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Nos. 05-908 & 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,
Respondents.

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

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeal for the Sixth and Ninth Circuits

BRIEF FOR *AMICI CURIAE* SENATORS EDWARD M. KENNEDY, PATTY MURRAY, MARIA CANTWELL, THOMAS HARKIN, RICHARD J. DURBIN, BARACK OBAMA, AND KEN SALAZAR IN SUPPORT OF RESPONDENTS

ALYSSA GSELL
CHARLOTTE GILLINGHAM
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

ANDY LIU
Counsel of Record
DAVID L. HAGA
LAUREL PYKE MALSON
BETH NOLAN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

October 10, 2006

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are United States Senators elected from various parts of the Nation. We submit this brief to urge the Court to reaffirm that local school districts may take voluntary action to ameliorate the pernicious consequences of racial isolation and promote the interests of integration and equal opportunity in our Nation's elementary and secondary schools.

As members of the branch of government to which the Constitution assigns responsibility for "enforc[ing], by appropriate legislation," the anti-discrimination guarantees of the Thirteenth and Fourteenth Amendments, *see* U.S. Const. amends. XIII, § 2, XIV, § 5, several of whom are also members of Senate Committees with principal jurisdiction over the Nation's civil rights and education laws and policy, *Amici* have substantial experience and interest in the issues now before the Court. While *Amici* believe that elementary and secondary education remains primarily a local endeavor, appropriate federal involvement is an integral component of promoting educational opportunity and ensuring a quality education for all of the Nation's children. Indeed, through its legislation, Congress historically has played an essential role in supporting local authorities in their efforts to achieve integrated schools and educational opportunities for children of all races.

Amici submit this Brief to bring the Court's attention to the federal legislative branch's long-standing recognition of the compelling national interest in promoting integration in elementary and secondary education and in preventing the harms of segregated education, and to the considered judgments of the legislative branch concerning the questions these cases present.

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named *Amici* and their counsel made any monetary contribution to the preparation and submission of this brief. By letters on file with the Court, all parties have consented to its submission.

SUMMARY OF ARGUMENT

Dating back to *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), this Court and numerous other federal courts repeatedly have recognized the harms inherent in racially segregated schools and either *ordered* local school authorities to pursue integration through various means or *deferred* to local school authorities that voluntarily did so. Similarly, with the passage of the Emergency School Aid Act more than three decades ago, and as recently as the No Child Left Behind Act, both the executive branch and the legislative branch have consistently, and unambiguously, recognized the important national interests in addressing racial segregation and racial integration in public education.

Nevertheless, Petitioners insist their Equal Protection rights have been violated because they were not assigned to the elementary or secondary public school of their choice under the Respondent local school districts' race-conscious integration plans. In so arguing, Petitioners brush away more than 50 years of Equal Protection Clause jurisprudence in the elementary and secondary school context as a mere "temporary" departure from what they contend is truly required by the Fourteenth Amendment: that government be entirely color-blind, regardless of circumstance, and that remedying "mere" racial segregation and promoting "mere" racial integration can *never* serve a compelling interest. Petitioners' argument disregards Congress's repeated recognition of the necessity of taking race-conscious measures to achieve the national interest in integrated educational opportunities for all of the Nation's children.

Petitioners rely almost exclusively on the Court's recent decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the Court addressed the University of Michigan's use of race as one of several criteria for promoting diversity among students admitted to its higher education programs. Petitioners read

Grutter and *Gratz* to preclude school officials (or any government actor) from considering race, by itself without other factors, when pursuing integration. Certainly, achieving diversity in other respects—in addition to racial diversity—can convey additional benefits in the educational context. Recognizing the benefits of other forms of diversity, however, does not diminish the compelling interest in achieving *racial* integration in schools. As *Grutter* explicitly acknowledged, "race unfortunately still matters." 539 U.S. at 333.

As is clear from the record in these two cases, racially segregated schools and racial isolation among elementary and secondary school children result in negative consequences for *all* students. Racially segregated schools tend to be characterized by lower average test scores and lower levels of student achievement than more integrated schools. In contrast, with racial integration, students learn tolerance toward others of different races, develop relationships across racial lines, and relinquish racial stereotypes. Students from schools with more integrated student bodies are also better prepared for a diverse workplace and develop more advanced social and intellectual maturity. Further, integrated schools help students develop improved critical thinking skills, while also improving race relations among students and expanding their opportunities in higher education and employment.

Accordingly, neither this Court nor Congress has ever foreclosed the pursuit of racial integration, standing alone, nor limited that pursuit to remedying past discrimination. Indeed, all three branches of the government have recognized the compelling national interest in racial integration.

Moreover, the decisions of this Court consistently express *deference* to local school districts' ability to voluntarily use rational, race-conscious measures to reduce *de jure* or *de facto* racial segregation and racial isolation. But, even viewed under a more exacting strict scrutiny analysis, the actions of the local school districts here were narrowly

tailored to serve a compelling interest in reducing racial isolation and promoting racial integration in schools, and therefore do not run afoul of the Equal Protection Clause.

In contrast to the admissions processes at issue in *Grutter* and *Gratz*, no students were denied admission to the public schools in Seattle or Jefferson County on account of their race. In fact, no student was denied admission at all (regardless of race). Nor do the local school districts' voluntary integration plans discriminate against or disadvantage members of any racial group, or establish a "preference" for members of any particular group. They apply to both white students and non-white students, and do not establish quotas or rigid numbers, nor do they displace a merit-based assignment system. To the contrary, they target broad ranges, and the percentage of white and non-white students varies (sometimes widely) from school to school within the districts.

In some instances, the plans operate in such a way that particular students (both white and non-white) are not assigned to the school of their choice. Those students, however, do not have any constitutional right to attend the school of their choice; that is a decision entirely within the discretion of local school authorities.

Without question, the local school districts have used race-conscious policies in order to achieve more racially integrated schools. This does not mean, however, that the local school authorities have pursued racial balancing for its own sake. Rather, they have adopted narrowly tailored integration plans for the associated educational benefits they provide to *all* children. Nothing in the Constitution prevents local school districts from voluntarily using race-conscious measures to pursue these compelling interests. Any ruling to the contrary would not only disregard Congress's repeated recognition of the compelling national interest in achieving racially integrated schools, but would impede Congress's ability to

effectively legislate on matters of civil rights and education in the future.

ARGUMENT

Since the Court's 1954 landmark decision in *Brown v. Board of Education*, the Nation has sought to give full meaning to the important goals of integration and equality, which are a fundamental part of the effort to ensure that all children receive a quality education. With the recent celebrations surrounding the 50th anniversary of the *Brown* decision, and the upcoming celebration next year of the 50th anniversary of the integration of Central High School in Little Rock, Arkansas, much attention has been given—deservedly so—to the significant progress made since 1954. The Court, the President, and Congress, however, all recently have acknowledged the reality that, today, "race unfortunately still matters," especially when it comes to the Nation's schools. *Grutter*, 539 U.S. at 333. *See also* No Child Left Behind Act, 20 U.S.C. § 6301, *et. seq.* (2002). As President George W. Bush remarked at the Grand Opening of the Brown v. Board of Education National Historic Site, "while our schools are no longer segregated by law, they are still not equal in opportunity and excellence. Justice requires more than a place in a school." Remarks by The President at Grand Opening of The Brown v. Board of Education National Historic Site, 40 Weekly Comp. Pres. Doc. 911-12 (May 17, 2004).

The two cases now before the Court involve school districts that have voluntarily undertaken efforts to do more and ensure that they are not merely providing "a place in a school." Their voluntary integration plans comport with established Equal Protection Clause jurisprudence. Indeed, "[t]o say that school officials in K-12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of *de facto* segregation and promote multiracial learning is to go further than ever before to disappoint the promise of *Brown*." *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328,

391 (D. Mass. 2003), *aff'd* 418 F.3d 1 (1st Cir. 2005). Accordingly, the decisions of the Courts of Appeal for the Ninth and Sixth Circuits should be affirmed.

I. THE LOCAL SCHOOL DISTRICTS' VOLUNTARY INTEGRATION PLANS PASS MUSTER UNDER ANY STANDARD.

The Court recently "decline[d] the invitation" to "make an exception to the rule that strict scrutiny applies to all racial classifications." *Johnson v. California*, 543 U.S. 499, 509 (2005). However, as discussed in Section II, *infra*, we do not believe that strict scrutiny is necessarily the correct standard to be applied here, or that *Johnson* or other decisions of this Court mandate that strict scrutiny be applied. Nevertheless, because the school districts' plans pass muster under even the most stringent scrutiny, and therefore would also pass muster under a more deferential standard of review, this Brief begins with an analysis of the challenged plans under the strict scrutiny standard. The strict scrutiny standard requires that the challenged use of race (1) serve a compelling government interest and (2) be narrowly tailored to do so. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

A. There Is A Compelling National Interest In Promoting Racial Integration In Schools.

The local school authorities' interests in both of the cases at bar are clear and undisputed: to avoid racial isolation and *de facto* racial segregation and promote integration in public school education. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1174 (9th Cir. 2005) ("*Parents*") (noting that the Seattle plan "seeks the affirmative educational and social benefits that flow from racial diversity . . . [and to] avoid the harms resulting from racially concentrated or isolated schools."); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004)

(finding Jefferson County school authority's interest to be "[t]o give all students the benefits of an education in a racially integrated school"). Petitioners neither challenge those motives nor suggest that they are a pretext for some illegitimate motive. *See McFarland*, 330 F. Supp. 2d at 855, n.42; *Parents*, 426 F.3d at 1175.

For more than 50 years, and as recently as three years ago, this Court has recognized the compelling interest in advancing integration in the Nation's schools. *See, e.g., Brown I*, 347 U.S. at 493-94; *Grutter*, 539 U.S. at 328 (finding "a compelling interest in attaining a diverse student body"). The Court has deferred to local school boards' "educational judgment that such diversity is essential to [their] educational mission." *Grutter*, 539 U.S. at 328.

Petitioners nonetheless argue that, while race is one component of the diversity recognized as a compelling interest in *Grutter*, attempting to achieve racial integration alone cannot be a compelling interest. That contention is directly at odds with five decades of Equal Protection Clause jurisprudence and the considered judgment of the legislative and executive branches, which repeatedly have recognized the compelling national interest in eradicating racial segregation and promoting integration in public schools.

As this Court recently concluded, "race unfortunately still matters." *Id.* at 333. The local school authorities' plans are designed to move society in a direction that will, one day, change that.

1. The Court has recognized the compelling national interest.

In *Brown I*, the Court acknowledged the inherent harms associated with racial segregation, which apply "with added force to children in grade and high schools." 347 U.S. at 494. Since then, the Court repeatedly has recognized the vital

importance of addressing racial segregation, and has suggested that it is well within local school districts' discretion—to which the Court generally has deferred—to pursue precisely the types of voluntary racial integration plans at issue here. *Brown* and its progeny unquestionably recognize a level of national interest in eliminating racial segregation and achieving racial integration that is at least as compelling as the interests held to satisfy strict scrutiny in other cases.

Brown I itself recognized the "detrimental effect" of segregation on school children and its particular importance in the education context. *Id.* As the Court stated:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required for the 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 adjust normally to his environment.

Id. at 493. *See also Lee v. Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970) (stating that "it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to *all* students, both black and white") (emphasis added). Combining its clear recognition of the importance of affording educational opportunity to all children and the "detrimental effect" of segregation in the education context, the Court expressly recognized the students' "personal interest" in access to equal educational opportunity and the "public interest" in eliminating obstacles to desegregation. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("*Brown II*"). If the Court had been employing the nomenclature of the strict

scrutiny test, it no doubt would have labeled these personal and public interests as "compelling."

Indeed, in this context, the Court has recognized the interests to be so compelling as to warrant *deference* to local school authorities that pursue integration. In *Washington v. Seattle School District No. 1*, the Court observed that:

> [T]he power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort.

458 U.S. 457, 479-80 (1982). Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) ("*Swann I*"), the Court recognized the valid interests in "hav[ing] a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole" and concluded that "[t]o do this as an educational policy is within the broad discretionary powers of school authorities . . .". *Id.* at 16. Likewise, in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971) ("*Swann II*"), the Court affirmed 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." *Id.* at 45.

The Court's subsequent decisions are entirely consistent with the view that racial integration is an important, constitutionally permissible goal, and that local school authorities have the discretion to voluntarily pursue racial integration as a matter of sound educational policy. "[T]he power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student as-

signment and desegregation—[is one] firmly committed to the local board's discretion." *Washington*, 458 U.S. at 479-80.[2]

Individual members of the Court have affirmed these principles. In *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973), for example, Justice Powell noted that local "[s]chool boards would, *of course*, be free to develop and initiate further plans to promote school desegregation" and specifically highlighted the values of racial integration: "[n]othing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." *Id.* at 242 (Powell, J., concurring in part, dissenting in part) (emphasis added). Similarly, in denying an emergency petition by white parents to stay a state-imposed, race-conscious student assignment plan in Los Angeles County, Justice Rehnquist noted that while the school authority was under no *obligation* to voluntarily pursue racial integration in the public schools, he had "*very little doubt that it was permitted* . . . to take such action." *Bustop, Inc. v. Bd. of Educ. of the*

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[2] *See also Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) ("local school authorities have the power to voluntarily remedy *de facto* segregation existing in schools and, indeed, such integration serves important societal functions"); *Johnson v. Bd. of Educ. of City of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) ("[T]he absence of a constitutional *duty* on the part of the school authorities to establish racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change."); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) ("It is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."); *Offermann v. Nitkowski*, 248 F. Supp. 129, 131 (W.D.N.Y. 1965) ("[T]he Fourteenth Amendment, while prohibiting any form of invidious discrimination, does not bar cognizance of race in a proper effort to eliminate racial imbalance in a school system.").

City of L.A., 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers) (emphasis added).

Notwithstanding the Court's and individual Justices' pronouncements, the Solicitor General's *amicus* briefs suggest that the cases currently before this Court are different because the local school districts are not currently operating under a court-ordered desegregation plan. *See Amicus* Br. of the United States, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 7-8; *Amicus* Br. of the United States, *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915) at 7-8. That, however, is a distinction without a difference. In fact, the Court recently and expressly stated that it "ha[s] never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 539 U.S. at 328. The Nation's interest in integrated schools does not depend on whether a school district has been subjected to a desegregation lawsuit. The detrimental effects of segregation and racial isolation exist whether or not a court order is in place. The "lingering effects" of such segregation simply do not "magically dissolve" without affirmative efforts by school districts to improve integration. *See Brown v. Bd. of Educ.*, 978 F.2d 585, 590 (10th Cir. 1992), *cert. denied sub nom. Unified Sch. Dist. No. 501 v. Smith*, 509 U.S. 903 (1993).

Moreover, in the case of former *de jure* systems—such as the Louisville school district—it defies logic that a race-conscious student assignment plan can be used to attain a declaration that the school system has eliminated the vestiges of the prior *de jure* dual system, but that such a plan cannot be used to *maintain* that status after the federal courts have relinquished jurisdiction in favor of local control.[3] By

[3] Indeed, a school district seeking "unitary status" must not only demonstrate past good faith compliance with desegregation orders, it must also demonstrate a good faith commitment to the *future* operation of the

requiring the elimination of the race-conscious plans used to achieve unitary status, the Petitioners' arguments would ensure the resegregation of many, if not most, of the prior *de jure* systems that have now been desegregated. Just as the Court found it "clear that [a] city could take affirmative steps to dismantle" a system of racial exclusion of minority contractors where the city had become a "passive participant," and without any prior history of discrimination by the city itself, the school districts should be permitted to address *de facto* segregation where they have no control over segregated residential patterns. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (plurality opinion).

2. The legislative and executive branches have recognized the compelling national interest.

Beginning in the early 1970's, with the passage of the Emergency School Aid Act, and as recently as the passage of the No Child Left Behind Act, both the executive branch and the legislative branch that *Amici* represent have repeatedly and unambiguously recognized the important national interests in specifically addressing racial segregation and racial integration in public education.

In anticipation of introducing the legislation that would become the Emergency School Aid Act of 1970 ("ESAA"), President Nixon issued a "Statement About Desegregation of Elementary and Secondary Schools," "plac[ing] the question of school desegregation in its larger context, as part of America's historic commitment to the achievement of a free and open society" and declaring that no issue "is more important to our national unity and progress." Richard Nixon, Statement About Desegregation of Elementary and Secondary Schools, Pub. Papers 304-05 (March 24, 1970). In discussing

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school system. *See Brown*, 978 F.2d at 592; *United States v. Unified Sch. Dist. No. 500*, 974 F. Supp. 1367, 1384 (D. Kan. 1997).

voluntary racial integration, President Nixon specifically noted that "[t]he important point to bear in mind is that where the existing *racial* separation has not been caused by official action, . . . increased integration is and should remain a matter for local determination." *Id.* at 312 (emphasis added).

Two months later, President Nixon introduced legislation that would become the ESAA, which was designed to eliminate segregation not only in the prior *de jure* systems, but also in those school districts in which *de facto* segregation existed. Thus, it explicitly recognized the national interest in addressing racial isolation in the classroom, regardless of its source:

> This Act deals specifically with problems which arise from *racial separation, whether deliberate or not*, and whether past or present. It is clear that *racial isolation* ordinarily has an adverse effect on education. Conversely, we also know that *desegregation is vital to quality education*—not only from the standpoint of raising achievement levels of the disadvantaged but also from the standpoint of *helping all children* achieve the broad-based human understanding that increasingly is essential in today's world.

See Richard Nixon, Special Message to the Congress Proposing the Emergency School Aid Act of 1970, Pub. Papers 449 (May 21, 1970) (emphasis added). The importance of these goals was clear: "doing a better job of overcoming the adverse educational effects of racial isolation, wherever it exists, benefits not only the community but the nation." *Id.* at 452.

Congress enacted the ESAA in 1972, agreeing that "racially integrated education improves the quality of education for all children." H.R. Rep. No. 92-576, at 3 (1971). Congress recognized that "education in an integrated environment, in which [all] children are exposed to diverse backgrounds, is beneficial." S. Rep. No. 92-61, at 7 (1971).

In 1984, recognizing the continued need for federal involvement in efforts to overcome the obstacles to desegregating schools and to prevent racial isolation, Congress passed the Magnet Schools Assistance Program to encourage and support local educational agencies that implemented magnet schools, which were found to be particularly successful in accomplishing these important goals.[4] The program had the stated purposes of:

> meet[ing] the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools [and] to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students.

Pub. L. No. 98-377, Title VII, 98 Stat. 1267, 1299 (1984) (repealed 1988). In reauthorizing the program in 1994, Congress explicitly found that "it is in the best interest of the Federal Government to . . . support . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of . . . education." Pub. L. 103-382, Title V, § 5101, 108 Stat. 3518, 3691 (1994) (amended 2002).

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[4] As the *Amici* brief of the United States acknowledges, in implementing regulations for the program in 1998, the Department of Education acknowledged that the goal of eliminating and preventing racial group isolation was a "compelling interest." *Amicus* Br. of the United States, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 26. While the United States attaches some significance to the fact that the regulations were amended in 2004 to eliminate the explicit reference to "compelling interest," that fact does not render the underlying interest any less compelling. *See id.* at 26-27. In any event, even the 2004 version of the regulations did not impose a *per se* prohibition on race-conscious measures. *See* 69 Fed. Reg. 4992 (Feb. 2, 2004) (merely requiring a "justification" for use of race-conscious student assignments in a voluntary plan).

Most recently, in the No Child Left Behind Act ("NCLB"), enacted in 2002, Congress explicitly endorsed the strong national interest in having local school authorities take voluntary measures to promote racial diversity and integration in public schools. Congress recognized the overarching goal of "ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301. In order for states to receive federal funding pursuant to NCLB, the public schools in each state must "adopt[ ] challenging academic content standards and challenging student academic achievement standards." 20 U.S.C. § 6311(b)(1)(A).

To show they have met these standards, states must demonstrate "adequate yearly progress" along certain criteria, including "[t]he achievement of students from major *racial* and ethnic groups." 20 U.S.C. § 6311(b)(2)(C)(v)(II)(bb) (emphasis added). NCLB further requires testing to measure students' progress toward specific goals at specific grade levels. The results of this testing must be "disaggregated . . . by each major racial and ethnic group . . . ," 20 U.S.C. § 6311(b)(3)(C)(xiii), and schools must show that each major group is making progress toward performance standards (and, thus, closing the achievement gap between minority and non-minority students). *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II)(bb). This, of course, is acknowledgment by both the legislative and executive branches that there is a national interest in properly tailored race-conscious measures in the educational setting.

In addition, NCLB specifically included language updating the Magnet Schools Assistance Program and affirming that:

> *It is in the best interests of the United States* . . . to continue the Federal Government's support of local educational agencies that are implementing court-ordered desegregation plans and local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different *racial* and ethnic back-

> grounds; and . . . to continue to desegregate and diversify schools . . . .

20 U.S.C. § 7231(a)(4)(A), (C) (emphasis added). In language that speaks directly to the instant cases, Congress stated that the express purpose of the updated provisions was "to assist in the desegregation of schools" by providing funding to local school authorities for "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools." 20 U.S.C. § 7231(b)(1).

As demonstrated above, Congress and the Executive Branch have long recognized the compelling national interests in addressing racial segregation and integration of the public schools. It is important that the decision of the Court in the cases at bar accommodate that interest and permit Congress to have the continuing flexibility to legislate effectively in this arena—which may require resort to race-conscious factors to achieve desegregated schools and to eliminate racial isolation in schools.

3. *Grutter* and *Gratz* did not overturn *Brown v. Board of Education*.

Petitioners acknowledge that, since *Brown I*, the Court repeatedly has recognized the national interests in addressing racial segregation and achieving racial integration, and has approved race-conscious means for achieving those goals. Petitioners dismiss this authority, however, as inconsistent with the "color-blindness" they contend is required by the Fourteenth Amendment. Petitioners argue that, "after *Brown v. Board of Education*, . . . the color-blind principle was *temporarily* obscured,"[5] and insist that *Grutter* established an entirely new constitutional regime, implicitly overturning five decades of Equal Protection Clause jurisprudence and

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[5] Petitioner's Brief (Pet'r Br.), *Parents* (No. 05-908) at 25 (emphasis added).

signaling that our society is at the point where concerns about race alone can never be considered compelling.

Grutter did no such thing. To the contrary, the Court in *Grutter* expressly stated that:

> Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which *race still matters.*

539 U.S. at 333 (emphasis added). Nor did *Grutter* hold that educational authorities could never consider racial diversity or pursue racial integration. *Grutter* recognized that certain forms of race-conscious governmental action must be subject to strict scrutiny. *Id.* at 326-27. Even then, however, *Grutter* affirmatively stated that not all race-conscious plans would fail. *Id.* at 328.[6]

What *Grutter* and *Gratz* did establish was that, in the context of the University of Michigan's competitive admissions program, the university could not create a preference for minority students based solely on their race that would insulate them from competition with other students for a limited number of spots. *Id.* at 334; *Gratz*, 539 U.S. at 270-71. Because race was only one of many factors that was considered in pursuing a diverse student body, the Court held

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[6] Petitioners' argument that the Fourteenth Amendment requires "color-blindness" likewise is belied by the fact that the very same Congress that proposed the Fourteenth Amendment also simultaneously proposed and/or enacted several measures that "expressly refer to color in the allotment of federal benefits." Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 431 (1997). These included the Freedmen's Bureau Act of 1866 and, despite the fact that the Act explicitly used race-conscious measures, "[n]o member of Congress hinted at any inconsistency between the Fourteenth Amendment and the Freedmen's Bureau Act." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985).

that the university could not apply a different set of rules to a subset of applicants, for whom race would essentially be the only grounds on which the university's admission decisions are made. *Gratz*, 539 U.S. at 270-72.

Petitioners seek to expand that holding, arguing that the local school districts may never consider race standing alone, but only as one of many factors—such as socioeconomic status or extracurricular talents. *See* Pet'r Br., *Meredith v. Jefferson County Bd. of Educ.* (No. 05-915) at 7-8; Pet'r Br., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (No. 05-908) at 44. Undoubtedly, achieving diversity in other respects—in addition to race—can convey additional benefits in the educational context, particularly in institutions of higher learning. However, recognizing the benefits of other forms of diversity does not diminish the compelling interest in achieving *racial* integration in the primary and secondary school context.

Indeed, *Grutter* recognized that racial integration, not some proxy for it, is valuable in and of itself. 539 U.S. at 330 (noting the "substantial" benefits of a racially diverse student population). *Grutter* found that racial diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." *Id.* (internal citations and quotations omitted). Those are the goals the local school districts are pursuing; consideration of other factors is irrelevant to those objectives, which *Grutter* recognized as valid in and of themselves.

4. The local school authorities presented clear evidence of a compelling interest.

As the Ninth Circuit observed below, "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." *Parents*, 426 F.3d at 1178.

History reveals that the same would be true in Jefferson County. *See McFarland*, 330 F. Supp. 2d at 836, 842-43.

Regardless of whether segregation is *de jure* or *de facto*, racially segregated 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.'" *Parents*, 426 F.3d at 1177, (quoting 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.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf).

The record below is replete with evidence that, under the challenged integration policies, the detrimental effects of segregation have been reduced and students have increased their tolerance toward others of different races, developed relationships across racial lines, and discarded racial stereotypes. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 853. This has helped students develop improved critical thinking skills, improved race relations among students, and expanded opportunities in higher education and employment. *Parents*, 426 F.3d at 1174-75. The benefits of racial tolerance and understanding are as "important and laudable" in the primary and secondary school context as they are in a university setting, *Grutter*, 539 U.S. at 330 (internal citation omitted), and perhaps more so. Indeed, these lessons are retained by students well beyond their public school years. As the Court has recognized, "education . . . is the very foundation of good citizenship." *Id.* at 331 (quoting *Brown I*, 347 U.S. at 493).

Petitioners, on the other hand, either did not challenge those conclusions or failed to present sufficient evidence to establish that the voluntary integration plans or the integrated schools they produced lacked benefit. Pet'r Br., *Parents* (No. 05-908) at 21. Petitioners instead argue that the challenged

programs constitute impermissible "racial balancing" because they allegedly prefer members of certain racial groups "for no reason other than race" and solely for the purpose of achieving a racial balance. *Id.* at 26 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring)). Petitioners' racial balancing argument, however, is nothing more than an effort to re-argue that there are no compelling interests associated with racial desegregation and integration. As such, recognition of the clear compelling interests outlined above defeats Petitioners' racial balancing argument.

B. The Local School Districts' Plans Are Narrowly Tailored.

Both the Petitioners and the Solicitor General erroneously apply the traditional "narrow tailoring" factors, and argue that application of those factors to the school districts' plans demonstrates that the plans violate the Equal Protection Clause. Those factors may be summarized as inquiries into: (1) whether individuals are afforded individual and holistic consideration; (2) whether the plans establish a quota; (3) whether the government gave serious, good-faith consideration to workable race-neutral alternatives that could achieve the compelling interest; (4) whether any member of any racial group is unduly harmed; and (5) whether the programs are limited in time. *See Grutter*, 539 U.S. at 334-36.

Those factors are inapposite here, where a race-conscious but non-preferential policy is at issue. The narrow tailoring inquiry is designed to test whether the government's use of race-conscious measures "fits" the asserted compelling interest "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. Given the nature of the programs at issue here, which are designed to avoid segregation and promote integration without preferring any

member of any group, and the fact that no party has disputed the sincerity of the local school authorities' motives, there is little likelihood that the motive for the use of race-conscious measures here was "illegitimate racial prejudice or stereotype." *Id.* That context is crucial to the narrow tailoring inquiry, which must be "calibrated to fit the distinct issues raised" in the cases at bar, taking "relevant differences into account." *Grutter*, 539 U.S. at 334 (internal quotation omitted).

Indeed, in this context, application of some of the traditional narrow tailoring factors makes little sense. Nevertheless, consideration of these factors confirms that the local school authorities' voluntary integration programs are "specifically and narrowly framed to accomplish [their] purpose." *Id.* at 333 (internal quotation omitted).

1. The individualized, holistic approach to school admission at issue in *Grutter* and *Gratz* is inapplicable in this context.

Grutter and *Gratz* concerned applications for admission to institutions of higher learning, where applicants were competing for a limited number of spaces and unsuccessful applicants would be denied admission. In that context, the Court indicated that "the admissions policy [should be] 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 (internal quotation omitted). Accordingly, the Court required individualized, holistic consideration of each applicant across a broad range of factors—of which race was only one of many. *Id.* at 338-39.

That type of individualized or holistic approach may be appropriate for examining applicants for admission to institutions of higher learning, but it has no application here—where

there is no competition for admission in the usual sense, no consideration of individual "merits," and all students will gain admission to a comparable school. Students' individual qualifications are irrelevant because, regardless of their test scores, grades, artistic or athletic ability, any student who wants to attend public school in their school district is permitted to do so. Accordingly, the potential dangers that were present in *Gratz* and *Grutter*—of substituting racial preference for qualification-based competition and fostering any associated stigma—are not present here.[7]

Indeed, *Bakke* explicitly recognized that denying admission to institutions of higher learning presented concerns that do not exist in the context of having an elementary school pupil attend a school other than, but comparable to, his neighborhood school in order to achieve desegregation:

> Respondents' 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.

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[7] While *Grutter* and *Gratz* found that individualized review was necessary to achieve viewpoint diversity across a broad range of factors in the university context, that sort of review is irrelevant to the local school districts' compelling interest here. Because preventing racial isolation and promoting racial integration are themselves the goals, the local school districts necessarily must focus on race, and *not* on the variety of other factors at issue in *Grutter* and *Gratz*. *See Parents*, 426 F.3d at 1182-83; *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) (when racial integration 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").

Here, Respondents did provide for all students to attend comparable elementary or secondary schools.[8] In no instance was the benefit of a public education denied a student in order to give such benefit to another student of a different race. *See, e.g., McFarland*, 330 F. Supp. 2d at 860 (finding that, in Jefferson County, the school board's "policy of creating communities of equal and integrated schools for everyone excludes no one from those communities . . . . When the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.").

Petitioners complain that they were denied the benefit of assignment to the schools of their choice under the local school districts' plans. However, no student is entitled to attend a particular school. *See Bustop, Inc.*, 439 U.S. at 1383 (rejecting the notion that children have any legally protected right to attend the public school nearest their home); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d at 516 ("Federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school.") (citing *McDaniel v. Barresi*, 402 U.S. 39 (1971) and other cases).

Petitioners therefore have suffered no cognizable injury under the Equal Protection Clause, and the individualized type of review at issue in *Grutter* is ill-suited to provide them relief here.

2. The voluntary integration plans do not establish racial quotas.

Just as *Grutter's* requirement of individualized, holistic review in the university setting is inapplicable in this context,

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[8] In both Jefferson County and Seattle, the schools affected by the plans at issue were all governed by the same policies, enforced by the same Board of Education. As in any school district, individual schools will vary to a certain extent based on, *inter alia*, experience of the faculty, age of the facilities, involvement of parents in the school and other factors, but those differences are not constitutionally significant.

so too is the rationale underlying the Court's prohibition on quotas.

"Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (quoting *Croson*, 488 U.S. at 496). The concern associated with a quota, as articulated by the Court, is that it insulates members of "certain minority groups" from competition with non-minority candidates for a finite number of positions. *Grutter*, 539 U.S. at 335; *Bakke*, 438 U.S. at 317. This practice substitutes race for qualification-based competition, thereby potentially depriving the non-minority candidates of the opportunity to compete, "[n]o matter how strong their qualifications." *Bakke*, 438 U.S. at 319.

Here, however, those concerns are not present. There is no competitive process for assignment to schools in the school districts. Individual students' qualifications are not taken into account. Therefore, the alleged danger associated with a quota—substituting race for merit—simply does not arise.

Moreover, and more importantly, the integration plans at stake here are not quotas. They do not reserve a fixed number of slots for students based on their race, but instead target a flexible (and broad) range of black or non-white students in each school. The variance is not a hard-and-fast number that must be met—indeed, the percentages of white and non-white students in the relevant schools vary significantly from school-to-school and from year-to-year. *Parents*, 426 F.3d at 1184-85; *McFarland*, 330 F. Supp. 2d at 856-58.

For example, under the Seattle plan, if the pool of non-white students who have voluntarily applied to a particular over-subscribed school is exhausted, no further action is taken—even if the non-white student enrollment is less than the 15% figure that the local school authorities have targeted. Or, stated differently, if the voluntary applicant pool is exhausted, no

students are recruited or forced to attend (or prevented from attending) a particular Seattle high school in order to make sure that its student population is 15% non-white. Moreover, the racial considerations do not even come into play unless a school is oversubscribed. Thus, the plan reflects an entirely permissible effort by the local school districts—as in *Grutter*—to obtain a critical mass of white and non-white students in the oversubscribed schools in order to achieve their compelling interests. *See Grutter*, 539 U.S. at 318.

3. The other traditional narrow tailoring factors confirm that the integration plans are permissible.

Consideration of the remaining narrow tailoring factors confirms that the local school districts' plans are constitutionally permissible.

Petitioners and the United States suggest that the voluntary integration plans are constitutionally suspect because the school districts failed to give "serious, good faith consideration" to race-neutral alternatives. Pet'r Br., *Parents* (No. 05-908) at 42-43; *Amicus* Br. of the United States, *Parents* (No. 05-908) at 23-24 (citing *Grutter*, 539 U.S. at 339); *see also Amicus* Br. of the United States, *Meredith* (No. 05-915) at 22. However, *Grutter* explained that such consideration need only be given to "*workable* race-neutral alternatives *that will achieve the diversity the university seeks.*" 539 U.S. at 339 (emphasis added). In other words, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only those that will actually succeed and promote the compelling interest. *Id.* at 309.

Here, the local school authorities properly concluded that a race-neutral alternative would not meet their goals.[9] As the

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[9] The Court repeatedly has deferred to the judgment of local school authorities in these areas. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, local autonomy of school districts is

Ninth Circuit succinctly concluded: "[W]hen 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." *Parents*, 426 F.3d at 1191. Indeed, "[i]f reducing racial isolation is—standing alone—a constitutionally permissible goal" (and it is), then "there is no more effective means of achieving that goal than to base decisions on race." *Brewer*, 212 F.3d at 752. The Court has recognized as much in uniformly adopting race-conscious remedies to address judicial findings of unconstitutional segregation. *See, e.g., Swann II*, 402 U.S. at 46 ("assignments made on the basis of race" are "the one tool absolutely essential to . . . eliminat[ion] of existing dual systems"); *McDaniel*, 402 U.S. at 41 ("In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes.") (internal citation omitted). The efficacy of race-conscious measures is no different in cases of *de facto* segregation.[10]

Petitioners further argue that the challenged plans burden both individuals denied assignment to the school of their choice and groups (presumably white students). However, as

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a vital national tradition. . . .") (internal quotations omitted); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *Washington*, 458 U.S. at 481 ("no single tradition in public education is more deeply rooted than local control over the operation of schools") (internal quotation omitted).

[10] History has shown that race neutral policies such as "freedom of choice" policies, standing alone, have been ineffective, resulting in "precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws." *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 435 (1968).

addressed above, regardless of whether race is taken into account, no individual student has a right to attend a particular school. *See Bustop, Inc.*, 439 U.S. at 1383 (rejecting the notion that children have any legally protected right to attend the public school nearest their home); *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) ("school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend"). Moreover, unlike paradigmatic affirmative action plans or quotas, the voluntary integration plans here do not uniformly "benefit" any group. For example, in some schools subject to the Seattle plan, white students are admitted into schools over non-white students while, at other schools, non-white students are admitted over white students. *See Parents*, 426 F.3d at 1192. The voluntary integration plans therefore do not unduly burden any individual or group.

Finally, the plans are sufficiently narrowly tailored in scope and in time. *Grutter*, 539 U.S. at 342. This durational requirement is satisfied where, as here, the government entity conducts "periodic reviews to determine whether racial preferences are still necessary to achieve" the compelling interest. *Id.* Both of the plans at issue here are subject to such periodic reviews. *See Parents*, 426 F.3d at 1192; *McFarland*, 330 F. Supp. 2d at 842.

Accordingly, each of the narrow tailoring factors warrant affirmance.

II. THE LOCAL SCHOOL DISTRICTS' PLANS SHOULD NOT BE SUBJECT TO STRICT SCRUTINY.

While, as demonstrated above, the challenged plans survive under the strictest of scrutiny, that should not be the standard of review. Although race-conscious programs generally are reviewed under the strict scrutiny standard, *Adarand*,

515 U.S. at 225-26, the Court has recognized that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327. The present context is very different from the circumstances in which strict scrutiny has been applied.

As Judge Kozinski stated in his concurring opinion in the decision of the Ninth Circuit below, strict scrutiny has been invoked in cases involving "old-fashioned racial discrimination laws, aimed at oppressing blacks," in affirmative action cases such as *Adarand*, where the racial classification "seek[s] to give one group an edge over another," and in cases such as *Johnson*, 543 U.S. 499, where the government actor sought to "segregate persons by race." *Parents*, 426 F.3d at 1193 (Kozinski, J., concurring) (quoting *Comfort*, 418 F.3d at 27 (Bouding, C.J., concurring)).

The challenged school integration plans here involve none of these concerns. In cases such as the present, where race was considered for the purpose of *remedying* segregation and *promoting* racial integration in elementary and secondary education, the Court has not applied strict scrutiny. Instead, it has *deferred* to the judgment of local school authorities in pursuing these important objectives.

For example, in *Swann I*, the Court was asked to address the constitutionality of a local school district's race-conscious efforts to address segregation in the public schools (through busing of African-American students). The Court did not apply strict scrutiny; instead, in affirming the constitutionality of the district's race-conscious integration effort, it made clear that local school authorities have broad discretion to assign students in such a manner as to specifically promote the interests of racial integration in a manner very similar to the challenged plans here:

> 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 . . .

Swann I, 402 U.S. at 16.

In a companion case, the Court again did not apply strict scrutiny, but affirmed 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." *Swann II*, 402 U.S. at 45; *see also, supra* at 9-11.

To be sure, certain subsequent opinions of the Court, arising in different contexts, suggest that strict scrutiny should apply in *every* circumstance, even for so-called "benign" racial classifications. In *Croson*, for example, the Court reviewed, under strict scrutiny, the city's plan requiring contractors with city contracts to sublease at least 30% of the value of each contract to minority-owned businesses. 488 U.S. 469. Likewise, in *Adarand*, the affirmative action program at issue sought to give an advantage to one racial group over another, questioning the ability of minority-owned businesses to compete on an even playing field. 515 U.S. 200. Both programs provided *preferential* treatment based on race.

In contrast, neither of the school districts' plans here provide preferential treatment, and both promote integration. In the contexts of school desegregation and voluntary school integration cases, students of *all* races benefit from the school districts' plans, and the Court has *never* applied strict scrutiny in these contexts.

In fact, in *Johnson v. California*, the Court's most recent decision on this issue, a majority of the Court acknowledged that, depending on the context, strict scrutiny should not necessarily apply to every race-conscious government action and

that government officials are entitled to some level of deference, even when acting in a race-conscious manner. *See Johnson*, 543 U.S. at 516 (Ginsburg, J. concurring, joined by Souter, J. and Breyer, J.) ("the same standard of review ought not control judicial inspection of every official race classification" and "[d]isagreeing . . . that 'strict scrutiny' properly applies to any and all racial classifications"); *id.* at 524 (Thomas, J., dissenting, joined by Scalia, J.) (concluding that the "strict scrutiny" standard should not apply to racial classifications by prison officials, to whom some level of deference instead should be afforded). That only makes sense where, as here, the challenged government action is not intended for, and does not have the effect of, oppressing minorities, segregating the races, extending preferences or denying benefits based on race, and does not attach any stigma to a person's skin color. *See Parents,* 426 F.3d at 1194 (Kozinski, J., concurring). Under this standard, the challenged school integration plans clearly pass constitutional muster.

CONCLUSION

For the foregoing reasons, the Court should affirm the decisions of the Sixth Circuit and Ninth Circuit and hold that local school districts may undertake voluntary efforts to promote integration in the Nation's public schools.

Respectfully submitted,

ALYSSA GSELL
CHARLOTTE GILLINGHAM
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

ANDY LIU
Counsel of Record
DAVID L. HAGA
LAUREL PYKE MALSON
BETH NOLAN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

Counsel for Amici Curiae

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