

No. 05-915

In the
Supreme Court of the United States

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 Sixth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In support of its extraordinarily broad claim of authority to use race to assign students to public schools, Respondents argue that the judgment of elected school boards to use race to discriminate against schoolchildren is entitled to deference. Respondents' Brief (Resp. Brf.) at 29. Such a claim departs from the command of equality contained in the Equal Protection Clause and is indistinguishable from an interest in outright racial balancing, which this Court has repeatedly admonished does not justify race-based decisionmaking. Respondents assert that social science research (that is not uniform, consistent, or conclusive) can support their claim that racial balancing constitutes a compelling state interest. What Respondents ask for is an exception to the nondiscrimination principle for locally elected K-12 public school boards, so that they can decide, with virtually unfettered discretion, what kind and degree of racial mix of schoolchildren, ages 5 to 18, should be assembled in our public schools. This Court has never before approved such a standardless warrant for racial discrimination in K-12 under the exacting requirements of strict scrutiny. It should not do it now. Finally, Respondents ignore the unique harm created and imposed on pupils by their racial balancing policy—including the stigma of racial classification and racial balancing itself. Last, even if this Court were to accept the notion that Respondents have a compelling state interest, these measures cannot be, and are not, narrowly tailored.

ARGUMENT

I

PLAINTIFF HAS STANDING TO BRING THIS ACTION

The "injury in fact to a cognizable interest" necessary to establish standing in an equal protection case is the denial of

equal treatment resulting from the imposition of a barrier, not the ultimate ability to obtain the benefit. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993). The District Court found, and Respondents concede, that Joshua McDonald's application to transfer to another elementary school was denied because of his race. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 n.3 (W.D. Ky. 2004); Resp. Brf. at 10. It is therefore of no significance that the school Joshua McDonald was forced to attend had similar educational programs. Joshua will face the same discriminatory program when he applies to middle school and high school. See Resp. Brf. at 46-47. In *Gratz*, petitioner Hamacher was denied admission to the University of Michigan's undergraduate school even though an underrepresented minority applicant with his qualifications would have been admitted. Hamacher was able to satisfy the requirements of standing by showing that "he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions." *Gratz*, 539 U.S. at 262. In the instant case, it has never been disputed that Joshua was "able and ready" to attend the school that he was denied admittance to by reason of his race, and that but for the District's discriminatory policy, Joshua would have enrolled in the school to which he sought a transfer.

Because Joshua was denied admittance to the school of his choice by reason of his race, and it is not disputed that but for his race he would have been granted the transfer, there can be no question that Joshua suffered an injury in fact sufficient to grant him standing to pursue his claim of damages under *Gratz*, *Northeastern Fla. Chapter* and their progeny. See Joint Appendix (JA) at 9 (Third Amended Complaint seeking damages for plaintiff).

II

**RESPONDENTS' PLAN
AMOUNTS TO "OUTRIGHT RACIAL
BALANCING" AND IS THEREFORE
PRESUMPTIVELY UNCONSTITUTIONAL**

Absent the need to remedy a prior constitutional violation or to generate the specific kind of diversity identified in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J. opinion). Indeed, this Court has repeatedly admonished that "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). As this Court explained in *Freeman v. Pitts*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. 467, 494 (1992).

Here, Respondents cannot assert that their plan is remedial. Any lingering effects of the previous dual school system operated by Respondents have been eliminated. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) ("To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects"). After Respondents were discharged from the consent decree, they chose to adopt the racial balancing plan at issue here. Respondents' overall student assignment plan is designed to achieve a pre-set racial mix of black and white students in the public schools. This is simple racial balancing, which the Constitution forbids.

Respondents compelling interest boils down to their unsupported assertion that the Jefferson County public schools

will become resegregated if they do not use a racial balancing plan. Resp. Brf. at 23. By “resegregation,” Respondents do not mean that black students will be intentionally excluded. Rather, they use this provocative term to indicate that certain schools will have fewer black students than others because of housing patterns. In *Freeman*, 503 U.S. at 494, this Court stated plainly that “[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.” See *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (“the Constitution is not violated by racial imbalance in the schools, without more”).

III

DEFERENCE TO LOCAL BOARDS ON THE USE OF RACE IN PUBLIC SCHOOLS IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

There should be no mistaking what the Respondents and their *amici* are asking this Court to do. They seek a decision that permits locally elected school boards to decide, with virtually unfettered discretion, what kind and quantity of racial mix of schoolchildren should be assembled in the public schools under their control. Resp. Brf. at 29. The argument that local officials should be granted deference in deciding whether and how to employ race in the service of educating our children is one that has previously been made and rightly rejected by this Court. It should not be given credence now, fifty-two years after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The following year in *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*), this Court declared that the ultimate objective in eliminating *de jure* segregation is to “achieve a system of determining admission to the public schools on a nonracial basis.”

Far from having any support in modern jurisprudence, Respondents’ view represents a troubling departure from the

demands of strict scrutiny to which all governmental racial classifications must be subjected. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995), this Court reiterated that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). In *Grutter*, this Court said “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ ” *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227). In *Johnson v. California*, 543 U.S. 499, 507-508 (2005), this Court rejected the application of any lesser standard than strict scrutiny. All racial classifications by government are “inherently suspect,” *Adarand*, 515 U.S. at 223, and “presumptively invalid.” *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Thus, this Court’s decisions repeatedly confirm that all racial classifications are subject to the “strictest of judicial scrutiny,” regardless of the allegedly benign motives and good intentions of the government.

Further, in *Grutter*, the deference accorded officials sprang from the university’s unique First Amendment interests. *Grutter*, 539 U.S. at 328-29. Similarly, in *Bakke*, Justice Powell made it clear that his analysis considered only whether diversity could be a “constitutionally permissible goal for an institution of higher education” such as the medical school. *Bakke*, 438 U.S. at 311-12 (Powell, J., opinion). The First Amendment rights of institutions of higher education are not part of the education mission of K-12 public schools. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and cases cited therein.

Respondents do an admirable job of supporting what is not contested, i.e., that the indisputably important task of educating children is properly and best discharged by parents, teachers, and state and local officials citing to *Kuhlmeier*, 484 U.S. at 273 (school officials’ discretion to promulgate rules of

conduct). Respondents cite in this context *Epperson v. Arkansas*, 393 U.S. 97 (1968). Resp. Brf. at 30. In *Epperson*, this Court recognized that courts will not intervene in conflicts arising in the daily operation of school systems as long as they “do not directly and sharply implicate basic constitutional values. On the other hand, ‘(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” *Id.* at 104. Here, of course, Respondents’ actions are implicating core constitutional values by assigning students on the basis of race to public schools in violation of the Equal Protection Clause.

Clearly, local school boards do not receive special dispensation from the dictates of the Equal Protection Clause by virtue of the *general* importance of their responsibility to educate the state’s schoolchildren. “The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Indeed, no court has ever held that the strict scrutiny that otherwise applies to racial classifications is diluted or otherwise subordinate to the deference accorded local school boards in the discharge of their administrative functions.

This Court uses strict scrutiny to test the validity of the means chosen by a state to accomplish its race-conscious purposes. In *Johnson*, 543 U.S. at 512, this Court refused to defer to the judgment of state prison officials on race even where “those officials traditionally exercise substantial discretion;” in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality), this Court rejected a school board’s judgment regarding the educational benefits of a racially diverse faculty; and in *Goss v. Lopez*, 419 U.S. 565, 574 (1974), this Court held that the “Fourteenth Amendment . . . protects citizen[s] against the State itself and all of its creatures—Boards of Education not excepted.”

The assertion that Respondents' racial balancing plan is intended to bestow a benefit upon historically disadvantaged students does not justify, much less require, a more lenient standard of review. In *Croson*, 488 U.S. at 469, this Court invalidated an elected local city council's voluntary race-based preference program, fearing that it was adopted for the purpose of "racial politics." The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. As pointed out in Pacific Legal Foundation, et al.'s Amicus Brief at 9, elected school boards, like elected city councils, are not insulated from the temptation of "racial politics." "Racial politics" not only helps one's own race, it is used to curry votes. Respondents concede that their racial balancing plan is responsive to its constituents and thus, is political in nature. Resp. Brf. at 20.

Moreover, Respondents acknowledge that their racial balancing plan is designed to remedy the "community's segregated housing patterns." Resp. Brf. at 23. This is nothing less than an attempt to impose racially discriminatory classifications to offset general societal discrimination, which has been forcefully rejected by this Court. See *Wygant*, 476 U.S. at 274.

Respondents' reliance on dicta in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), is of little weight.¹ Resp. Brf. at 31. Decided 18 years before *Croson* settled the question of the level of scrutiny to apply to all race-based classifications, the language of *Swann* implies that a school board's use of race-based classifications is subject

¹ "The language quoted in Respondents' brief was mistakenly attributed to *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 16. However, the quoted language actually appears in the companion case of *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

to the same deferential standard of review as any other decision arising from the board's plenary power to establish and implement educational policy. This Court's pronouncement in *Croson*, *Johnson*, *Adarand*, and *Grutter*, that all racial classifications are subject to strict scrutiny absolutely forecloses any such implication.

Furthermore, *Swann* did not address the level of scrutiny to be given to local school boards' political decisions; rather, it addressed the wholly distinct issue of the scope of federal court powers to adopt desegregation policies where the governing school district has failed to do so. Within this context, this Court recognized that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16.

If one had to choose a context in which deference would NOT be appropriate—based on the experiences of the past half century of local school districts making race-based student assignments—one would be hard pressed to find a better choice than a local school board imposing nonremedial race-based school assignments because the policy is favored by its political constituency.

IV

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. Social Science Research Does Not Support the Conclusion That Racial Diversity Provides Educational Benefits to Students

Respondents' assertion that its racial balance plan "provides important education benefits," Resp. Brf. at 24, is based primarily on controversial and one-sided social science

