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 Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuit

BRIEF OF THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, & IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) AND UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND (UEAALDF) IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Whether the Court should apply the strict scrutiny test to a student assignment plan in the public schools that considers race where the plan can apply to all races and where there is no competitive consideration of the students to whom the plan applies?

Whether a local school board may consider race in the assignment of students to the public schools in its district in order to further the goal of assuring the racial integration of the schools in the district?

Whether the provisions of the student assignment plans of the Seattle and Jefferson County School Boards that consider the race of students are proper under the Fourteenth Amendment?

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INTEREST OF THE AMICI CURIAE

On Friday, March 24, 2006, thousands of Latina/o high school and middle school students ignored the warnings and

threats of principals, police and parents, scaled chain link fences, broke through locked gates and climbed over formidable barricades to march through the streets of Los Angeles asserting their right to equal treatment in this society. Police and television helicopters whirling overhead recorded the high-spirited throngs of youth experiencing their first taste of freedom and dignity. Mass opposition to draconian anti-immigrant laws was sweeping across the nation.[1]

The Latina/o and immigrant communities of Los Angeles, inspired by the courage of the youth, took over downtown Los Angeles on the very next day. On Saturday, March 25, 2006, Los Angeles became the home of the largest civil rights march and rally in the history of this nation. During the next two months the new civil rights movement, born out of the struggle for immigrant rights, but, like all civil rights movements, fueled by an unconquerable human desire for freedom, equality and unbreakable social bonds, came to life all over this nation.

The Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) played a key role in organizing and leading this new civil rights movement. We come before this Court now to speak for every Latina/o, black, Asian, other minority and white activist of the new civil rights movement. We stand intransigently and proudly for affirmative action, integration and immigrant rights.

Struggle teaches people how to fight and what is worth fighting for. Since our founding in 1995, BAMN's experience of organizing mass action in defense of affirmative action, integration and immigrant rights has taught a new genera-

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person, other than amici, their members and counsel, made any contribution for the preparation or submission of this brief.

tion of young leaders what we must do to defend and expand civil rights.

On April 1, 2003, BAMN spearheaded the march and rally at the Supreme Court that occurred on the day that this Court heard the two University of Michigan affirmative action cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*. Over 50,000 young people of all races came to Washington on that day to express their unswerving commitment to save *Brown v. Board of Education*. The April 1, 2003 March on Washington gave young people the experience of learning that when you stand and fight, you can win.

Not by coincidence, hundreds of BAMN Los Angeles high school students experienced their first walkout two weeks before the mass high school walkouts. On March 7, 2006, BAMN students left many of Los Angeles' premier magnet schools to attend a Los Angeles Superior Court hearing and become intervenor-defendants in defense of the Los Angeles Unified School District (LAUSD) desegregation, magnet school and busing plan in *American Civil Rights Foundation v. Los Angeles Unified School District*. A central premise of BAMN, which is to unite the struggle for black and Latina/o equality and freedom, was expressed in action and in the courtroom on that day. All of the students who are now defendant-intervenors in the LAUSD case were instrumental in leading the mass high school actions in the spring of 2006 and continue to build the new civil rights movement to this day.

BAMN has an immediate and direct interest in the outcome of these cases. BAMN students are actively participating in the fight to win integrated, equal, quality education for all young people in this nation. The ability of the LAUSD and other school districts to achieve any measure of integration will be directly affected by the outcome of these cases. But BAMN's interest in these cases goes beyond their immediate practical impact on LAUSD and other districts' desegregation

and affirmative action programs. While the great majority of Americans support integration and equality, there are very few voices in America determined to stand against the justifications and excuses for growing segregation and inequality. Since the continuation of all desegregation policies hangs in the balance in the cases before the Court, as with *Plessy* and *Brown* in the past, it is essential that the voice of those that stand intransigently for integration and will never submit to segregation be heard in these proceedings. Our nation's aspirations and our laws must cohere.

The second amicus is United for Equality and Affirmative Action Legal Defense Fund (UEAALDF). Formed in 1997 as a civil rights legal coalition after the anti-affirmative action lawsuits *Grutter v. Bollinger* and *Gratz v. Bollinger* were filed against the University of Michigan, UEAALDF, representing several civil rights organizations and 41 current and potential University of Michigan Law School students, attained intervener status in *Grutter* and litigated all the way up to this Court. In 2004, UEAALDF successfully represented hundreds of pro-integration students, parents and school employees as intervenor-defendants in *Avila v. Berkeley Unified School District* in defense of the integration plan in Berkeley, California.

In Detroit, Michigan, UEAALDF represented thousands of public school students, teachers, parents and community activists in the fight to restore Detroit citizens' democratic right to vote for their school board. UEAALDF is also representing black and progressive white voters in Michigan who were defrauded in a racially-targeted voter fraud scheme perpetrated by the "Michigan Civil Rights Initiative" in their petition-gathering drive to reach the November 2006 ballot with Measure 06-2, which, if passed and implemented, would ban affirmative action.

In Los Angeles, UEAALDF is intervening to defend voluntary school integration in *American Civil Rights Foundation*

v. Los Angeles Unified School District. The American Civil Rights Foundation has initiated a new suit against the Berkeley Unified School District's voluntary integration plan, and UEAALDF is continuing its defense of integration in the Berkeley public schools. Through its legal work, UEAALDF is committed to making this nation's commitment to democracy and equality living and breathing principles, not lifeless abstractions.

INTRODUCTION

America cannot and will not hold together if the most basic and modest policies for integrating our schools and our society are banned by law. The petitioners in these cases invite the Court to follow in the footsteps of the dishonest and arrogant majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896) by concocting a legal basis for accelerating and institutionalizing growing segregation and inequality. This is a road we must not go down.

The racial and ethnic makeup of America has changed significantly in the last three decades. In a short time, we will become a majority-minority nation. The question before this Court is how we respond to this completely new development in our nation's history. We are now a society that is at once increasingly multiracial and diverse—and increasingly segregated. As Americans, we pride ourselves on having become more integrated and tolerant. At the same time, Latina/o and black people are treated as second-class citizens. Our children are increasingly educated in separate and unequal schools.

Hurricane Katrina showed every American how much racism and inequality shape governmental policies and how detrimental this can be for our whole nation. Forming and following a coherent social policy that can address the growing inequality and segregation of our nation—and at the same time seem fair and beneficial to the vast majority of Americans—can sometimes be difficult. These cases, how-

ever, are easy. Upholding *Brown v. Board of Education* is immensely popular. The Louisville and Seattle school desegregation plans have longstanding and far-reaching popular support. In Louisville, a majority-white school district, 82 percent of people of all races support the plan.[2]

Hundreds of other school districts in the nation rely on similar desegregation plans to integrate some or all of their schools. Urban magnet school programs, the crown jewels of big-city public education, are based on common-sense integrationist policies similar to those utilized by the Louisville and Seattle plans.

Achieving integration in education requires conscious action. Breaking down the racial divide caused by residential segregation requires a plan. The modest plans employed by the Louisville and Seattle school districts are proof that in this nation, in both the North and the South, integrated education can be sustained and even protected against segregationist attacks. This Court must uphold the Louisville and Seattle desegregation plans if integrated education—the promise of *Brown v. Board of Education*—is to be sustained in this nation.

SUMMARY OF ARGUMENT

In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court declared that separate schools could never be equal schools because the social stigma of racism affected the hearts and minds of black children in ways that might never be undone. For the same reason, in *Keyes v. Denver School District No. 1*, 414 U.S. 883 (1973), this Court held that segregation inherently harmed the education of black and Latina/o children even if the school district did not openly declare that it was segregating its students. Finally, in *Swann*

[2] USA Today, "Race is Still Part of Equation for Equal Education," June 19, 2006.

v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971), the Court again declared segregation unlawful and declared that a local school board had the authority, if not the obligation, to take racially-conscious measures in order to remedy the effects of segregation, whatever had caused that segregation.

The question is whether this Court will honor the promises of equality in *Brown*, *Keyes*, and *Swann*. The school districts in the cases now before the Court did no more—and in fact far less—than this Court said was permissible in *Swann*. Specifically, they adopted modest, racially-conscious student assignment plans to assure that the schools in Seattle and Jefferson County did not mirror the segregation in the neighborhoods of those districts.

The petitioners have presented no basis for asserting strict scrutiny, as the classifications at issue confer no preferences and in fact may burden all races at various times. Similarly, the petitioners have presented no reason that the Equal Protection Clause allows law schools to take measures to achieve diversity for a few students in elite institutions, but denies that right to the secondary and elementary schools, which educate the population as a whole. Moreover, as racial diversity was the sole need for diversity that was not achieved by the normal procedures of the school boards, there is no reason that the plans could not focus on that crucial form of diversity.

Finally, the amici assert that the petitioners, in their attempt to justify their opposition to modest measures to desegregate the schools, have asked this Court to adopt principles that derive not from *Brown*, but from *Plessy*. As set forth below, these principles, which are adopted by the dissenters in the Ninth Circuit, have been justifiably rejected by this Court from *Brown* forward.

ARGUMENT

THE COURT SHOULD REAFFIRM THE NATION'S COMMITMENT TO THE INTEGRATION OF THE PUBLIC SCHOOLS AS THE ONLY WAY TO ACHIEVE EQUAL EDUCATION FOR THE NATION'S FAST-GROWING AND DIVERSE MINORITY POPULATIONS.

A. *Brown* rightly held that separate can never be equal.

Fifty years ago, this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) struck down the legal fiction of "separate but equal"—one of the great lies of American history—and won this Court enormous authority and prestige within this nation and throughout the world.

Striking that blow against America's Jim Crow system of relegating black people and other minorities to second-class status breathed life into America's long-standing rhetorical commitment to democracy for people striving for freedom in newly-emerging nations around the world. In the United States, *Brown* came to symbolize a determination to make democracy, freedom and equality a reality for each and every one of its citizens. For millions of black and Latina/o people, many of whom had sacrificed dearly to fight in World War II, the *Brown* decision signaled that America could be a nation based on hope rather than hypocrisy.

The simple, straightforward honesty of the *Brown* decision is what made it so powerful. In carefully-chosen words, *Brown* declared that *all* forms of segregation were harmful to black students and that *all* separate education was inherently unequal education:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually

> interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. . . .
>
> * * * *
>
> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are by reason of the segregation deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown, supra, 347 U.S. at 494-495(internal punctuation omitted).

The *Brown* Court reached this conclusion by beginning with the recognition that education included far more than the opportunity to acquire certain specific skills:

> Today, education 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 in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id., 347 U.S. at 494-495.

Before *Brown*, the Court had held that segregated law and graduate schools were inherently inferior because they lacked "those qualities which are incapable of objective measurement, but which make for a great law [or graduate] school."

Sweatt v. Painter, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In *Brown*, the Court held that "…the same considerations apply with added force to children in grade and high schools." *Brown*, *supra*, 347 U.S. at 493-494.

The Court then moved to the central point of its analysis. Precisely because of racism, separate had never been equal in terms of the resources allocated to white and black schools. But the Court passed that obvious point and assumed that material resources could be made equal. Even so, the Court held, separate schools were not equal because of the effect that separation had on students:

> To separate [elementary and secondary students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id., at 494.

With an eye to the explicit segregation of the South *and* to the open but not explicit segregation in the North, the Court declared that *all* forms of segregation were inherently harmful to the education of black children and that the impact of segregation was ". . . greater when it had the sanction of law." *Id*., 347 U.S. at 494. *Brown's* recognition that separate can never be equal entered the public consciousness.

In 1973, when the Court considered its first case from a Northern city, it made clear that it *meant* that segregation harmed black students regardless of whether the local authorities openly announced their intent to segregate the schools or disguised their intent by professing equality while locating schools in particular neighborhoods, drawing unfair district lines, using discriminatory assignment plans and other measures to segregate the schools. *Keyes, supra.*

In *Keyes*, the Court drew a distinction between *de jure* and *de facto* segregation, with the former defined by proof that the school board intended to create a segregated system. Sensing that that distinction could be used—which it later was—to limit desegregation in the North, Justices Powell and Douglas declared that the Court should hold that black (and Latina/o) children were harmed by separate education whatever the source of the segregation. As they recognized, segregation is an everyday fact of life for black and Latina/o students attending separate and inferior schools. Confronting the facts of separate and unequal education on a daily basis, those students do not make fine distinctions as to what caused that segregation:

> If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation.

Id, 414 U.S. at 230 n 14 (Powell, J, concurring).[3]

Conceding to opposition to desegregation in the North, the Court's majority never adopted Justices Powell and Douglas's view that segregated schools unlawfully deprived black students of an equal education whenever action by any state agency had aided, abetted or supported that segregation. But even so, the Court unanimously continued its recognition that both *de jure* and *de facto* segregation were harmful and that local school authorities had the authority, if not the Constitutional obligation, to take racially-conscious measures

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[3] See also Justice Douglas's comments in concurrence:

> Where a State forces, aids, or abets or helps create a racial 'neighborhood,' it is a travesty of justice to treat the neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.

Keyes, *supra*, 414 U.S. at 215-216 (Douglas, J, concurring).

to assure that the schools reflected the racial composition of the communities in which they were located:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann, *supra*, 402 U.S. at 16 (1971).

B. Separate cannot be equal today.

Brown's recognition that ending segregation is essential to achieving equality remains absolutely true today. One need only read the continuing barrage of attacks on urban schools, which combine just criticisms with rank prejudice, to realize that the racial stigma of separate education remains—and the need for integration to erase that stigma and to assure equality also remains.

Brown's mandate is both more important and more complex today. Instead of a national public school population that is over 80 percent white, only 58 percent of today's public school students are white. That percentage is declining and will continue to decline due to demographic changes in the nation as a whole. Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project, January 2006, at 8.

At the same time, segregation is *increasing* for *all* minorities in almost *every* area of the country:

CHANGES IN SEGREGATION 1991-2003 BY REGION

Changes in Black Segregation

% Black in 90-100% Minority Schools

Region	1991-1992	2003-2004
West	26%	30%
Border	33%	42%
Midwest	40%	46%
South	26%	32%
Northeast	50%	51%

Changes in Latina/o Segregation

% Latina/o in 90-100% Minority Schools

Region	1991-1992	2003-2004
West	30%	39%
Border	11%	16%
Midwest	21%	25%
South	39%	40%
Northeast	46%	44%

Source: Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project, January 2006, at 10-11.

In a nation that is far more urban than it was in 1954, the tensions caused by an increasingly large *and* increasingly segregated minority population create the potential for

explosions far greater than those that rocked the country in the 1960s.

What is needed to prevent those explosions is a new national policy for equality, including a new national policy for school desegregation.

Obviously, this case cannot serve as the vehicle for determining such a policy. But if this case cannot solve the school crisis, it can make it far worse. The Seattle and Jefferson County school boards have adopted modest policies that promise only modest gains in integration. If even those plans are set aside, there will be no models for the future, no plans that will stem the tide of segregation, and no relief for the rising tension.

A house divided against itself cannot stand. To begin reuniting this house, the amici ask this Court to sustain the Seattle and Jefferson County plans in full.

C. The School Boards acted properly to prevent the segregation or resegregation of their districts.

As will be seen, the Seattle and Jefferson County School Boards did no more—and in fact far less—than what the Court said they could do in *Swann*. At its most basic level, this case tests whether what the Court declared was permissible in *Swann* is still permissible today.

In devising the plans that they implemented, the central fact confronting the Seattle and Jefferson County boards was the pattern of segregated housing that existed in those jurisdictions.[4]

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[4] The dissent below does not like the term "segregated housing" because, it says, "one can no more 'segregate' without a person doing the segregation than one can separate an egg without a cook." *Parents Involved*, 426 F. 3d at 1198 (Bea, J, dissenting). In fact, there were many "cooks" who separated the races over many years, usually with illegal acts

In Seattle, 70 percent of the population and 40 percent of the students were white—and a majority of the white students lived north of the city center. Conversely, 60 percent of the students were minorities and 84 percent of the black students, 74 percent of the Asian Americans, and 65 city center. *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc)

In Seattle, the students could choose the high school that they wanted to attend. From extensive past experience, the school board knew that at four of the city's ten high schools, there would be too many applications for the entering ninth grade class and that a high percentage of those applications would come from the neighborhood in which the particular school was located. The "free choice" system would result in the oversubscribed high schools having minority populations that ranged from 30 to 80 percent. Thus, the board adopted a racial tie-breaker that required the oversubscribed schools to select minority or white students as appropriate until the school obtained an entering ninth-grade class that was within 15 percent of the racial composition of the City. *Parents Involved, supra,* 426 F 3d at 1169-1171[5]

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and violence. As with many of the current opponents of *Brown*, the dissent below wants to ignore the reality of segregation by redefining terms so that it supposedly does not exist. All-white neighborhoods in cities with substantial minority populations are, according to the dissent's definition, not segregated—they simply reflect that people like to live among their "own kind."

[5] In Seattle, the student population is 60 percent minority and included substantial numbers of blacks, Latina/os and Asians. Thus, the 15 percent requirement meant that the four oversubscribed high schools had to have a minority population of 45 to 75 percent. *Parents Involved, supra,* 426 F 3d at 1169-1171.

In Jefferson County, the school district includes the city of Louisville and its suburbs. The district's students were now 34 percent black and 66 percent white, with only a small number of Latina/o or Asian students. The black students lived in the central city, while the white students lived in the suburbs. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 839-840 (W.D. Ky. 2004), *aff'd* 416 F. 3d 513 (6th Cir. 2005).

Traditionally, the Jefferson County school board assigned students to schools based on geographic districts. As those districts led even more directly to a racial composition in the schools that replicated the segregated nature of housing, the board adopted a student assignment plan that required each school to be within approximately 15 percent of the racial composition of the entire district. *McFarland, supra*, 330 F. Supp. 2d 842.[6]

In terms of the housing patterns—and the need for racially conscious measures to overcome them—Seattle and Louisville County are like almost every other American city, with the exception that both still retain a population that is sufficiently diverse so that it is possible to achieve a racially-integrated system within the boundaries of a single district.

There is no specific evidence in the record as to the causes of the segregated housing patterns in Seattle and Jefferson County. As Professor Orfield and countless other authorities have stated, however:

> In most cities it is easy to show that housing segregation was initiated and institutionalized with massive official support [and] that most minority neighborhoods segre-

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[6] In Jefferson County (metropolitan Louisville), the overall student population was 34 percent black and 66 percent white, with no other minority having a significant number. The Jefferson County plan required each school to have between 15 and 50 percent black students. *McFarland, supra*, 330 F. Supp. 2d at 842.

> gated during the period of overt segregation policies remain segregated today.

Gary Orfield, *Dismantling Desegregation* (1996), at 297.

As Orfield states, these patterns, once established, simply continue in spite of the passage of non-discrimination statutes:

> Black fears of violence and intimidation in some white communities are still serious obstacles to housing choice. Whites and white realtors almost never look for housing in what are defined as minority communities, and real estate operations are often organized along racial lines. Minority brokers are seldom employed by white offices and rarely get listings in white areas unless racial transitions are already well under way. Because most people shop for housing in areas where they have knowledge of housing or have acquaintances, the fact that the history of segregation has given black and white families familiarity with separate sets of communities and fears about each other's neighborhoods tends to reinforce a self-perpetuating segregation.

Orfield, *supra*, at 298.[7]

As discussed above, Justices Powell and Douglas rightly held that patterns of segregated housing like those in Seattle and Louisville—which trace back to countless forms of state action in the past—should be sufficient to *require* school districts to take action to integrate their districts in order to

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[7] Orfield's conclusions are transparently obvious. In fact, Justice Powell and many others reached the same conclusion thirty years ago:

> The familiar root cause of segregated schools in all the bi-racial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public authorities.

Keyes, *supra*, 413 U.S. at 222-223 (Powell, J).

assure equal education to black and other minority students. *Keyes*, *supra*, 413 U.S. at 216-217 (Douglas, J, concurring) and 223-237 (Powell, J, concurring). But in this case, the issue is whether the districts *may* adopt such a plan in order to further a local school board's determination that the integration of the schools is vital for the entire community.

In *Bradley v. Milliken*, 418 U.S. 717, 741 (1974) this Court declared that "No single tradition in public education is more deeply rooted than local control over the operation of schools . . ." Similarly, in *Freeman v. Pitts*, 503 U.S. 467, 490 (1992), this Court declared that a desegregation decree should be dissolved in part in order to further the "vital national tradition" of "local autonomy" and control of the schools.

But if preserving "local autonomy" and control is a sufficient ground for limiting or dissolving desegregation decrees as in *Milliken* and *Pitts*, then it must be a sufficient ground for maintaining a local school district's desegregation efforts. If it were not, "local control" would simply be an excuse to be deployed where it could be used to maintain segregation.

In fact, for reasons beyond consistency and honesty, there are vital reasons that this Court should sustain local initiatives like those in Seattle and Jefferson County. With differing numbers of differing minorities in different areas of the country, there is a vital need for flexibility in order to achieve integration in each local area.

In Seattle, there is less racial segregation in housing--and more diversity in the number of racial groups that are present. The district therefore has the chance to preserve and further a deeper and richer level of integration than is possible in many cities.

Similarly, in Louisville, the district has the rare opportunity to assure that there is extensive integration between black and white students.

In other cities, the situation is less favorable, but racially-conscious plans can still take some steps towards preventing further segregation.

In Detroit, for example, where *Milliken* makes it impossible for the city or the suburbs to achieve any substantial integration, the Detroit school board gives "preference" to white and Asian students at some magnet schools in order to preserve a fig leaf of integration.

Similarly, in New York, suburban districts may adopt transfer policies that allow them to have a few black and Latina/o students in their districts. *Brewer v. West Irondequoit Cent. School Dist.*, 212 F. 3d 738 (2d Cir. 2000).

In Los Angeles, the students in the district are now 90 percent black and Latina/o. By using racially-conscious criteria, however, the district can maintain magnet schools that can assure some integration with white people, and even more integration between black people and Latina/os.

If this Court were to sustain either challenge here, it would have devastating effects on these and many other plans. By rejecting these challenges, the Court can at least prevent the destruction of numerous local initiatives and preserve some measure of actual integration in Seattle, in Louisville and in many other areas of the nation.

D. The petitioners have offered no basis for subjecting the school boards' plans to strict scrutiny.

The petitioners ask this Court to strike down the plans at issue because they want their children to attend a "neighborhood school."

Far more than once, this Court has confronted cases in which the cry of "neighborhood schools" was a convenient cover for not wanting to attend schools with any black students. Mobs burned buses in Boston and in Michigan not

because they objected to public transport, but because they objected to integration.

Even assuming *arguendo*, however, that there is not an ounce of prejudice in the petitioners' claimed desire to attend schools in their neighborhood, the petitioners have barely stated a cognizable interest, much less an interest that deserves strict scrutiny by this Court. There is no claim that parents or students have *ever* had an unfettered right to choose a particular public school in Seattle or particular classmates in Jefferson County. Nor is there a claim that the school boards assigned petitioners to schools that would provide them with an inadequate education. Indeed, there is little evidence in the record that the schools that they want to attend are in any sense better than the schools to which they have been assigned.

The entire claim is that the petitioners like one school more than another and that the project of assuring an integrated education to all students should take a back seat to *their* individual preferences.

If that is a cognizable interest—which is dubious—the petitioners state no basis for their assertion that this interest must be protected by strict scrutiny. Unlike in *Grutter*, there is no question of an alleged "preference" in a selective admission system that is based on what are said to be measures of merit. As there are no judgments on "merit," there is no stigma of rejection. Nor is there a claim that one race or another is disfavored by the system. Black students may be assigned to one school and white students to another in order to preserve some level of integration.

As Chief Judge Boudin of the First Circuit and Judge Kozinski of the Ninth Circuit held, these plans should not be reviewed under strict scrutiny at all. *Comfort v. Lynn School Committee*, 418 F. 3d 1, 28-29 (1st Cir. 2005)(Boudin, C.J., concurring), *cert. den.* ___ U.S. ___, 126 S. Ct. 798 (2005);

Parents Involved, supra, 426 F. 3d at 1194-1195 (Kozinski, J, concurring). Applying a standard of robust and realistic review, Judge Kozinski held as follows:

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

Parents Involved, supra, 426 F. 3d at 1195 (Kozinski, J, concurring).

The Ninth Circuit majority rightly expressed considerable sympathy with this approach, *Parents Involved, supra*, 426 F. 3d at 1173 n. 12, and it is the standard that should be applied by this Court.

E. The petitioners wrongly claim that Grutter's recognition of diversity does not apply to elementary and secondary schools.

Just as *Grutter v. Bollinger*, 539 U.S. 244 (2003), recognized the benefits of racial diversity in a law school class, the same benefits obtain from the integration of a public high school or elementary school.

In *Brown* itself, this Court applied its past decisions on law and graduate schools to elementary and secondary education, holding that the need for equality in the intangible factors applied with "added force to children in grade and high schools." *Brown, supra*, 347 U.S. at 494.

In fact, it would be astounding if any court twisted the Equal Protection Clause in a manner that held that educational institutions had a right to assure a diverse learning environment for a few students in an elite law school but lacked the right to assure a similarly diverse environment for

the overwhelming number of students who attend public elementary and high schools. In addition to its rank elitism and its direct conflict with numerous decisions of this Court holding that public school students are entitled to freedoms like those described in *Grutter*, such a distinction ignores the simple fact that younger students can benefit more from racial integration, since their views of the world are not yet as formed as those of law and graduate students.

F. The petitioners wrongly assert that the public schools may not attempt to achieve racial diversity.

Having first said that *Grutter* does not apply at all to elementary and secondary schools, the petitioners, supported by the amicus brief filed by the Attorney General of the United States, next attempt to transfer *Grutter* to secondary schools without any attempt to account for the evident differences between an elite law school and a public high school (Seattle Pet. Br. at 29-30, 44-45; Br. of the United States in *Meredith*, at 13-15, 16-20).

In an elite school, the institution *selects* a small number of students from a large number of applicants. But in the public elementary and secondary schools in Seattle and Jefferson County, there is no selectivity. The school system and the individual schools have a statutory obligation to admit everyone. It would be pointless, stigmatizing, and educationally counterproductive to go through the fiction of a "holistic review" that supposedly determined what other elements of "diversity" a first or ninth grader might bring to a particular school. There is no suggestion in the record that the public schools of Seattle or of Jefferson County need to, or could, adopt a plan to achieve any form of diversity other than racial diversity.

The glaring defect in the normal student assignment policies is racial diversity—as it was in *Brown*—and the

school boards have properly adopted policies to deal with the *real* problem that they face.

G. The petitioners wrongly resurrect arguments from *Plessy v. Ferguson*.

Just as *Brown* occupies a place of high honor in our history, *Plessy* occupies a place of universal scorn.

In that case, the Court upheld a Louisiana statute requiring "separate but equal" accommodations for passengers on intrastate trains. *Plessy, supra.*, 163 U.S. at 551. Separate, of course, was never equal, but the soothing fiction of *Plessy* sanctioned the entire array of segregation laws in the South—laws that were consciously designed to uphold a system of white supremacy, a system which found its clearest expression in thousands of lynchings. See John Hope Franklin, *From Slavery to Freedom*, 3rd ed, at 338-343.

None of the parties or amici call for a return to that system. None support Plessy or a return of legal segregation. Yet if one reads the arguments of the petitioners and their supporters closely, their arguments come from *Plessy*. In a society where segregation exists, the views justifying that segregation recur from generation to generation.

Listen to the arguments of the petitioners and of the dissenters in the Ninth Circuit.

The Seattle petitioners assert that ". . . the educational benefits of racial diversity are far too uncertain to qualify as a compelling state interest. . ." (Seattle Pet. Br., at 35). Similarly, the dissenters in the Ninth Circuit assert that ". . . the evidence regarding the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent." *Parents Involved, supra.*, 426 F.3d at 1206 (Bea, J, dissenting), citing *Grutter*, 539 U.S. at 364-365 (Thomas, J, dissenting).

That is, *Brown* was wrong, integration has achieved little, and so racial separation may be an acceptable option.

The dissenters then say *de facto* segregation *is* an acceptable option. In 1995, Justice Thomas claimed that separate schools did not necessarily lead to unequal schools—reviving the *Plessy* corpse. *Missouri v. Jenkins*, 515 U.S. 70, 120-123 (1995)(Thomas, J, concurring).[8] Citing Justice Thomas's words, the Ninth Circuit dissenters claim that the Seattle district's attempt to prevent racially-isolated schools ". . . . presents another racial stereotype, which assumes there is something wrong with a school that has a heavy nonwhite student body, or something better about a school that has a heavy white student body population." *Parents Involved*, 426 F. 3d at 1203-1204 (Bea, J, dissenting), citing *Jenkins*, 515 U.S. 70, 120-123 (1995)(Thomas, J, concurring).

Again, the argument is from *Plessy*. If separate is seen as unequal, it is only because ". . . the colored race chooses to put that construction upon it." *Plessy, supra*, 163 U.S. at 551.

But the dissenters then go even further. After a brief rhetorical nod to the history of discrimination, the dissenters state, ". . . it is only natural that people should sort themselves out in urban space along lines of race, as well as of religion and social class." Similarly, it is only "natural," they say,

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[8] Justice Thomas's exact words were as follows:

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

Jenkins, 515 U.S. at 122.

Brown did not say that black students were inferior; it said that the stigma of racism made black students feel inferior.

that the "schools mirror their [residential] choices." *Parents Involved, supra,* 426 F.3d at 1219.

As *Plessy* said, separate facilities are in accord with the "established usages, customs, and traditions of the people. . ." *Plessy*, 169 U.S. at 550.

Even this, however, does not plumb the depths to which the dissenters have sunk. According to the dissenters, if *de facto* segregation is ever to change, it must come from the voluntary choices of individuals, not from "compulsory racial discrimination by the state." *Id*, at 1199, 1219. Or, as *Plessy* said:

> The argument [against the separate but equal law] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by the enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.

*Plessy, supra,*163 at 551.

As both the state in 1896 and the petitioners today are seeking a law to enforce *their* views of what customs should be, their professed belief in voluntary action is hypocritical. *Brown* recognized, however, that the law both reflects and can change popular customs—and the law can be used to provide support to what Lincoln called the better angels of our nature.

Again, *Brown* was right. In 1954, few thought that the "customs" of the South could change. But in part due to *Brown* and the decisions and laws that followed it, there is now only a tiny minority of white people who support a return to that system.

In adopting their desegregation plans, the school boards in Seattle and Jefferson County did as *Brown* did. They acted for equality—and they correctly assumed that they could, over time, both change the customs and keep and enlarge the majority that elected them.

In case after case, this Court had to order recalcitrant local officials to comply with their duty to desegregate the public schools. Today, however, the petitioners ask this Court to order local school boards to stop their efforts to desegregate.

Apart from the real consequences that would come from such an order, the symbolic value of such an order would be enormous. The same Court that once ordered integration would now be preventing integration. Every racist in the country would be heartened—and almost every black, Latina/o and other minority would be enraged.

The Court should not go down that path. By law, logic and justice, these are easy cases. Acting under the moral mandate of *Brown*, this Court should sustain the modest actions taken by democratically-elected boards to integrate the schools within their district.

CONCLUSION

For the reasons stated, the amici assert that the Court should affirm the decisions of the United States Court of Appeals for the Sixth and Ninth Circuits.

Respectfully submitted,

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