(3)

No. 05-908

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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I. BRIEF IN OPPOSITION

Petitioner (hereinafter "PICS") asserts that this case is an appropriate vehicle for the Court to examine application of the Equal Protection principles laid down in *Gratz* and *Grutter*[1] to public high school assignments. Pet. 1. Respondents (hereinafter "the school board") urge the Court to deny certiorari because: (a) lower federal courts are addressing these issues without conflict or apparent difficulty; (b) the Court of Appeals appropriately applied the Michigan decisions to the specific facts of this case; and (c) due to the passage of time and changing circumstances, there is a serious question as to whether any relief could be afforded to petitioner or its members.

II. STATEMENT

A. Factual Background

This litigation concerns the application of the school board's "Open Choice" assignment policy to Seattle's ten comprehensive high schools. The record is limited to the 1999-2000 and 2000-01 school years.

1. History of School Integration Measures in Seattle

As detailed in the en banc Court of Appeals decision, the school board has struggled for many years to address the effect of the city's racially concentrated housing patterns on its schools. Pet. 3a-9a. Courts that have examined the

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[1] *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 538 U.S. 306 (2003) (hereinafter "the Michigan decisions" unless otherwise referenced).

situation have uniformly observed that racially segregated housing patterns exist in Seattle and that, if a neighborhood schools policy is employed, these housing patterns result in racially imbalanced or segregated schools.[2]

The record also shows without contradiction that the school board had concluded, and social science evidence fully supports the proposition, that diverse, racially balanced schools provide educational and social benefits that are not afforded in racially concentrated schools. Pet. 20a-26a. These benefits include improved race relations and reduction of prejudice, improved employment and higher educational opportunities, enhanced critical thinking skills, and improved transmission of democratic values. Pet. 22a-26a.

For these reasons, Seattle has for many years voluntarily employed a variety of measures in order to avoid racially imbalanced schools and enhance educational opportunities for

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[2] Pet. 2a (Ninth Circuit en banc opinion); Pet. 132a-133a (Ninth Circuit panel opinion); Pet. 269a-270a (district court opinion); Ninth Cir. Order of June 17, 2002 (certifying question), p. 3 ("[D]ue to Seattle's racial diversity and its racially imbalanced housing patterns, if Seattle's children were simply assigned to the high schools nearest their homes, the high schools would become segregated in fact (*"de facto"* segregated)".); *Parents Involved in Cmty. Schs.*, 149 Wash. 2d 660, 72 P.3d 151, 153 (2003) ("Because of racially segregating housing patterns, mandatory assignment to neighborhood schools would result in largely segregated schools."); *Seattle Sch. Dist. No. 1 v. State,* 473 F. Supp. 996, 1007 (W.D. Wa. 1979), *affirmed,* 633 F.2d 1338 (9th Cir. 1980), *aff'd sub nom. Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982) ("[S]egregated housing patterns exist in the City of Seattle. These segregated housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented.").

its children. The most comprehensive of these measures, involving large scale mandatory busing, was adopted in 1977 and led to this Court's decision in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). Thereafter, in 1988, the school board adopted a less intrusive "controlled choice" plan that allowed families to choose schools within groupings based on race, geography, and other factors. Pet. 7a.

After several years, dissatisfaction with the controlled choice plan, as well as changes in the racial demographics of the city and its schools, caused to the school board to look at other options. After extensive study, including public surveys, it adopted the Open Choice policy that is at issue here. The policy was adopted in 1998 and applied to high schools for the 1999-2000 school year. Pet. 8a-9a; ER 22-24.[3]

2. The School Assignment Plan for 1999-2001

As effective for 1999-2001, the Open Choice policy generally allowed parents to send their children to any school within the city. Where schools were "over-subscribed," *i.e.*, when more students selected a school than the number of seats available, several "tiebreakers" were used to determine assignments. The generally applicable tiebreakers at the high school level were whether the student had a sibling already assigned to the school and proximity of the student's residence to the school. In general, students with a sibling in the school were offered assignment to their school of choice first, followed by those living closest to a school. In this way, the school board sought to both honor its commitment to choice,

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[3] "ER" and "SER" citations refer to the Excerpt and Supplement Excerpt of Record, required under Ninth Circuit Rule 30-1.

while also giving preference to families with students already in the school or who lived in the school's neighborhood. ER 26-37.

Recognizing that adoption of a neighborhood preference would tend to perpetuate segregated housing patterns and undo progress that had been made in earlier years, the school board modified the distance tiebreaker by adopting an "integration tiebreaker." The integration tiebreaker applied where an oversubscribed school had a student population that deviated by more than a set percentage from the district-wide racial demographic of 60% minority/40% white. The deviation level or "band" was set at 10% for 1999-2000 and 15% for 2000-01. ER 17. Accordingly, the integration tiebreaker applied (depending on the year in question) if a school's enrollment was more than 60 (or 65) percent white students or more than 70 (or 75) percent students of color. Pet. 10a-11a.

Where the integration tiebreaker applied, students whose race served to bring the school closer to the district-wide demographic were assigned to a school before a student whose assignment would drive the school's demographic further from the norm. For the 2000-01 school assignment cycle, where the integration tiebreaker applied, it was subject to a "thermostat," whereby the integration tiebreaker was no longer used once the demographics of the entering class have come within 15% of the district-wide norm. Thereafter, remaining assignments were determined by the other tiebreakers. Pet. 9a-12a.

Like Seattle's earlier efforts to achieve integrated schools, the integration tiebreaker was designed to avoid the segregative effects of a neighborhood schools policy. ER 26-27. Unlike earlier measures, however, the integration

tiebreaker did not make race the exclusive or even predominant factor in school assignments. It accounted for only about 300 of 3000 9th grade assignments in 2000-01. The majority of these assignments involved students of color from the city's south end, where 77% of minority students reside, who sought assignments to schools in the city's predominantly white north end. ER 19, 55, 308.

Of Seattle's ten comprehensive public high schools, five were oversubscribed in the years in question. Depending on the particular year, three or four of these five had demographics that triggered the integration tiebreaker: Ballard, Nathan Hale and (in 2000-01 only) Roosevelt high schools (all located in the city's predominantly white north end) were designated as "integration positive" for minorities. Franklin, located in south Seattle, was integration positive for white students. Under the plan, each student, regardless of race, could attend at least one of the oversubscribed schools. ER 308.

As shown by the following table, the integration tiebreaker made a significant difference in the make-up of the ninth grade classes at each of these schools:

School	9th Grade Class % Students of Color With Integration Tiebreaker	9th Grade Class % Students of Color Without Integration Tiebreaker
Franklin	59.5	79.2
Hale	40.6	30.5
Ballard	54.2	33.0
Roosevelt	55.3	41.1

Pet. 13a.

Due to the extraordinarily high demand for assignment to Ballard High School, however, there was considerable unhappiness about the effect of the integration tiebreaker in the adjacent (predominantly white) Queen Anne and Magnolia areas of Seattle. Some perceived that the integration tiebreaker prevented white students in those neighborhoods from accessing Ballard's then brand-new building, or from being assigned to Nathan Hale High School, which, had recently become popular due to innovative academic programs. ER 17, 96-97; SER 303-04. It was uncontested, however, that families from these neighborhoods could have elected to send their children to Franklin High School, which PICS admits and the record demonstrates is a "very impressive" school, or they could have sought assignment to Garfield High School, regarded by many as Seattle's most prestigious high school, which was integration neutral at the time. ER 87-88, 261, 422-23, SER 431-36.

3. Application of the Assignment Plan in Subsequent Years

In April 2001, just before school assignments for the 2001-02 school year were to be finalized, the district court granted summary judgment in favor of the school board. Accordingly, the integration tiebreaker was utilized in that year. In May 2002, however, the Court of Appeals invalidated the tiebreaker on state law grounds and subsequently enjoined its use. Pet. 15a-16a, 138a.

a. The integration tiebreaker has not been utilized since 2002.

As a result, high school assignments for the 2002-03 year were made without application of the integration tiebreaker. After assignments for the 2002-03 school year had been made,

the Ninth Circuit panel granted the school board's rehearing petition and certified the state law question to the Washington Supreme Court. Pet. 15a-16a. Although the Ninth Circuit panel vacated its injunction at the time it granted rehearing, the School Board decided, due to continued uncertainty surrounding the ongoing litigation, that the tiebreaker would not be reinstated at that time. Pet. 141a-142a.

b. The District's new administration has not determined whether or how to reinstate the tiebreaker.

Since that time, the entire membership of the school board has changed and a new superintendent of schools has taken office. These officials have not taken a collective position on reinstatement of the tiebreaker. In the normal course, the District's staff develops proposals to amend the assignment plan in the fall of each year, for implementation in the following spring. That process was complete for the 2006-07 assignment cycle by the time the Ninth Circuit's en banc decision was handed down. As a result, the new board and administration have not deliberated on whether to reinstate or modify the tiebreaker in light of the Court of Appeals' en banc decision.

c. The impact of possible future application of the tiebreaker on PICS is speculative.

Below, PICS established its standing by showing that several of its members were likely to be adversely impacted by the future use of the integration tiebreaker. PICS identified four member-families who were allegedly likely to be adversely affected. All are white and lived in either the Queen Anne/Magnolia neighborhoods or in Laurelhurst, also in the city's northern half: Jill Kurfirst had a son entering high

school in the 2000-01 school year. ER 90, 278, 450. Winnie Bachwitz had a daughter who entered high school in the 2000-01 school year. ER 90, 460. John Miller had a son in middle school who was expected to start high school in 2002-03. ER 278, 447, 463. Rick Hack had children in middle schools and elementary school, the youngest of whom was entering fourth grade in fall 2000, and now is enrolled in ninth grade. ER 278, 447, 462-63.[4] The District's records do not reflect any children of these parents currently enrolled in its schools below the ninth grade level.

Since the 2000-01 assignment cycle described in the record, a number of circumstances have changed, which bear directly on the school board's consideration of whether to reinstate or modify the tiebreaker. Choice patterns have changed: in 2000-01, five of Seattle's ten regular high schools were oversubscribed (Ballard, Garfield, Roosevelt, Hale and Franklin). ER 16. Three of those five were deemed racially imbalanced (Ballard, Hale and Franklin), thereby triggering the integration tiebreaker. ER 17-18. At that time, Ballard was by far the most popular school, and the PICS parents' complaints were focused on lack of access to that particular school, where the waiting list exceeded 100 students.

For the 2005-06 school year, in contrast, Ballard, Garfield, Roosevelt and West Seattle high schools were oversubscribed, but only Ballard and Roosevelt would be deemed imbalanced under the 15% plus-or-minus standard

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[4] Two other PICS members were mentioned elsewhere in the record. Debi Preston had a daughter who was a senior in Ballard at 2000. ER 464. PICS member Kathleen Brose had daughter who was assigned to Franklin High School in 2000. ER 465-66.

previously employed to trigger the tiebreaker.[5] As measured by first choice of assignment, Roosevelt is now the most popular school. Ballard ranks third in terms of choices, and its waiting list in the fall of 2005 (without the use of the integration tiebreaker) included 28 students.[6]

In addition, because of declining enrollment and a severe budget crisis, the school board has recently undertaken consideration of changes to the Open Choice program, at least at the elementary school level, in order to limit transportation costs.[7]

B. Proceedings Below

Petitioner's recitation of the procedural history of this litigation largely ignores the holdings of Washington Supreme Court, which provide important context in analyzing the interests at stake here.

The Ninth Circuit panel initially invalidated the integration tiebreaker under a Washington statute prohibiting racial discrimination or preferences in public education, finding it

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[5] *See, http://www, seattleschools.org/area/siso/disprof/2005/DP05indsch.pdf* (p.34) (visited 3/17/06); *http://seattleschools.org/area/facilities-plan/Choice/HistoricalWaitlists.pdf* (visited 3/17/06).

[6] *See http://www.seattleschools.org/area/facilities-plan/Choice/HistoricalChoices.pdf* (visited 3/17/06).

[7] *See* Tan Vinh, *Parents may get less of a Choice,* The Seattle Times (March 18, 2006), available at http://archives.seattletimes.nwsource.com/cgi-bin/texis, cgi/web/vortex/display?slug=school-future15m&date=20060318&query=Seattle+Schools+%26+transportation (visited 3/20/06).

"remarkably clear" that the "plain meaning" of the statute prohibits the racial tiebreaker. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236, 1244 (9th Cir. 2002). On petition for rehearing en banc, the panel 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 1085 (9th Cir. 2902).

The Washington Supreme Court upheld the integration tiebreaker. Like the Court of Appeals and district court, it found that the integration tiebreaker was intended to ameliorate the effects of residential segregation. It further stated that:

> [T]here is strong empirical evidence that a racially diverse school population provides educational benefits for all students. Most students educated in racially diverse schools demonstrated improved critical thinking skills - the ability to both understand and challenge views which are different from their own. ... Research has also shown that a diverse educational experience improves race relations, reduces prejudicial attitudes, and achieves a more democratic and inclusive experience for all citizens.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wash. 2d 660, 72 P.3d 151, 161 (2003) (citations omitted).

The state court ultimately held that:

> The School District's open choice plan does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin as meant by law.

> To the extent the tie breaker is race conscious, it furthers a core mission of public education: to make available an equal, uniform and enriching educational environment to all students within the district.

Id. at 166.[8]

III. REASONS FOR DENYING THE WRIT

Because the en banc Ninth Circuit correctly applied established Equal Protection precedents, including the Michigan decisions, consistently with other circuits that have addressed the same issue, and because of the passage of time since the record was made in this case, and intervening changed circumstances, this case is not appropriate for review by this Court.

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[8] The Washington Supreme Court also held that the interests furthered by the tiebreaker are protected by the Washington Constitution, stating: "The goals of teaching tolerance and cooperation among the races, of molding values free of racial prejudice, of preventing minority students from becoming isolated from the rest of the educational system, and eliminating or preventing the emergence of a problematic class of 'minority schools' are integral to the mission of public schools." 72 P.3d at 162. While declining to reach the question of whether the state constitution mandates measures such as the integration tiebreaker, the court made it clear that if the appropriate showings were made, "then the state constitution would most certainly mandate integrated schools." *Id.* at 162-63.

A. There Is No Circuit Conflict or Apparent Confusion in the Lower Courts.

PICS' primary argument for granting certiorari is that there is "uncertainty and confusion" among the lower federal courts concerning application of the Michigan decisions to the K-12 context. Pet. 9-15. Although PICS tries to make the case that there is a circuit conflict in this regard, in fact there is no such conflict. Moreover, lower courts are experiencing no apparent difficulty in applying either the compelling interest or narrow tailoring prongs of the strict scrutiny analysis described in those cases to the K-12 context.

Following the Michigan decisions, three circuit courts (the First, Sixth, and Ninth) have addressed K-12 district-wide integration policies, where the interests asserted in support of consideration of race were similar to those at issue here. Each recognized a compelling interest in achieving or maintaining integrated schools and also identified similar considerations that must be taken into account in a context-specific narrow tailoring inquiry under the Equal Protection Clause.

The en banc First Circuit in *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. June 16, 2005), *cert. denied,* 126 S. Ct. 798 (2005), upheld the constitutionality of Lynn, Massachusetts' race-conscious K-12 school transfer policy. Similarly, the Sixth Circuit affirmed the constitutionality of Louisville, Kentucky's race-conscious K-12 school assignment policy for educationally comparable schools in *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd,* 416 F.3d 513 (6th Cir. 2005) *(per curiam), reh'g and reh'g en banc denied* (Oct. 21, 2005), *cert. filed* (Jan. 18, 2006, No. 05-915). These decisions are entirely consistent with the en banc Ninth Circuit's reasoning in this matter.

In addition, before the Michigan cases were decided, the Second Circuit reached a similar result in *Brewer v. West Irondequoit Central Sch. Dist.*, 212 F.3d 738, 749, 752-53 (2000). It concluded that there is a compelling educational interest in reducing racial isolation in K-12 schools through race-conscious means.

Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246, *as amended on denial of reh'g and reh'g en banc* (5th Cir. 2005), is not to the contrary. There, a school district defended a race-based plan for assigning students to a middle school magnet program on the basis that the plan was permitted under a 20-year-old consent decree which had been designed to remedy past segregative practices in the district. The school district had previously been granted unitary status, however, and the school board conceded that it could not justify the plan as necessary to remedy present effects of past illegal practices. *Id.* at 258-59. It also advanced no other compelling interests that could justify its use of race. *Id.*

The remaining cases cited by PICS to show that the courts of appeal are conflicted about the application of *Gratz* and *Grutter* to K-12 assignments plans hardly support that proposition, given that they were decided before the Michigan cases. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed,* 529 U.S. 1050 (2000); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied,* 529 U.S. 1019 (2000), and *Wessmann v. Gittens,* 160 F.3d 790 (1st Cir. 1998), involved admission to unique schools or programs that provided discrete, limited governmental benefits. *Tuttle* involved admission to kindergarten in a special alternative school. Like *Cavalier, Eisenberg* concerned a transfer to a special math and science magnet school. *Wessmann* involved admission to a competitive examination high school. These cases did not

involve a system of race-conscious assignment to comparable comprehensive high schools, in which any student, regardless of race, could attend at least one of the popular oversubscribed high schools.

In summary, PICS has not established that there is a circuit conflict or that Supreme Court guidance is required at this time. To the extent that circuit courts continue to refine the application of the Michigan cases in the highly fact-specific context of K-12 school assignment plans, granting review without the benefit of a record that reflects current trends in this dynamic area of educational policy would not be helpful to the orderly development of the law.

B. The Court of Appeals' Strict Scrutiny Analysis Does Not Conflict with This Court's Precedents.

PICS' next argument for granting certiorari is that the en banc Ninth Circuit decision conflicts with or inappropriately extends the reasoning of the Michigan cases. Pet. 15-24. As shown herein, however, the Court of Appeals correctly applied both parts of the strict scrutiny test, as described in the Michigan and other equal protection decisions, to hold that the school board's interests in avoiding racially concentrated or isolated schools and achieving the educational and social benefits of racial diversity in secondary education were "clearly compelling," and that the "use of the race-based tiebreaker is narrowly tailored to achieve the District's compelling interests." Pet. 33a, 62a.

1. The Court of Appeals appropriately recognized the contextual differences between K-12 school assignments and selective higher education admissions.

PICS asserts that Seattle's integration tiebreaker is invalid for two primary reasons. First, it argues that, because the record does not demonstrate Seattle's schools are currently experiencing the effects of past *de jure* segregation, race-conscious measures to achieve integrated or diverse schools are prohibited *per se*. Pet. 16-17. Second, PICS contends that, even if race can be considered for purposes of avoiding the deleterious consequences of *de facto* segregation, such consideration is permitted only as a part of a multi-factored "holistic review" of each individual, such as would be applied in the context of selective college or university admissions. Pet. 18. The Court of Appeals appropriately rejected these contentions, based on this Court's instruction in the Michigan cases to carefully consider the context in which race is considered. Pet. 22a-33a.[9]

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[9] As stated in *Grutter*, "context matters when reviewing race-based government action."

> [G]eneralizations ... must not be applied out of context in disregard of variant controlling facts. ... Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

539 U.S. at 327.

As the Court of Appeals noted, "[i]n Seattle, the threat of having to attend a racially concentrated or isolated school is not a theoretical or imagined problem." Pet. 28a. As even the panel that initially struck down the integration tiebreaker conceded, "if Seattle's children were simply assigned to the high schools nearest their homes, the high schools would become segregated in fact (*"de facto"* segregated)." Ninth Cir. Order of June 17, 2002 (certifying question), p. 8. Additionally, the Court of Appeals correctly assessed the record with respect to the school board's findings and social science evidence showing that the educational and social benefits of attending integrated high schools are similar to those of a university as articulated in *Grutter*. Pet. 23a-24a.

Based on this record, the Court of Appeals concluded that there is a compelling interest in "ameliorating real identifiable de facto racial segregation." Pet. 30a. In reaching this conclusion, the Ninth Circuit relied on earlier decisions of this Court concerning K-12 education, to determine that the interests at stake are sufficiently important to warrant consideration of race. Pet. 24a-25a.[10]

PICS' argument that the Open Choice plan is flawed because it uses race as a single tie-breaker to decide some assignments, rather than a multi-factored "holistic review" of each individual, ignores the relevant context. The statements

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[10] Ever since *Brown v. Board of Education*, 349 U.S. 294 (1955), this Court has recognized the importance of these benefits. *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) ("Attending an ethnically diverse school may help accomplish this goal by preparing minority 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.") (citations omitted).

cited by PICS from the Michigan decisions concerning the importance of holistic review have meaning only in the context of selective admissions and other "zero sum" programs and the rationale advanced to support them. As explained by Justice Powell, such selective college admissions programs are "wholly dissimilar" from elementary or secondary school programs where students are admitted to one school rather than another in an effort to promote racial integration. *Regents of Univ. of Calif. v. Bakke,* 438 U.S. 265, 300-01 n.39 (1978). In contrast, as the Washington Supreme Court explained, "[t]he goal of busing is to provide children with an education in an integrated setting, a benefit that accrues to all races. Further, busing does not deny any child the opportunity to go school, and the burden of being sent to a different school is generally borne by children of all races." *Parents Involved in Cmty. Schs.*, 72 P.3d at 160.

Finally, PICS' argument that the Open Choice plan amounts to "mechanistic" racial balancing ignores the facts. The Open Choice plan, and the integration tiebreaker specifically, do not seek to achieve a pre-determined racial distribution in any school. Rather, the plan is reactive to choice patterns, by preventing the priority given to neighborhood residents (the distance tiebreaker) from excluding white or minority students who do not live close to a popular school from an opportunity to attend.

2. The Court of Appeals applied the correct level of scrutiny.

The Court of Appeals conducted an extensive and fact-specific narrow tailoring analysis, utilizing all of the "hallmarks" described in the Michigan cases. Pet. 42a-61a. PICS asserts, nevertheless, that the Court of Appeals was unduly deferential to the school board on two issues: the

determination that race-based measures were necessary and the utility of race-neutral alternatives. Pet. 19. While admitting that the Michigan decisions permit deference to educational judgment as to the importance of diversity in the context of higher education, PICS contends that such deference should not be accorded outside of that context or with respect to narrow tailoring issues. Pet. 21. PICS' contentions in this regard are clearly wrong.

As the Court of Appeals noted, this Court has long deferred to local school boards "at the intersection between Constitutional protections and educational policy." Pet. 51a-52a (collecting authorities); *see also Washington v. Seattle Sch. Dist.*, 458 U.S. at 474 (1982) ("the desirability and efficacy of school desegregation are matters to be resolved through the political process"). Additionally, this Court's narrow tailoring analysis in *Grutter* was specifically deferential to the judgment of school officials with respect to the narrow tailoring issue of the utility of alleged race-neutral alternatives. *See Grutter*, 539 U.S. at 539-40 (consideration of race neutral alternatives did not require university to adopt measures that would compromise other important educational values in order to achieve diversity).

These legal deficiencies aside, PICS' argument about inappropriate deference invites this Court to engage in a fact-specific review of the record, while ignoring the key aspects of that record. The record shows that, while the school board recognized and valued a preference for neighborhood schools, it also recognized that strict application of such a preference would result in further school segregation. There is no evidence to dispute the conclusion that, absent consideration of race, a school assignment policy that gives preference to neighborhood schools results in segregated schools in Seattle. Rather, PICS simply argued that schools were sufficiently

diverse if they had only few white students, but many students of color from different ethnic groups. Pet. 50a-51a. The Court of Appeals correctly rejected this argument. *Id.*

With respect to race-neutral alternatives, PICS has never suggested nor does the record reveal any race-neutral alternatives that would have been as effective in advancing integration and at the same time preserving the other values identified by the school board. The Court of Appeals extensively examined the options put forth by PICS (poverty as a proxy, the "Urban League Plan" and a lottery) and concluded in each instance that the school board had a reasoned basis for rejecting it or that there was no evidence to support the proposition that an alleged option would work. Pet. 53a-56a.

3. Having correctly ...ified a compelling interest and concluded that the integration tiebreaker was narrowly tailored to serve that interest, the Court of Appeals did not ignore individual rights.

PICS finally suggests that any governmental action that uses race to remedy a racial problem is prohibited by the Fourteenth Amendment's guarantee of individual rights. Pet. 22-24. This is a blatant misreading of *Grutter* and related decisions. In *Grutter,* this Court stated:

> Because the Fourteenth Amendment 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. ... We have held that all racial classifications imposed by government must be

> analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

539 U.S. at 326 (internal citations, quotes and punctuation omitted).

Read in context, the portions of *Grutter* cited by PICS simply stand for the proposition that any racial classification–whether of the type involved in the Michigan cases or here–must be justified as furthering a compelling interest and narrowly tailored to achieve that end. As demonstrated above, the Court of Appeals correctly found that both elements of strict scrutiny were satisfied. Accordingly, PICS' "group vs. individual rights" argument has no merit.

C. Passage of Time and Changed Circumstances Render This Case Inappropriate for Supreme Court Review.

The record in this case is limited to the application of the integration tiebreaker to Seattle's over-subscribed high schools during the 1999-2000 and 2000-01 school years. As a result of the ups and downs of this litigation, the school board has suspended use of the integration tiebreaker since 2001-02 assignment cycle. Whether the new school board and new superintendent would do so again, and what modifications it would make to the assignment plan, are unknown and cannot be determined from the record in this case.

In addition, it is impossible to know whether a decision in favor of PICS would provide any relief to its members. First, it appears that the PICS members who allegedly had or would have been adversely impacted by the integration tiebreaker are

no longer in such a position and that there is no likelihood that they will be in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (To satisfy case or controversy requirement and warrant prospective relief, plaintiff must show "real and immediate" threat of injury). Second, even assuming that there are other undisclosed PICS members who might be impacted by the tiebreaker's re-adoption, changes in school popularity and choice patterns, coupled with uncertainty about the future course of school board action, make it extremely unlikely that a decision concerning the validity of the system in 1999-2001 would resolve issues about a new system yet to be devised. It would be inappropriate to grant certiorari in these circumstances.[11]

The school board respectfully submits that the orderly development of the law in this area counsels that, when there is a demonstrated need for Supreme Court review of this question, such review should be applied to a plan developed in light of the Michigan cases and related lower court decisions. Supreme Court review should not be applied to

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[11] *Cf. Montana v. Imlay*, 506 U.S. 5, 6 (1992) (Stevens, J., concurring in the dismissal of the writ of certiorari as improvidently granted) ("At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits–except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place.") (footnote omitted).

stale record concerning a plan that was designed and implemented long before those cases were decided.[12]

IV. CONCLUSION

For the reasons stated, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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[12] *Cf. Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of certiorari) (Resolution of this issue "must await a final judgment on a program genuinely in controversy").