet be forced, by compelling reasons, to acknowledge that race exists in America. *See Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (noting that, in our society, "race unfortunately still matters").

23. Students are selected by merit into at least one District *program* (which carries a corresponding school assignment), but not into any District *school*. Those who test in the top 2 percent of their grade levels are offered admission to the Advanced Placement Program for academically talented students. Selection for that program is not at issue in this case.

Justice Powell's comment suggests an even more fundamental reason why a careful, holistic, individualized consideration of an applicant's worth is not necessary here: No student is being excluded from the government resource at issue-a free public education.[24] In the assignment process, all students are accommodated with the same baseline high school education.[25] As I will discuss in more depth below, differences among the high schools may be relevant to our consideration of the "burdens" that the Plan imposes, but perceived or actual differences in academic quality do not transform the District's assignment process into a competition

24. Of course, I agree with the majority that the government must offer its benefits on equal terms, regardless of race. *See* maj. op. at 987-89. But the governmental benefit at issue here is *a high school education*, not free student choice about school assignments. Indeed, the District could devise a permissible assignment system that is devoid of student choice among high schools. Nonetheless, the District has opted to offer some choices to families-not as an abstract benefit, but rather as an educational policy that interacts with and is necessarily constrained by other District policies, including the District's diversity and integration goals.

25. Justice Powell noted:

> Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

Bakke, 438 U.S. at 301 n. 39, 98 S.Ct. 2733.

for access to a limited government resource. This is especially true where it is clear that every student can enroll in at least one of Seattle's oversubscribed, "quality" high schools.

2. *Where "true diversity" is not the goal, consideration of a broad range of diversity factors is unnecessary.*

Another rationale for the Court's requirement of holistic review is that it provides a closer fit with a university's interest in viewpoint diversity. *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325. The Court held that it was impermissible to presume that race would correlate with viewpoint, perspective, or background; rather, the university must *evaluate* each applicant's viewpoint, perspective, and background. *Id.* at 338-39, 123 S.Ct. 2325.

The danger that race would be used to "fill[] stereotyped 'viewpoint' niches," *Comfort*, 283 F.Supp.2d at 379, is not present here. The diversity interest in K-12 education is much simpler: that children learn to interact with peers of different races. That interest requires that there *be* children of different races in the classroom. Rather than relying on stereotypes, intergroup contact has the opposite effect; it inhibits the formation of stereotypes by teaching children that "all people are different no matter what their color or ethnic background." *Id.* In other words, the District's focus on racial diversity is not a presumption that students of the same race will share common viewpoints; the presence of students of different races is meant to break down, rather than to further, racial stereotypes by giving students an opportunity to learn that race does not signal an individual's viewpoint, perspective, or background.

Moreover, the holistic review necessary to achieve "true diversity" is of even less relevance to the District's interest in preventing and ameliorating de facto racial segregation. As the Second Circuit has said:

> If reducing racial isolation is-standing alone-a constitutionally permissible goal, as we have held it is . . . , then there is no more effective means of achieving that goal than to base decisions on race. . . . [T]he cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored only address the efficacy of employing strictly racial classifications to achieve "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim . . . is precisely to ameliorate *racial* isolation in the participating districts.

Brewer, 212 F.3d at 752-53 (citations omitted). In other words, when the District's compelling interest is in racial diversity, it makes little sense to ask it instead to evaluate a student's musical talent, athletic prowess, or eligibility for a free lunch.[26]

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26. The majority's view is that diversity is an all-or-nothing proposition and that it is improper to try to achieve racial diversity without simultaneously trying to achieve every other conceivable type of diversity (e.g., socioeconomic, religious, or linguistic). *See* maj. op. at 971-72. I disagree. The District's interest is in the socialization benefits that come from racial diversity in particular. The narrow tailoring inquiry is not concerned with how a *different* compelling interest might lead to similar benefits, but rather asks whether race-neutral means are effective in achieving the race-related compelling interest at issue.

Appendix B

B. *Viewed in its historical and factual context, the District's Plan satisfies an appropriate narrow-tailoring test.*

Except for rejecting the narrow-tailoring factors peculiar to situations of competition and "true diversity," I have no disagreement with the majority's identification of the remaining narrow-tailoring factors. As I will discuss, I conclude that the Plan satisfies the narrow-tailoring test. But first, in order to facilitate an accurate narrow-tailoring inquiry, I believe it is necessary to supplement the majority's statement of facts by placing the District's adoption of the Plan in a broader factual context.

1. *The broader context of desegregation efforts and the Board's decision to adopt the Plan.*

The increase in Seattle's minority population after World War II was concentrated first in the central, then in the southeast, area of the city.[27] Because school assignments were made strictly on the basis of neighborhood, schools in the central and southeast areas reflected that population concentration. In 1962, the central area's Garfield High School reported 64 percent minority enrollment (it accommodated 75 percent of all black students), and six of

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27. The history that follows comes principally from two documents in the district court record. One is a paper entitled, "The History of Desegregation in Seattle Public Schools, 1954-1981," which was prepared by the District's desegregation planners. The other is the "Findings and Conclusions" adopted by the Board in support of the current Plan.

the central area elementary schools had at least 75 percent minority enrollment.[28] Meanwhile, the eight high schools serving other major areas of the city remained more than 95 percent white.

In the 1960's, the District responded to this imbalance in various ways. It granted the central area principals' request for special financial assistance. It responded to racial tensions by experimenting with exchange programs, in which a handful of students switched high schools for several weeks. And in 1963, the District implemented a voluntary racial transfer program, through which a student could transfer to any school with available space, if the transfer would improve the racial balance at the receiving school. Although this program had some positive results, it did not reduce the racial imbalance significantly.

In the 1970's, the District stepped up its efforts. It adopted a plan to desegregate central-area middle schools by requesting volunteers to transfer between minority- and majority-dominated neighborhood schools and ordering mandatory transfers when the numbers of volunteers were insufficient. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities, and eliminating the "special transfers" that had allowed white students to leave the Garfield area. In addition, for the 1977-78 school year, the

28. South and southeast area high schools Franklin and Cleveland would experience similar enrollment changes in the 1960's and the 1970's, with minority enrollment at Franklin reaching 78 percent in 1977.

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District instituted a magnet-school program to promote desegregation. According to the District's history:

> While it appeared evident that the addition of magnet programs would not in itself desegregate the Seattle schools, there was supportive evidence that voluntary strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

By the 1977-78 school year, Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 75 percent, and Garfield 64 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment, with one school (Lincoln) at 37 percent. *See Seattle Sch. Dist.*, 458 U.S. at 461, 102 S.Ct. 3187 (noting that the racial imbalance in Seattle's schools had increased between the 1970-71 and 1977-78 school years).

In the spring of 1977, the NAACP filed a complaint with the Office of Civil Rights, alleging that Seattle's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the ACLU, threatened to file an action in court if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop a desegregation plan, the Office of Civil Rights concomitantly agreed to delay its investigation, and the ACLU agreed to delay filing a lawsuit. *See Seattle Sch. Dist.*, 458 U.S. at 460 n. 2, 102 S.Ct. 3187 (describing this threat of litigation).

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During the summer of 1977, the District and community representatives reviewed five model plans. Ultimately, the District incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Seattle Plan." The Seattle Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve racial balance. Mandatory high school assignments were linked to elementary-school assignments, although various voluntary transfer options were available. With the Seattle Plan, Seattle became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Seattle students and the Seattle School District.

"History of Desegregation" at 36-37. An initiative was passed immediately to block implementation of the Seattle Plan, but the initiative ultimately was declared unconstitutional by the United States Supreme Court. *Seattle Sch. Dist.*, 458 U.S. at 470, 102 S.Ct. 3187 (holding that the initiative violated equal protection).

The Seattle Plan apparently furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways.[29] In 1988, the District

29. For example, the District's History of Desegregation reports that the Seattle Plan was extremely confusing, required mandatory busing of non-white students in disproportionate numbers, made facilities and enrollment planning difficult, and contributed to "white flight" from the city schools.

abandoned the Seattle Plan and adopted a new plan that it referred to as "Controlled Choice." Under the Controlled Choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Seattle's housing patterns, the District's planners explained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near the student's home, but others were in "racially and culturally different neighborhoods." Although roughly 70 percent of students received their first choices, the Controlled Choice plan still resulted in mandatory busing for 16 percent of the District's students.

In the mid-1990's, District staff were directed to devise a new plan for *all* grade levels to simplify assignments, reduce costs, and increase community satisfaction, among other things; the guiding factors were to be choice, diversity, and predictability. Staff developed four basic options, including the then-existing Controlled Choice plan, a regional choice plan, a neighborhood assignment plan with provision for voluntary, integration-positive transfers, and an open choice plan.

Board members testified that they considered all the options, as they related to the District's educational goals-with special emphasis, at the secondary-school level, on the goals of choice and diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because it was seen to increase parental involvement in the schools and promote

improvements in quality through a marketplace model. The District sought to maintain its commitment to integrated education by establishing diversity goals, but moving away from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970's and 1980's. The Board adopted the current, open choice Plan for the 1998-99 school year.

The Plan now under review permits students to rank their choices among the District's 10 high schools. The District has sought to make each of the 10 schools unique, with programs that attempt to respond to the continually changing needs of students and their parents.[30] Only when oversubscription results from families' choices-as, of course, it has-does the District become involved in the assignment process. Assignments to oversubscribed schools proceed by way of a series of tiebreakers: first, students with a sibling attending the selected school are assigned; second, *if* but only if the school deviates from the District's proportion of white and minority students by more than a specified percentage,[31] students who bring that school closer to the ratio are assigned; third, students are assigned in order of the distance from their

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30. Indeed, the District implemented the school assignment Plan as part of a comprehensive plan to improve and equalize the attractiveness of all the high schools, which included a weighted funding formula, a facilities plan, and a new teacher contract that would make teacher transfers easier.

31. Originally, schools that deviated by more than 10 percent were considered "imbalanced." For the 2000-2001 school year, the trigger was increased to 15 percent, softening the effect of the tiebreaker.

homes to the school.[32] The first and third tiebreakers seek to further the District's goal of parental involvement, and the second is directed toward the District's diversity goal. Students not assigned to one of their chosen schools are assigned to the closest school with space available; naturally, students who list more choices are less likely to receive one of these "mandatory" assignments.

Having examined the District's interests and the specifics of the Plan in its historical context, I will turn next to a consideration of whether the Plan is narrowly tailored to serve the compelling governmental interests that I have identified.

2. *The District's Plan is narrowly tailored.*

A narrow-tailoring analysis requires consideration of three traditional groups of factors: (1) the necessity for the action and the efficacy of alternative, race-neutral remedies; (2) the extent to which the action is proportional to the District's interests (particularly, whether it is of limited duration and is flexible, in relation to its objective); and (3) the relative weight of any burden on third parties. *See Paradise*, 480 U.S. at 171, 107 S.Ct. 1053; *see also Comfort*, 283 F.Supp.2d at 371-73. As I stated above, the purpose of this inquiry is to "'smoke out' illegitimate uses of race" by ensuring that the government's means are closely fitted to its ends. *Croson*, 488 U.S. at 493, 109 S.Ct. 706.

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32. A fourth tiebreaker, a random lottery, is seldom used because distance is calculated to 1/100th of a mile.

Appendix B

(a) *The Plan achieves the District's diversity goals more effectively than any workable race-neutral alternative.*

(i) *Need for the integration tiebreaker*

The integration tiebreaker allows the District to make students' and parents' choices among high schools the primary feature of its educational plan,[33] while discouraging a return to enrollment patterns based on Seattle's racially segregated housing pattern. When the District moved from its Controlled Choice plan to the current, open choice Plan, it predicted that families would tend to choose schools close to their homes. Indeed, this feature was seen as a positive way to increase parental involvement. However, unfettered choice-especially with tiebreakers based on neighborhood or distance from a school-raised the risk that Seattle's high school enrollment would begin to reflect its segregated housing patterns. The District's 2000-01 enrollment data showed that, of the students living in the southern half of Seattle, only 23 percent are white (6,247 out of 27,377 students), as compared with 64 percent of the students living in the northern half of the city (12,571 out of 19,555 students).

It is de facto residential segregation across this white/nonwhite axis that the District has battled historically and that it sought to prevent by making the integration tiebreaker a part of its open choice Plan. Although I have no doubt that

33. "Today choice is a popular way to reform American education. . . ." Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 Tul. L.Rev. 563, 564 (2001).

other forms of race-based tension exist, *see* maj. op. at 983-84 n. 47, the District reasonably placed its focus here. The District has consistently faced a pattern in which its white students live predominately in the northern half of the city (in 2000-2001, 66.8 percent of the District's white students lived in the northern half of the city) and its students of color-in *each* of the three largest categories that the District tracks[34]-live predominately in the southern half of the city. In 2000-2001, 74.2 percent of the District's Asian students, 83.6 percent of its Black students, and 65 percent of its Hispanic students lived in the southern half of the city:

34. Native American students are by far the smallest group and are the only group spread evenly between the two halves of the city.

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2000-01 Enrollment By Geographic Area

Geographic Area	Asian	Black	Hispanic	White
North	2,879	1,778	1,693	12,571
South	8,269	9,054	3,145	6,247
Total	11,148	10,832	4,838	18,818
Percentage of Students South	74.2%	83.6%	65.0%	33.2%

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Moreover, Seattle's peculiar geography makes its northern neighborhoods and schools distant from its southern neighborhoods and schools. In these circumstances, the District permissibly could prioritize white/nonwhite, primarily north/ south, movement. This white/nonwhite focus also is consistent with the history of public school integration measures in this country, as reflected in a current federal regulation defining "[m]inority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school," without distinguishing among the various categories included within the definition of "[m]inority group." 34 C.F.R. § 280.4(b).

To discourage choices that would perpetuate this north-south division between the district's white and nonwhite populations, the District gave priority to choices that would counter it and create north-south movement within the District. In the 2000-01 school year, the integration tiebreaker operated in four high schools (that is, four high schools were oversubscribed and deviated by more than 15 percent from the ratio of white to nonwhite students District-wide). Although the integration tiebreaker was a limited measure, in contrast to the District's previous efforts, it did serve to alter the imbalance in the schools in which it operated.

The majority's contrary view is based on a skewed presentation of the enrollment statistics. Figures reflecting the tiebreaker's total effect on a school's enrollment, such as those cited in the majority opinion, *see* maj. op. at 984 ("Table 2"), 985 ("Table 3"), 985 (citing a maximum shift of 6.1 percent in the white/nonwhite ratio), artificially minimize the tiebreaker's effect by failing to recognize that students

enter the ninth grade in much greater numbers than they transfer to other schools after the ninth grade. The following statistics submitted by the District, which portray directly the effect of the tiebreaker on the make-up of the ninth grade classes at the four affected schools, illustrate the function of the tiebreaker far more accurately:

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2000-01 Change in Percentages of Students of Color in Ninth Grade Classes

School	Without Integration Tiebreaker	With Integration Tiebreaker	Percent Change
Franklin	79.2	59.5	- 19.7
Nathan Hale	30.5	40.6	+ 10.1
Ballard	33.0	54.2	+ 21.2
Roosevelt	41.1	55.3	+ 14.2

In other words, the majority's references to a 6.1 percent maximum shift do not tell the whole story.

Still, without the integration tiebreaker, the freshman classes at some of the affected north-end schools may well have been sufficiently diverse to promote interaction across the white/nonwhite axis and to prevent the tokenization of nonwhite students. *See* maj. op. at 984 n. 49. However, without the integration tiebreaker, the Plan would have operated to prevent students of color who lived in the south end of Seattle from attending those schools because of the schools' distance from south-end neighborhoods. The tiebreaker furthered the District's goal of giving south-end students of color the opportunity to opt out of attending the more racially concentrated schools in their neighborhoods, if they so desired.

Certainly, the integration tiebreaker does not attempt to achieve perfect adherence to the District-wide ratios in each of the District's high schools. Except by encouraging an optout, the tiebreaker does not directly alter the racial make-up of schools that are not oversubscribed, even that of the south-end schools that diverge widely from District-wide proportions. *See supra* note 13. I do not, however, view the Plan's underinclusiveness as a fatal flaw.

Indeed, I find it peculiar that the majority's rebuttal makes so much of the failure of the District's Plan to achieve perfect racial balance. To be sure, in strict scrutiny review, especially in the First Amendment context, a law's underinclusiveness can be a sign that the enacting authority was not in fact motivated by its stated objectives. *See*

Republican Party of Minn. v. White, 536 U.S. 765, 780, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (noting that underinclusiveness impairs the credibility of the government's rationale for restricting speech) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994)). Apparently, in order for the majority to find that a race-conscious means is necessary to achieve the District's stated goals, the means would have to produce perfect adherence to the District's racial make-up-which, in Seattle's circumstances, only aggressive districting, forced busing, and more intrusive racial classifications could do. However, requiring that the chosen means achieve perfect balance would make strict scrutiny impossible to satisfy, because the burden caused by the Plan-the third element of the narrow-tailoring inquiry-would be enormous. That is why, in contexts more relevant to this case, such as employment, courts have found that the modesty-*i.e.*, the underinclusiveness-of government action is a point *in favor* of a conclusion that the action was narrowly tailored. *See, e.g.*, *Cotter v. City of Boston*, 323 F.3d 160, 171 (1st Cir.) ("The necessity for relief was great, but the means chosen by the Department were modest-only three African-American officers were promoted out of rank-indicating narrow tailoring."), *cert. denied*, 540 U.S. 825, 124 S.Ct. 179, 157 L.Ed.2d 47 (2003).

Because strict scrutiny is not meant to be "fatal in fact," *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325, I would hold that the District's modest measures, which were enacted to decrease the intrusiveness and burden of its assignment policy, do not cause its Plan to become unnecessary or the District's motivations to become suspect. And, the Plan

furthers the District's goals better than any workable race-neutral alternative.

(ii) *Race-neutral alternatives*

In *Grutter*, the Court explained that narrow tailoring "require[s] serious, good faith consideration of *workable* race-neutral alternatives *that will achieve the diversity the university seeks.*" 539 U.S. at 339, 123 S.Ct. 2325 (emphasis added). On the other hand, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[35] *Id.* Furthermore, the Court made clear that the university was not required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission. *Id.* at 340, 123 S.Ct. 2325. Implicit in the Court's analysis was a measure of deference toward the university's identification of those values. *See id.* at 328, 340, 123 S.Ct. 2325 (affording deference to the university's judgment that diversity and "academic selectivity" were important to its educational mission). By affording deference to the university's identification of its core educational values in this context, the Court simply recognized that whether a race-neutral measure is truly an alternative in the first place depends on whether that measure is consistent with an institution's core values.

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35. Indeed, later in the opinion, the Court noted that universities in states with laws against "racial preferences" were experimenting with "a wide variety of alternative approaches." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. Yet the Court did not require the university to have analyzed fully and rejected each of these alternatives; instead, it noted that universities in states without such laws should monitor and "draw on *the most promising aspects* of these race-neutral alternatives as they develop." *Id.* (emphasis added).

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The majority faults the District for failing to consider seriously three specific race-neutral measures. Maj. op. at 970-975. One of the majority's suggestions-that the District measure and assign students according to their "true diversity," maj. op. at 971-72-cannot properly be considered an "alternative," because it is not directed toward achieving the District's interest in a racially integrated learning environment. *See supra* pp. 1001. Furthermore, it is clear from the record that the school board *has* discussed the use of other diversity measures, including poverty, as a tiebreaker. Although the majority correctly points out that there has been no formal study of that proposal by District staff, Board members' testimony reveals two legitimate reasons why the majority of the Board rejected the use of poverty measures to reach its goal of racial diversity: one, it is insulting to minorities and often inaccurate to assume that the two populations are coextensive; and, two, implementation would be thwarted by high school students' reluctance to reveal their socioeconomic status to their peers.

The majority also asserts that the District should have considered more formally a proposal developed by the Urban League (which, incidentally, did not eliminate the integration tiebreaker, but merely demoted it). Maj. op. at 973-75. The majority quotes at length from the colorful and often emotional testimony of one Board member, who clearly was not impressed by the proposal. But there was other testimony from other Board members suggesting that the Board was aware of, and informally considered, the Urban League's proposal. Board member Schaad-Lamphere testified that she remembers reading the Urban League's plan and considered it to be similar to other regional assignment plans being

proposed at the same time; she testified that she weighed it as she did other community input. Furthermore, the testimony of Board member Nielsen is consistent with Superintendent Olchefske's understanding that regional plans, including the Urban League's, had been disfavored by the Board because of the high value the District placed on choice among the different academic offerings at the various high schools. In other words, when all the testimony in the record is examined, it is clear that the Urban League's plan was in fact considered and that it was rejected for legitimate educational reasons.[36]

The majority concludes that such informal consideration is inadequate and that we should evaluate the District's consideration of race-neutral alternatives using the same rigorous evidentiary standard that we use to evaluate whether a local government has proved that past discrimination justified its enactment of a remedial minority set-aside program. Maj. op. at 972 (citing cases that elucidate the latter standard). To the contrary, our cases on set-aside programs plainly employ different standards to these different analyses-

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36. The majority also notes the Urban League's suggestion that the District improve and better market its specialty programs, especially at racially concentrated schools. In fact, the District demonstrated that it *is* striving to improve its programming in a manner intended to make all schools equally attractive, thereby reducing or eliminating its dependence on the integration tiebreaker; it has installed new principals, constructed new buildings, undertaken major renovations, introduced an International Baccalaureate program, and introduced an information technology program linked with community colleges, among other things. Similar steps taken at Ballard and Nathan Hale High Schools led to their recent turn-arounds in popularity.

with a more permissive view toward the analysis of race-neutral alternatives. *Compare Coral Constr. Co. v. King County*, 941 F.2d 910, 916-22 (9th Cir.1991) (discussing, within its "compelling government interest" analysis, the high burden of demonstrating actual discrimination by the county), *with id.* at 923 (noting, under the race-neutral alternatives prong of the narrow-tailoring analysis, that "some degree of practicality is subsumed in the exhaustion requirement" and that exhaustion of every possible alternative is *not* required); *see also Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1416-17 (9th Cir.1991) (citing *Coral*). Under the relevant standard, the District adequately considered the alternatives.

Finally, the majority would require the District to "earnestly appraise []" a random, citywide lottery for high school assignments. Maj. op. at 970 (emphasis omitted). In view of the District's clear commitment to educational choice among high schools, and in view of its desire to provide students with an opportunity to attend school closer to home, the majority's suggestion flatly contradicts the *Grutter* Court's approach to narrow tailoring:

> The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system". . . . But [this] alternative[ ] would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.
>
> . . .

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> . . . We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

539 U.S. at 340, 123 S.Ct. 2325. The university, in other words, was not required to "earnestly appraise[ ]," maj. op. at 970 (emphasis omitted), a lottery system. The majority is incorrect in its conclusion that the District must do so, despite the harm that a lottery would do to the goals of choice and parental involvement that lie at the heart of its educational mission.[37]

It is a closer question whether the District's goals could be met by using a pure lottery *tiebreaker*-that is, a lottery to determine which of the students who had *chosen* a particular school would be enrolled there. This format would allow the District to retain its emphasis on choice and would cause unhappiness more randomly. However, as Superintendent Olchefske explained, District patterns suggested that more people would choose schools close to home, thus raising the

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37. The majority interprets *Grutter* to demand that every school consider a pure lottery unless, but *only* unless, such a lottery would sacrifice the academic quality or diversity of the student body. *See* maj. op. at 971. This narrow reading does not fit a context, like this one, in which the school's mission is not to fashion an academically exceptional student body. Instead, the more appropriate principle to draw from *Grutter* is that schools need not consider alternatives that would do violence to the values central to their particular educational missions-here, choice and parental involvement.

justifiable concern that the pool of students choosing a particular school would be skewed in favor of the demographic of the surrounding residential area. Indeed, when the District adopted the Plan, it could not predict exactly how much harm open choice would do to the racial diversity of its schools. A lottery, in the face of this uncertainty, would have left the District without a safety net for its diversity goals and, moreover, would have prevented the District from furthering the policy goals reflected in its sibling and proximity tiebreakers.

Over the long history of its efforts to achieve integrated schools, the District has experimented with many alternatives, including magnet and other special-interest programs, which it continues to employ, and race-conscious districting.[38] But when a racially integrated school system is the goal (or racial isolation is the problem), there is no more effective means than a consideration of race to achieve a solution. Even Plaintiff's expert conceded that, "if you don't consider race, it may not be possible to offer an integrated option to students. . . . [I]f you want to guarantee it you have to consider race." As Superintendent Olchefske stated, "when diversity, meaning racial diversity, is part of the educational environment we wanted to create, I think our view was you took that issue head on and used-you used race as part of the

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38. We have held that a local government's continuing efforts to combine race-neutral measures with a minority set-aside program are "one factor suggesting that [a set-aside] plan is narrowly tailored." *Coral*, 941 F.2d at 923; *Associated Gen. Contractors*, 950 F.2d at 1417 (citing *Coral*). *See supra* pp. 1002-1003, 1004 & n. 30, 1008-1009 n. 36 (discussing the District's many race-neutral efforts to promote integrated schools).

structures you developed." The logic of this point is sound: When race is a principal element of the government's compelling interest, then race-neutral alternatives seldom will be equally efficient. *Cf. Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1066 (9th Cir.1999) (upholding, as narrowly tailored, a research elementary school's admissions policy that explicitly considered race in pursuit of a racially balanced research sample). Of course, race-conscious remedies still must be proportional to the government's interest.

(b) *The Plan satisfies requirements of proportionality, flexibility, and limited duration.*

The District's plan is proportional to its interests and is sufficiently flexible and time-limited to meet the requirements of narrow tailoring.

(i) *Proportionality*

To determine whether the means adopted are proportional to the government's interest, courts have considered the "relationship between the numerical relief ordered and the percentage of nonwhites in the relevant [school population]." *Paradise*, 480 U.S. at 179, 107 S.Ct. 1053; *see Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir.1999) (per curiam) (applying *Paradise's* proportionality analysis to K-12 student assignment plans); *Comfort*, 283 F.Supp.2d at 372 (same); *see also Brewer*, 212 F.3d at 756-57 (Miner, C.J., dissenting) (same).

The principal question here is whether linking the integration tiebreaker to the racial demographic of the

District's population-rather than, for instance, that of the city of Seattle-overshoots the District's goals. Specifically, Plaintiff suggests that, even when they are considered "out of balance" by the District (i.e., when they deviate from the 60/40 ratio by more than 15 percent and thus enroll less than 45 percent or more than 75 percent nonwhite students), Seattle's oversubscribed schools are sufficiently racially diverse to achieve the District's goals.

I disagree that the District's means significantly overshoot its goals. First, the District is trying to teach its students to be effective participants in the racially diverse environment in which they exist. Superintendent Olchefske noted that Seattle's school-age demographic is significantly more racially diverse than the demographic for its population as a whole. ("There [are] a lot of elderly white people in this town," he noted.) And he stated that the District has no regular access to data on the racial make-up of Seattle's private school students.

Second, even if the racial mix at *some* of the oversubscribed high schools would be sufficiently diverse for the District to achieve its goals[39] in those schools without the integration tiebreaker, this fact would not account for the effect of the integration tiebreaker on the overall school system. A clear objective of the School Board was that "no child should be required to attend a racially concentrated school." Removing the integration tiebreaker would mean that non-white students living in the southern area of the

39. To reiterate, in this context the District's relevant goals are for regular intergroup contact to occur and for students not to feel isolated or tokenized.

city, where neighborhoods and schools are more racially concentrated, would not have an opportunity for access to the more diverse schools in the northern part of the city, simply because of where they live. Giving them this access furthers the District's diversity goals.

Furthermore, the fact that a particular oversubscribed high school would draw a sufficiently diverse population in a given year without the integration tiebreaker does not guarantee that it would continue to do so. As I discussed above, open choice puts school assignment in the hands of the students; a tiebreaker tied to the District's racial demographic is a natural way for the District to retain a safety net.

(ii) *Flexibility*

The District also has shown that its Plan is flexible in the short term and that its approach has been flexible over the long term. The District no longer forces white students south, nor nonwhite students north. For this reason, racial concentration has increased in some schools. But the District's response has been measured. Responsive to community concerns and its own educational goals, the District has abandoned its complicated and mandatory systems for integrating its schools. Instead, it has developed a system that gives south-end non-white students an opportunity to leave racially concentrated schools (if they wish to) and promotes integrated schools across the district, while preserving the choice that it considers so critical to parental involvement. Mandatory assignments are kept to a

minimum,[40] and waivers are permitted for various reasons. The District's consistent movement from coercive to voluntary integration measures lends credence to its argument that it is working, through improvements to its programs, to reduce or eliminate oversubscription and therefore to reduce its reliance on the integration tiebreaker.

Furthermore, the Plan is not inflexible in the manner of a quota; the integration tiebreaker operates only when *patterns of individual choice* result in oversubscription, and only until the school approximates the characteristics of the district as a whole. Choice, not a prescribed ratio of white to nonwhite students, controls the overwhelming majority of assignments. And choice patterns have been shown to change over time, as new facilities and programs are offered at different schools.

The District has demonstrated its ability to be responsive to these choice patterns and to the concerns of its constituents. It revisits the plan annually.[41] In 2000, when a higher than

40. For the 2000-01 school year, roughly 350 students received "mandatory" assignments, meaning that their assigned school was not one of their choices. Roughly 100 of these students had listed only one choice and another hundred had listed only two choices. Of the roughly 300 students affected by the integration tiebreaker, only 84 were given "mandatory" assignments. Of these, 29 were ultimately assigned to the same school they would have been attending without the tiebreaker, and 55 received assignments affected by the tiebreaker.

41. Like the majority, maj. op. at 976 n. 32, I believe that this annual review, combined with the fact that the tiebreaker operates (Cont'd)

normal number of students selected the same schools, the Board responded by increasing the integration trigger from a 10 percent to a 15 percent deviation from the school population and adopting a "thermostat" that turns off the integration tiebreaker as soon as the school has come into balance. The majority considers it constitutionally significant that the Board rejected a staff suggestion that the trigger instead be increased to 20 percent. Board members testified that they rejected a 20 percent trigger, in effect, because it would fail to assist students in moving from racially concentrated south-end schools. In other words, the proposed 20 percent trigger would no longer promote the Board's goals; it therefore could not be considered narrowly tailored to achieve the District's compelling interest because it would not achieve that interest at all. The Board's decision thus is not a sign that the Board has failed, as the majority suggests, to "minimize [the] adverse impact on third parties," maj. op. at 975.

(c) *Relative burden on third parties.*

The majority assumes that every student who is denied his or her choice of schools because of the integration tiebreaker suffers a constitutionally significant burden. As I

(Cont'd)

only until a school comes into balance, satisfies the durational requirement of narrow tailoring. *See Grutter*, 539 U.S. at 342-43, 123 S.Ct. 2325; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (holding that narrow tailoring requires that a program be limited in scope and duration "such that it will not last longer than the discriminatory effects it is designed to eliminate" (internal quotation marks omitted)).

foreshadowed above, however, I consider the District's Plan to impose a minimal burden that is shared equally by all of the District's students. *See Parents Involved*, 72 P.3d at 159-60 (noting that the burden of not being allowed to attend one's preferred school is shared by all students equally).

When we view the Plan on the large scale, without attempting to anticipate students' subjective and shifting preferences for different schools, all the District's students are *equally* subject to the possible burden of being denied their first choices. Only when we conceive of the Plan narrowly, by imagining two students-one white, one nonwhite-who are next door neighbors and have identical preferences for Ballard or for Franklin high school, will one student bear a "burden" and the other gain a "benefit."

Yet it is well established that "there [is] no right under Washington law to attend a local school or the school of the student's choice." *Id.* at 159.[42] Of course, students and their parents will nonetheless prefer some schools over others; their preferences may be based on their perceptions of a school's academic quality, on their subjective preference for a particular educational theme or program, or on the convenience of attending a particular school, among other things. These preferences result in changing choice patterns and the oversubscription of certain high schools. But oversubscribed schools do not become a limited government

42. Subject to federal statutory and constitutional requirements, structuring public education has long been within the control of the states, as part of their traditional police powers. *See Barbier v. Connolly*, 113 U.S. 27, 31-32, 5 S.Ct. 357, 28 L.Ed. 923 (1884) (describing the states' traditional police powers).

resource because of their popularity in a given year or their convenience for a given family. *See Hampton*, 102 F.Supp.2d at 380 n. 43 ("The Court understands that students and their parents might prefer one school over another. The preference may even arise from a perception that one school is better than others due to its location, its teachers and principal, or its classroom environment. However, these matters of personal preference do not distinguish those schools in a constitutionally significant sense."); *see also supra* note 24. Despite any differences in academic quality (or perceptions thereof), all students who enroll in a Seattle high school will receive a high school education that meets state standards. And, as the District points out, even if Plaintiff's assertions of objectively unequal school quality were accepted,[43] it is undisputed that the integration tiebreaker operates to give every student an opportunity to attend at least one of five oversubscribed "quality" high schools (because at least one is "integration positive" for both white and nonwhite students). I do not believe that students' subjective preferences for one school over another, where the existence and educational relevance of objective differences among them is disputed, make the inconvenience of a nonpreferred assignment weightier than the District's legitimate educational goals.

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43. The District has disputed Plaintiff's assertion of significant differences in objective quality among the 10 high schools. Before granting summary judgment to Plaintiff, the majority must accept the District's version of the facts. *See Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 609 (9th Cir.2003) (stating that, on summary judgment, facts are to be viewed in the light most favorable to the nonmoving party). If this factual issue were material, summary judgment would not be proper. *Id.* at 610.

Finally, the District has minimized any burden by working to ameliorate the inconvenience and frustration for families who do not receive their preferred school assignments. When the popularity of the District's five oversubscribed schools spiked for 2000-01 assignments, the School Board met to consider ways to soften the adverse effects. The administration immediately began to "aggressively move the waitlists" and to attempt to increase capacity at the oversubscribed schools. The Board and the administration discussed specific, long-range plans to increase the attractiveness of the undersubscribed schools. Finally, the District reached out to students receiving assignments to undersubscribed schools to share with them advantages of the schools of which they may not have been aware.

III. *Conclusion.*

For all these reasons, the Plan adopted by the Seattle School District for high school assignments is constitutional notwithstanding its inclusion of an integration tiebreaker. I would affirm the district court's judgment, and I dissent from the majority's contrary holding.

APPENDIX C — ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON DATED APRIL 6, 2001

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C00-1205R.

April 6, 2001.

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation,

Plaintiff,

v.

SEATTLE SCHOOL DISTRICT NO. 1, a political subdivision of the State of Washington; et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

ROTHSTEIN, District Judge.

I. BACKGROUND

For over thirty years the Seattle School District has made efforts to ameliorate the often pernicious consequences of the racial isolation in its schools that would, but for those

efforts, track the racial segregation of the city's housing patterns. A majority of Seattle's white residents live in neighborhoods in the northern, historically more affluent end of the city. A majority of the city's African American, Asian American, Hispanic and Native American residents live in the south. Racial isolation in schools may render a child indifferent to the benefits and responsibilities incumbent on citizens of a pluralistic society. Racial isolation may also prevent a child from being exposed to much of the educational and socio-economic opportunity this nation promises.

Since the 1960's, while courts around the country were ordering intransigent school districts to desegregate, Seattle's school board was voluntarily exploring measures that were designed to provide all of the district's students with access to diverse and equal educational opportunities. At one time the district experimented with mandatory busing procedures that met with widespread dissatisfaction and even outrage. More recently, responding to its constituents' concerns, the school board has sought to develop less coercive policies that would afford parents and students more choice in selecting which high school to attend, while adhering to the principle that all of the district's students should have access to racially integrated schools of comparable quality. Over the past several decades, both Washington state and federal courts have, at every level, approved and even lauded the school board's continuing and evolving efforts to attain and maintain a desegregated system.

The school board has not yet achieved its ultimate goal of offering the best possible education in all of its high

schools. Despite the district's efforts, it remains a stark reality that disproportionately, the schools located in the northern end of the city continue to be the most popular and prestigious, and competition for assignment to those schools is keen. The school board has decided that in order to afford all of the city's students—including those from predominantly minority south Seattle—access to these more popular schools, it must employ a tiebreaker mechanism that elevates race over proximity to determine who may attend these schools.

Since 1998, the Seattle School District has assigned students to its regular ten high schools according to an "open choice" policy, by which students throughout the district list which high school they would like to attend in order of preference. The district will assign the student, if possible, to the high school listed as his or her first choice. Five of the district's high schools, however—Ballard, Nathan Hale, Roosevelt, Franklin, and Garfield—are listed as a first choice by more students than they can accept.[1] Approximately 82% of students entering high school in 2000 selected one of these five schools as a first choice. The school district allocates the available spaces in these oversubscribed high schools by using a series of tiebreakers. The first tiebreaker asks whether the student has a sibling already attending his or her first-choice school. For the stated purposes of "achieving diversity, limiting racial isolation, and providing an equal opportunity

1. Fewer than 20% of the district's students listed one of the five remaining high schools—Cleveland, West Seattle, Sealth, Rainier Beach and Ingraham—as a first choice. As a result, a student wishing to attend one of these schools will in all likelihood be given his or her first choice.

to receive a quality education," the district will, if necessary, use a second tiebreaker for those oversubscribed high schools that are racially "out of balance," selecting for placement students whose race will help mitigate the imbalance of the racial makeup of the chosen school. Defendants' Memo in Support of Partial Summary Judgment on State Law Claim at 2.

The school district has determined that a school is out of balance if it deviates by more than 15% from the overall racial breakdown of the population of students attending Seattle's public schools, which is currently approximately 40% white and 60% nonwhite.[2] Of the oversubscribed high schools, only Garfield is currently considered in balance.[3] The district estimates that without the integration tiebreaker, the nonwhite populations of the 2000-2001 ninth grade class at Franklin would be 79.2%; at Hale 30.5%; at Ballard 33%; and at Roosevelt 41.1%. Using the integration tiebreaker mechanism, the nonwhite populations of the same schools respectively are 59.5%; 40.6%; 54.2%; and 55.3%.[4] Under the plan's most recent revision, the integration tiebreaker will

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2. In November 2000, the district adopted the 15% variance policy. For assignments made for the 1999-2000 school year, the district was still using a 10% variance to measure racial balance.

3. Under the new 15% band, Roosevelt will no longer be out of balance.

4. Eighty-nine more white students were assigned to Franklin than would have been absent the tiebreaker; 82 more nonwhite students to Roosevelt; 107 more nonwhite students to Ballard, and 27 more nonwhite students to Hale.

be turned off once the entering class is brought into racial balance, and the district will turn to the third tiebreaker, proximity of the student's home to the school of choice, or the fourth tiebreaker, a lottery, to determine the remaining placements.

Plaintiffs, a group of parents whose children were not, or may not be, assigned to a high school of their choice under the assignment plan using the racial integration tiebreaker, claim that use of the tiebreaker violates the Washington Civil Rights Act (the "Act," the "Initiative," or "Initiative 200") (codified at RCW 49.60.400), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Title VI of the federal Civil Rights Act of 1964.

II. DISCUSSION

A. *State Law Claim: Initiative 200*

Guided by the principle that a court should avoid deciding a matter on federal constitutional grounds if state law grounds are available, the parties, in their cross motions for summary judgment, have asked the court to make an initial determination of the effect of Initiative 200 on the district's open choice policy. Plaintiffs contend that the Initiative outlaws the use of a racial tiebreaker in school assignments. Defendants argue that this provision should not be construed to outlaw the tiebreaker program, and in the alternative, that if it must be so construed, the Initiative is unconstitutional under both the Washington state and the United States constitutions.

Appendix C

In 1998, Washington voters passed Initiative 200, the Washington Civil Rights Act. The Act declares that state government, including local school districts, may not "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of ... public education." RCW 49.60.400. Because the statute has not yet been interpreted by the Washington state judiciary, this court has the task of predicting how the state's highest court would apply the Act to this case. *See Commissioner v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

The court has a duty to construe Initiative 200, if possible, in a way that makes the initiative consistent with the state and federal constitutions; "where a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so." *In re Cross,* 99 Wash.2d 373, 382-83, 662 P.2d 828 (1983). As discussed below, applying Initiative 200 to outlaw the school district's integration plan would render the Act unconstitutional. The definitions of "preference" and "discrimination" provided in Washington and federal case law, however, furnish a reasonable saving construction that renders a finding of unconstitutionality unnecessary.

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1. *Application of Initiative 200 to the Open Choice Policy Would Impermissibly Effect an Amendment to the Washington Constitution*

It is an established principle under Washington law that the legislature, or the people acting in their legislative capacity, may not amend the state constitution except by a special process. As recently noted in *Gerberding v. Munro,* Washington courts "have often stated the initiative process, as a means by which the people can exercise directly the legislative authority to enact bills and laws, is limited in scope to subject matter which is legislative in nature. . . . Thus, the initiative power may not be used to amend the Constitution." 134 Wash.2d 188, 210 n. 11, 949 P.2d 1366 (1998) (citations omitted). An amendment to the constitution may be effected only "through the process for constitutional amendment articulated in Wash. Const. art. XXIII." *Id.* at 211, 949 P.2d 1366. If plaintiffs' construction of Initiative 200 constitutes an amendment to the Washington Constitution, the court must either fashion a reasonable saving construction or find the initiative unconstitutional.

The Washington Constitution, article IX § 1 provides, "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex." The section following states, "the legislature shall provide for a general and uniform system of public schools." Washington case law has construed the language of these two sections separately and in concert to require school districts to provide equal educational opportunity to students of all races, to limit racial isolation, and to provide

a racially and ethnically diverse educational experience. The provisions have also been construed to authorize local school boards to implement race-conscious measures to effectuate this policy.

A number of Washington court cases refer to school districts' constitutionally-derived authority or duty to operate integrated schools. In *Seattle Sch. Dist. No. 1 v. Washington,* Judge Doran found that "[s]egregated schools are prohibited by Article IX, Section 1, of the Constitution," and that "[a] racially segregated education is inadequate to equip students, especially minority students, with basic educational skills and with the ability to participate effectively in our open political system and in the labor market." No. 81-2-1713-1, Findings of Fact and Conclusions of Law, Madden Decl., Exh. 2 at 68-69. The Washington Supreme Court has also found that it is "the duty of the school board to act in the best interests of the majority of students," even if to do so would be to the detriment of some students. *Citizens Against Mandatory Bussing v. Palmason,* 80 Wash.2d 445, 457, 495 P.2d 657 (1972).

That court went on to find that to limit the authority of school boards by not allowing them to take race into account in efforts to desegregate their schools "would frustrate the purpose of Const. art. 9, § 1 . . . and of section 2 thereof." *Palmason,* 80 Wash.2d at 449, 495 P.2d 657. In that case, the Washington Supreme Court refused to authorize a referendum on the Seattle School District's race-conscious policy of transferring students to non-neighborhood schools in an effort to reduce the effect on schools of residential segregation. The court found that to do otherwise would

unduly limit the district's constitutional mandate to provide equal educational opportunity to all of its students. In *Dawson v. Troxel,* the Washington appellate court reiterated that "in some circumstances a racial criterion *may* be used—and indeed in some circumstances *must* be used—by public educational institutions in bringing about racial balance." 17 Wash.App. 129, 132, 561 P.2d 694 (1977), quoting *DeFunis v. Odegaard,* 82 Wash.2d 11, 27, 507 P.2d 1169 (1973).[5] The Washington Constitution, therefore, imposes a duty on school boards to operate racially integrated schools, and recognizes the reality that in some cases, to fulfill that duty, a school board may need to take race into account.

Plaintiffs argue that the Washington Constitution merely grants school districts the authority to use their discretion in operating their schools, and that the legislature (or the people acting in their legislative capacity) may limit that discretion however it sees fit. They offer as an analogy that school boards would not be permitted to thwart a legislative enactment requiring all schools to offer a course in American history, or prohibiting smoking on school grounds. This analogy is flawed. Washington courts have not found that freedom not to take a course in American history, or license to smoke on school grounds, is a right conferred by the state's constitution. Access to equal educational opportunity, however, is. The authority to use race to provide "a general and uniform system of public schools," a phrase the courts

5. *DeFunis* analyzed to what extent the state could use race-conscious measures under the Fourteenth Amendment, and the quotation refers in the *DeFunis* context to situations in which *de jure* segregation had occurred in the past. *Dawson,* however, did not limit its use of the *DeFunis* principle to that context.

have construed to mean racially integrated schools, is an authority derived directly from the Washington Constitution. An initiative effecting an amendment to this authority would be unconstitutional under Washington law.

2. *Pre-Initiative 200 Meaning of "Discrimination" and "Preferential Treatment" Under Washington Law*

The court need not (nor would it be permitted to) contort the language of Initiative 200 in order to give it a saving construction. Washington case law offers long-established and reasonable definitions of racial "discrimination" and "preference" which, applied to Initiative 200, exempt the school board's tiebreaker program.

Article IX § 1 of the Washington Constitution requires the state to operate public schools "without distinction or preference on account of race." At the same time, Washington state courts have consistently held that a school board's race-conscious assignment policy will *not* constitute a "preference" or "discrimination" when instituted to accomplish school integration. Presuming, as the court must, that Washington courts have adjudicated these matters consistent with the Washington Constitution, and specifically with article IX, the court finds that despite the fact that the school board's tiebreaker program takes race into account, case law dictates that the program does not constitute a "preference" or "discrimination" based on race under Initiative 200.

Citizens Against Mandatory Bussing v. Brooks involved a mandamus action in which a coalition asked the court to

initiate a recall of school board members, charging that the "race of the students was the criterion used to determine which students in the school district would be transferred and which schools they would attend, contrary to the Constitution of the State of Washington." 80 Wash.2d 121, 126, 492 P.2d 536 (1972). Rejecting this charge, the Washington Supreme Court upheld the Seattle School District's authority to adopt measures, designed to mitigate *de facto* segregation, that were not required by the Fourteenth Amendment. In doing so, the court drew on *Swann v. Charlotte-Mecklenburg Bd. of Educ.* for the proposition that while *courts* are limited in their powers to impose desegregation measures, and may do so only to remedy those constitutional violations arising from a state actor's *de jure* segregation, *school boards* may exercise a wider latitude in voluntarily adopting desegregation measures. 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The Washington Supreme Court upheld the Seattle School District's right to make race-based distinctions, and found that the district's race-conscious busing measures did not violate the Washington Constitution, including, this court must presume, article IX § 1. Article IX § 1, therefore, which outlaws preferences meted out on racial grounds, does not to apply to the school board's voluntary race-conscious efforts to integrate Seattle's high schools. Later that year the Washington Supreme Court reiterated its *Brooks* holding, deeming the procedure by which the school board implemented a mandatory race-based busing policy "a reasonable one, by any definition of that term." *Citizens Against Mandatory Bussing v. Palmason,* 80 Wash.2d 445, 451, 495 P.2d 657 (1972). Again, the finding came against the backdrop of the Washington Constitution. Five years later, as the court has already discussed, Judge Farris in *Dawson*

v. Troxel emphasized the principle that "in some circumstances a racial criterion *may* be used—and indeed in some circumstances *must* be used—by public educational institutions in bringing about racial balance." 17 Wash.App. 129, 132, 561 P.2d 694 quoting *DeFunis v. Odegaard,* 82 Wash.2d 11, 27, 507 P.2d 1169 (1973).

3. *Definitions of "Preference" and "Discrimination" Under Federal Law*

Ninth Circuit precedent, which parallels Washington courts' definitions of "preference" and "discrimination," bolsters the conclusion that Initiative 200 does not apply to programs designed to overcome racially imbalanced schools. The Ninth Circuit has identified two different types of government programs that take race into account. On the one hand are "affirmative action" programs, such as those used in higher education admissions and contracting awards that use racial minority status as a positive factor, conferring a government benefit to members of a minority at the expense of those of the majority. On the other hand are measures, such as those designed to effect racially integrated public schools, that seek to ensure that a benefit, available to all, is distributed in a manner that the governing body has decided will benefit the citizenry as a whole. As stated in *Associated Gen'l Contractors of Calif. v. San Francisco Unified Sch. Dist.,*

> We think it is useful and necessary to distinguish between the two major types of positive governmental action taken on behalf of minorities. *First, there are "reshuffle" programs, in which*

> *the state neither gives to nor withholds from anyone any benefits because of that person's group status, but rather ensures that everyone in every group enjoys the same rights in the same place. The most common examples are school desegregation cases and programs.* Second, there are "stacked deck" programs, in which the state specifically favors members of minorities in competition with members of the majority for benefits that the state can give to some citizens but not to all. This category includes affirmative action programs of both the quota and "positive-factor" varieties.

616 F.2d 1381, 1386 (9th Cir.1980) (citations omitted, emphasis added).

The Ninth Circuit recently reiterated this distinction in *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir.1997). In 1996, the voters of California ratified Proposition 209, amending the California Constitution[6] to include a provision identically worded to Initiative 200. The day after the election, a group of plaintiffs brought suit to enjoin the state from implementing the amendment. Plaintiffs argued, inter alia, that the proposition's elimination of the state's affirmative action and "preference" programs would "restructure[ ] the political process to disadvantage only those seeking to enact legislation intended to benefit minorities

6. Whether Proposition 209 effected an amendment to the California Constitution was not at issue in *C.E.E.* for, unlike Initiative 200, Proposition 209 evidently amended its state's constitution according to proper constitutional procedure.

and women," *C.E.E. v. Wilson,* 946 F.Supp. 1480, 1499 (N.D.Cal.1996). Groups seeking to enact such programs before passage of Proposition 209 could petition the appropriate legislature; after Proposition 209, they would be forced to pass an amendment to the California Constitution. Thus, plaintiffs argued, the situation was indistinguishable from *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) and *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), in which the Supreme Court struck down initiatives that forced certain minority groups to petition for redress at higher, more remote levels of government.

Granting the injunction, the district court defined "preference" broadly, to "include[ ], at a minimum, programs or policies that use racial or gender classifications." 946 F.Supp. at 1489. The district court granted the injunction in part based on a finding that "Proposition 209's reach may extend beyond mere 'zero-sum' [i.e. stacked deck] antidiscrimination efforts." *Id.* at 1503 n. 24. The court couldn't rule out the possibility that the proposition might be construed to apply to school districts' use of measures designed to mitigate *de facto* racial isolation in schools, finding that "the measure could eliminate, or cause fundamental changes to, *voluntary desegregation programs run by school districts.*" *Id.* at 1493-94 (some emphasis added). Thus construed, the plaintiffs had demonstrated a probability of success on their claim that the proposition was indistinguishable from the statutes the Supreme Court struck down in *Seattle* and *Hunter,* and therefore unconstitutional.

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Proposition supporters, seeking to save it from constitutional infirmity, conceded on interlocutory appeal that the measure did *not* apply to voluntary school programs designed to ameliorate racial segregation, and was thus in fact distinguishable from the measures struck down in *Hunter* and *Seattle.* Appellants Governor Pete Wilson and Attorney General Dan Lungren stated that "the [amicus curiae] United States' claim that [Proposition 209] 'generally prohibits *race-conscious* busing programs designed to overcome *de facto* school segregation' is incorrect. *Busing programs do not involve preferences based on race.*" Appellants' Reply Brief at 10, *C.E.E. v. Wilson,* 122 F.3d 692, Madden Decl., Exh. 1 (emphasis added).

The Ninth Circuit agreed. In vacating the district court's preliminary injunction, the court emphasized, in a footnote critical to the case's holding, that the district court erred in failing to distinguish school desegregation "reshuffling" programs from other affirmative action programs. The court reiterated the distinction made in *Associated Gen'l Contractors* and went on to add, "[u]nlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." *C.E.E. v. Wilson,* 122 F.3d at 708 n. 16.[7]

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7. The court accepts plaintiffs' assertion that students denied their choice of schools are deprived of curriculum advantages not necessarily available at other schools. However, maintaining a diversified school system is a step towards ensuring equal quality throughout the district.

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Furthermore, a constitutionally-infirm contract procurement or university admissions policy grants preference only to nonwhites. The program at issue here falls *indiscriminately* on whites and nonwhites alike, ensuring a racially integrated system for the benefit of the school district as a whole. Even while the program allows minority students access to Ballard and Hale, Seattle's popular predominantly white schools, it also allows white students access to Franklin, the city's popular predominantly minority school. It is in this sense, too, that the program is not a "preference."

As the Washington Supreme Court has observed,

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society that each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Brooks, 80 Wash.2d at 128, 492 P.2d 536, quoting *Swann,* 402 U.S. at 16, 91 S.Ct. 1267. In fulfilling its constitutional mandate, the school board has found that it cannot provide an equitable and diverse educational opportunity to the district as a whole without depriving some students of access to their first choice. This is a proper exercise of the school board's discretion with which the courts may not interfere. As the *Palmason* court said, "the [members of a school board have a] duty . . . to act in the best interests of the majority of

students; and the fact that some students might suffer adverse effects was not a consideration which, in law, they were required to find controlling." 80 Wash.2d at 457, 495 P.2d 657.

It may be said, as plaintiffs do, that nonwhite children given spots at Nathan Hale and Ballard, or white children given spots at Franklin, are being granted a "preference" in common parlance. The term "preference," however, as used in the Washington Constitution and defined in state and federal law, and therefore necessarily as used in Initiative 200, has acquired a legally fixed meaning derived from dozens of years of race discrimination jurisprudence. Under that definition, the school board's program is *not* a preference.

B. *Federal Claim: the Equal Protection Clause*

The parties do not dispute that because the district's open choice policy relies on racial classifications, the court must use strict scrutiny to analyze the plan's constitutionality. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 225-26, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To survive strict scrutiny, the plan must 1) serve a compelling government interest and 2) be narrowly tailored to do so. *Id.* at 227, 115 S.Ct. 2097.

1. *Compelling Interest*

During one of its recent executive sessions, the school board issued the following "Board Statement Reaffirming Diversity Rationale:"

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Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.

Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. It also fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours.

Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

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Minutes of Executive Session of the Board of Directors, November 17, 1999, Taylor Decl., Exh. 3 at 12.

There is no evidence, nor do plaintiffs claim, that the school board adopted the plan for any other reason than as stated above. Thus, succinctly stated, the board's purpose in adopting its current open choice policy is to mitigate the historical effects on its high schools of the residential segregation of Seattle's neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers. The court must evaluate against the backdrop of existing legal precedent whether this interest is compelling.

a. *The School Board has Authority to Cure De Facto Segregation*

Plaintiffs argue that the integration-positive tiebreaker does not serve a compelling interest. Plaintiffs claim first that the Supreme Court has foreclosed the possibility that a government actor can use race for any reason other than to remedy past acts of *de jure* discrimination, citing the Court's holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Croson* found that the only justification for Richmond's use of racial quotas in the city's contract procurement process would be a showing that racial quotas were necessary to remediate the effects of past discrimination by the city. As the Second Circuit has pointed out, however, "*Croson* does not reach the issue of whether a non-remedial purpose could constitute a compelling government interest, because the classification at issue in *Croson* was only defended as necessary to remedy

past discrimination." *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 748 (2nd Cir.2000). *Croson*'s holding, therefore, cannot be extended to address the question currently before the court, for the school board does not claim that the tiebreaker is meant to remedy past *de jure* discrimination, but to cultivate diversity and enhance the educational opportunity available to all its students by achieving an integrated system.

Plaintiffs claim that similarly, the Supreme Court in *Wygant v. Board Of Educ.*, when evaluating a school board's use of a race-based layoff program designed to increase the minority faculty presence, indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved," 476 U.S. 267, 276, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). In her concurring opinion, however, Justice O'Connor clarified that "certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently . . 'compelling' to sustain the use of affirmative action policies." *Id.* at 286, 106 S.Ct. 1842 (O'Connor, J., concurring).

The Second Circuit has gone so far as to explicitly reject application of the reasoning of *Croson* and *Wygant* to the school desegregation context.

> Neither case . . . involved desegregation of a student population in the public school system, a goal that we may assume at this point in the

> proceedings is more compelling than reduction of racial isolation or underrepresentation in the commercial context [of] teachers' jobs and the construction industry at issue in *Wygant* and *Croson.* Further, the danger identified by the Supreme Court as inherent in non-remedial based programs, *see Croson,* 488 U.S. at 498, 109 S.Ct. 706 ("a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy"), is not present when a local school board acts to remedy clearly identifiable, indeed obvious, racial isolation in particular school districts.

Brewer, 212 F.3d at 751 (some citations omitted). The *Brewer* court's analysis supports the conclusion that the *Croson* line of cases does not control the question currently before the court.

Absent a Supreme Court or Ninth Circuit[8] holding that a government entity must establish past *de jure* discrimination

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8. Plaintiffs cite *Ho v. San Francisco Unified Sch. Dist.* for the proposition that "[t]he perilous undertaking of employing race as a remedy must be justified by the defendants as alleviating a violation of the Constitution." 147 F.3d 854, 865 (9th Cir.1998). In that case, however, defendants did not proffer diversity as the interest in using race in the school board's assignment plan, relying instead on continuing adherence to a fifteen-year-old consent decree that had been entered into in an effort to reduce the effects of segregation. The Ninth Circuit's admonition in *Ho* is, therefore, highly case-specific.

to justify the use of race in this context, then, the court must evaluate whether promoting racial integration may be a compelling government reason for using race in secondary school assignment plans. While plaintiffs have argued that Supreme Court cases have foreclosed this possibility, the court finds, to the contrary, that the Supreme Court has long suggested quite the reverse:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The Supreme Court clarified that *Swann* was not merely intended to apply to situations in which there had been a constitutional violation, when it declared in a companion case that "as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *North Carolina Bd. of Educ. v. Swann,* 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). A number of other Supreme Court cases declare the same principles. In *Washington v. Seattle Sch. Dist. No. 1,* the Supreme Court reinstated the authority of the Seattle School District to bus students to help cure *de facto* racial imbalance, arising where

"segregated housing patterns . . . created racially imbalanced schools." 458 U.S. 457, 460, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). In his concurring opinion in *Keyes v. School Dist. No. 1,* Justice Powell declared, "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation. . . . Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." 413 U.S. 189, 242, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). In *Bustop, Inc. v. Board of Educ.,* plaintiffs asked the federal courts to stay an order issued by the California Supreme Court that would have implemented a race-based desegregation plan. Then-Justice Rehnquist wrote,

> [plaintiffs'] argument is indeed novel, and suggests that each citizen . . . has a 'federal right' to be 'free from racial quotas. . . .' While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.

439 U.S. 1380, 1381, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978). Thus, the Supreme Court has repeatedly recognized the authority of school boards, (while repudiating that of courts), to take measures to integrate *de facto* segregated districts beyond what the Constitution requires.[9]

9. As discussed above, the Seattle School District operates under authority granted by the Washington Constitution. Washington (Cont'd)

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The circumstances that gave rise to the court-approved school assignment policies of the 1970's continue to be as compelling today as they were in the days of the district's mandatory busing programs. As the federal district court found in *Seattle School Dist. No. 1 v. State,* later upheld by the Supreme Court, "segregated housing patterns exist in the City of Seattle. These housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented." 473 F.Supp. 996 (W.D.Wash.1979). The defendants have established that housing patterns in Seattle continue to be racially concentrated. *See* Lewis Second Supplemental Declaration, Exh. A-1. Absent a Supreme Court or Ninth Circuit directive on point, it would defy logic for this court to find that the less intrusive programs of today violate the Equal Protection Clause while the more coercive programs of the 1970's did not.

b. *Seattle School District's Diversity Interest*

Plaintiffs claim that defendants' tiebreaker uses race, and only race, in moving towards its diversity goal. Therefore, plaintiffs argue, the district's asserted diversity interest is not compelling because Justice Powell's opinion in *Bakke* sanctioned the use of race to create a diverse educational environment only if it were one criterion among several.

(Cont'd)

state courts have long held that a school district has authority under state law to take race into account in order to maximize its students' educational opportunities. *See, e.g., Citizens Against Mandatory Bussing v. Brooks,* 80 Wash.2d 121, 492 P.2d 536 (1972); *Citizens Against Mandatory Bussing v. Palmason,* 80 Wash.2d 445, 495 P.2d 657 (1972).

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Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct..2733, 57 L.Ed.2d 750 (1978). Plaintiffs cite Justice Powell's distinction between racial or ethnic diversity and "genuine diversity," which would include a whole range of factors, and his observation that a "special admission program [that focuses] *solely* on ethnic diversity would hinder rather than further attainment of genuine diversity." *Id.* at 315, 98 S.Ct. 2733.

Bakke's limit on the exclusive use of race to create a diverse environment does not speak to the question before the court. As the Second Circuit has found, "*Bakke* . . . is not directly on point as it expressed no opinion as to the compelling interest of reducing racial isolation in elementary public school education." *Brewer,* 212 F.3d at 751. Interests asserted at the higher education level carry much different implications than those asserted at the elementary and secondary school level. This difference arises because, as the Supreme Court has recognized, "[e]ducation has come to be a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." *Seattle Sch. Dist. No.1,* 458 U.S. at 472-73, 102 S.Ct. 3187. Justice Powell's observations therefore do not apply as forcefully in the earlier stages of a child's education.

Achieving racial diversity and mitigating the effects of *de facto* residential segregation are, the court finds, compelling government interests as a matter of law. In deference to the authority vested in the school district under the Washington Constitution, the court will ask only whether the board had a sufficient basis for adopting a plan to achieve

a goal found to be compelling as a matter of law.[10] *See Wygant,* 476 U.S. at 277-78, 106 S.Ct. 1842.

Plaintiffs claim that "diversity" as a goal must be more than an attractive generality. *See Wessmann v. Gittens,* 160 F.3d 790, 800 (1st Cir.1998). The school board, through its expert Dr. Trent, identifies four discrete reasons why racial balance at the high school level is important:

> [1.] Opportunity and achievement. The research shows that a desegregated educational experience opens opportunity networks in the areas of higher education and employment, particularly for minority students, which do not develop when students attend less integrated schools. . . .
>
> [2.] Teaching and learning. The research shows that academic achievement of minority students improves when they are educated in a desegregated school, likely because they have access to better teachers and more advanced curriculum. The research also shows that both white and minority students experienced

10. Plaintiffs cite *Ho* for the proposition that the burden of justifying use of race in the school plan falls on defendants: "Once the plaintiffs established the School District's use of racial classifications . . . the School District has the duty to justify them." 147 F.3d at 865. This language does not, however, shift the ultimate burden of proof to defendants. According to standard Equal Protection methodology, once a defendant has asserted a compelling government interest, the burden of proving a constitutional violation returns to plaintiffs. *See Wygant,* 476 U.S. at 277-78, 106 S.Ct. 1842.

> improved critical thinking skills—the ability to both understand and challenge views which are different from their own—when they are educated in racially diverse schools.
>
> [3.] Civic values. The research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more democratic and inclusive experience for all citizens. . . . Recent research has identified the critical role of early school experiences in breaking down racial and cultural stereotypes. . . .
>
> [4.] Employment. Research . . . shows that, as a group, minority students who exited desegregated high schools were more likely to be employed in a racially diverse workplace, obtained more prestigious jobs than those who did not, and that their jobs tended to be higher paying than those students who did not attend desegregated schools.

Trent Decl. ¶ 4.

Although Dr. Armour, plaintiffs' expert, takes issue with many of the conclusions of defendants' expert, his contravening testimony fails to cast doubt on the fact that the school board had a sufficient basis for believing diversity and integration were important goals. Indeed, Dr. Armour concedes that "[t]here is general agreement by both experts

and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among the various racial and ethnic groups." Armor Dep. at 23-24, Madden Decl., Exh. 1. The court finds, given the testimony of both parties' experts, that as a matter of law defendants have established that they had a sufficient basis for implementing the integration-positive tiebreaker for the actual purpose of achieving diversity and reducing the effects of *de facto* segregation in the Seattle School District.

2. *Narrowly Tailored*

Defendants have established that their race-conscious policy was implemented to further a compelling interest. Plaintiffs argue that defendants' open choice plan, which at some point in the assignment process takes only race into account, is mere "racial balancing" and as such cannot, as a matter of law, be narrowly tailored to serve a compelling government interest. As support for this proposition plaintiffs cite *Eisenberg v. Montgomery County Public Schools,* 197 F.3d 123 (4th Cir.1999); *Tuttle v. Arlington County. Sch. Bd.,* 195 F.3d 698 (4th Cir.1999); and *Wessmann v. Gittens,* 160 F.3d 790. In each of these cases, the defendants used race-conscious integration programs that sought to achieve a racial balance that reflected the overall demographic of the district. The defendants asserted a compelling interest in fostering diversity in their schools. The appellate courts rejected this interest because the "racial balancing" programs were designed to achieve only *racial* diversity, as opposed to the "genuine diversity" sanctioned by Justice Powell in *Bakke.* The programs were not, therefore, permitted by the

Fourteenth Amendment. Relying on these holdings, plaintiffs here argue that the only diversity the tiebreaker mechanism promotes is *racial* diversity, and as such is indistinguishable from the "racial balancing" that the courts in *Tuttle, Eisenberg,* and *Wessmann* found unconstitutional.[11]

The court finds, however, that defendants' interest here is not only to promote diversity for educational and social value; they have also established that they seek to ameliorate the *de facto* effects of residential segregation in Seattle. It is uncontroverted that 74% of Asian American students, 84% of African American students, 65% of Hispanic students, and 51% of Native American students live south of a line somewhere slightly north of the downtown area. *See* Lewis Sec. Supp. Decl., Exh. A-1. As defendants point out, this demographic distribution strongly suggests that were geography alone to determine school assignment, the district would be highly segregated into white and nonwhite schools. *Id.* Were the school district to stop taking race into account in its school assignment policy, it seems inevitable that the district's schools, over the course of the next few years, would revert to their pre-existing "natural state" of racial segregation.

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11. It is axiomatic that these cases are not binding precedent in the Ninth Circuit. This circuit has been more circumspect on the subject of "racial balancing," upholding a school board's right to maintain a race-based layoff plan for the purpose of reflecting the racial demographic of the district, and finding that "[t]he school district is not precluded from taking voluntary action to obtain better racial balance in its teaching faculty." *Zaslawsky v. Board of Educ.*, 610 F.2d 661, 664 (9th Cir.1979).

Appendix C

Preventing the re-segregation of Seattle's schools is, as discussed above, a compelling interest. The Second Circuit has highlighted the error in modeling a narrow tailoring analysis on a "diversity" rationale alone in cases in which a district has asserted a legitimate and compelling desegregation rationale:

> We recognize that [in enjoining the school district's use of race in its transfer policy] the District Court did conduct a narrow tailoring analysis. We believe, however, that it focused on the wrong question: the District Court asked whether the Program is narrowly tailored to achieve the goal of "true diversity," when the appropriate inquiry, as evident from our discussion in the preceding sections, is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation. The difference in these two frameworks is not mere semantics. If reducing racial isolation is standing alone a constitutionally permissible goal, as we have held it is . . . then there is no more effective means of achieving that goal than to base decisions on race. "True diversity," on the other hand, may certainly be defined more broadly than race. *See Bakke,* 438 U.S. at 315, 98 S.Ct. 2733. Indeed, the cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored, . . . *Wessmann, Bakke,* and *Hopwood* [ ], only address the efficacy of employing strictly racial classifications to achieve

> "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim, as initially found by the District Court and affirmed by this Court today, is precisely to ameliorate racial isolation in the participating districts.

212 F.3d at 752-53 (some citations omitted). Thus the Second Circuit has pointed out the error of relying on *Wessmann* and its progeny for the proposition that exclusive reliance on race in a school assignment plan— "racial balancing"— is not narrowly tailored to achieve diversity in school assignments. Those cases misapprehended the importance of the other interest asserted here, integration of a *de facto* segregated system, on the narrow tailoring analysis. It bears repeating that the Second Circuit found that "[i]f reducing racial isolation is standing alone a constitutionally permissible goal, as we have held it is . . . then there is no more effective means of achieving that goal than to base decisions on race."

This court agrees with the Second Circuit that the *Wessmann* line of cases misconstrued Supreme Court directives regarding the proper deference a court should grant to a local school board's authority to ameliorate the effects of *de facto* segregation. In *Brewer,* the Second Circuit addressed the *Wessmann* court's reasoning:

> In rejecting the [defendant] Boston Latin School's argument that it was attempting to alleviate vestiges of past discrimination, *Wessmann* relies, we think wrongly, on Supreme Court precedent

> ...hich holds merely that absent a finding of a constitutional violation, a school district is under no obligation, enforceable by a federal court, to remedy the imbalance. *The absence of a duty sheds little light on the constitutionality of a voluntary attempt.*

212 F.3d at 751 (citations omitted, emphasis added). The *Brewer* analysis of *Wessmann* applies equally to *Tuttle* and *Eisenberg.*

The school district contends that to further its interest of providing racially diverse schools and mitigating the effects of racial segregation, it must take race into account. This conclusion is fully grounded in reason and supported by the parties' experts. As plaintiffs' expert has conceded, "if you don't consider race, it may not be possible to offer an integrated option to students." Armor Dep. at 60, Madden Decl., Exh. 1.

None of plaintiffs' other criticisms of the open choice policy call into doubt defendants' assertion that it is narrowly tailored. Plaintiffs claim there is no "end point," or "sunset provision," but the integration-positive tiebreaker applies only to schools deemed out of balance. Once a school is considered in balance (as is Garfield), the board will abandon the use of race in its assignments to that school. In addition, under the newly-revised plan, the district switches off the racial tiebreaker as soon as an entering class comes into balance, and will not use race to assign the remaining spaces in that school.

Appendix C

The plan does not mandate a specific racial quota. Instead, the plan uses the 60/40 ratio as a floor, and allows a significant 15% deviation from those numbers before it will take race into account. This mechanism is designed to prevent the city's segregated housing patterns from totally dictating the racial makeup of the district's popular schools. While the board has considered adopting a deviation of 20%, that option was rejected because it would have left "only one, and possibly . . . no" high schools out of balance, rendering the integration plan virtually ineffectual. Schaad-Lamphere Dep. at 86-87, Madden Decl., Exh. 2.

The school district has a demonstrated history of reducing the use of race in its assignment plans, as the mandatory busing plans of the 1970's have given way to the more choice-oriented plans of the 1990's and of this century. Preston Dep. at 83-85., Madden Decl., Exh. 3. Indeed, the school district recently revised a number of facets of the open choice policy in November 2000, increasing the allowable deviation from the 60/40 ratio from 10% to 15%; adopting the "off-switch" for the tiebreaker once an entering class comes into balance; and limiting application of the tiebreaker to students entering ninth grade. These changes are further evidence that the board is responsive to its constituency and will, where feasible, consider alternatives that are less burdensome.[12] The school district has a demonstrated history of, and concrete plans for, revisiting the necessity of the use

12. Plaintiffs ask the court for a declaratory judgment that the plan before these changes were made was also unconstitutional. The court finds that since the district has abandoned that plan with no indication it intends to return to it, that plan is not currently an issue before the court.

of race on a frequent and regular basis. In particular, defendants claim that in the future, the school board hopes to achieve and maintain diversity through entirely voluntary measures, by developing programs and making renovations designed to attract a broad array of students to all of its high schools.

Finally, as the court has observed, the defendants' policy is a "deck-shuffle" as defined by the Ninth Circuit, and as such does not, strictly speaking, prefer one race over any other. All children in the district are subject to the plan, and children of all races may attend at least one of the district's popular schools. At the same time, the plan maximizes the effect students' choices have on their assignments. These facts render the open choice policy in stark contrast to the court-sanctioned mandatory busing plans of earlier decades.

Defendants have presented sufficient evidence that a less burdensome plan would not, at this time, produce the degree of integration necessary to achieve their goals. The court finds therefore that defendants have established that their plan is narrowly tailored to further the compelling interests asserted in this case.

III. CONCLUSION

The court's ruling recognizes that even as the Seattle School District works to improve the programs and facilities at the weaker schools, it must be allowed to provide all of Seattle's students the equal opportunity, as the Washington Constitution mandates, to attend the city's more popular schools. It may be true that the school board's measures cause

dissatisfaction to some. Many of the south-end schools continue to offer less attractive programming and facilities, and as this lawsuit highlights, some students will not be allowed to attend the high school of their choice. It is within the board's discretion, however, as to how best it may achieve its legitimate and constitutionally-derived mandate.

Because applying Initiative 200 to outlaw the Seattle School District's racial tiebreaker would render the Act unconstitutional, and because both Washington and federal law provide long-established and reasonable bases for a saving construction, the court holds that Initiative 200 does not prohibit the district's continued use of the open choice policy's integration tiebreaker. Defendants' motion for partial summary judgment on plaintiffs' state law claims is therefore GRANTED. Plaintiffs' cross motion for partial summary judgment on the same question is DENIED.

The court also finds that defendants' use of race in its open choice policy tiebreaker serves a compelling government interest and is narrowly tailored to do so. Defendants' motions for summary judgment on plaintiffs' federal law claims are therefore GRANTED. Plaintiffs' motion for summary judgment on the same is DENIED.