UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMANTHA J. COMFORT, on behalf of her minor child and next friend, ELIZABETH NEUMYER, et al.
Plaintiffs,
v.
LYNN SCHOOL COMMITTEE, et al.
Defendants,
and
COMMONWEALTH OF MASSACHUSETTS
Defendant-Intervenor.

Civil Action No. 99-cv-11811 NG (Lead)

TODD and LAURIE BOLLEN, on behalf of their minor child and next friend MATTHEW BOLLEN, et al.
Plaintiffs,
v.
LYNN SCHOOL COMMITTEE, et al.
Defendants.

Civil Action No. 01-cv-10365 NG

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF FROM FINAL JUDGMENT

Relief from a final judgment under Rule 60(b)(5) is appropriate when a party "can show 'a significant change either in factual conditions or in law.'" *Agostini* v. *Felton*, 521 U.S. 203, 215 (1997). "A court may recognize subsequent changes in either statutory or decisional law." *Id*. The decisional law upon which the final judgment in this matter is based has been changed by the Supreme Court's decision in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. __, WL 1836531 (2007). At least one Plaintiff, remains subject to the race-based assignment process sustained by the final judgment in this matter. That Plaintiff is currently in middle school and is therefore limited in the choices of out-of-district schools to

which he may transfer. The continued application of the final judgment to the Plaintiffs makes this judgment prospective in nature. Its prospective nature makes the judgment of the type that the Supreme Court considers appropriate for relief under Rule 60(b)(5). *Agostini*, 521 U.S. at 238-39. Without such relief, the Plaintiffs would be the only school children in America who lack the equal protection rights established by the Court in *Parents Involved* – as they could otherwise be bared by the doctrine of issue preclusion from challenging the constitutionality of any race-based school assignment decision made by Lynn under its present school assignment plan.

ARGUMENT

I. Applicability of the *Parents Involved* decision to *Comfort*

The Defendant-Intervenor Commonwealth of Massachusetts acknowledged the similarities between the Circuit Court decisions in the *Meredith*, *Parents Involved* and the present matter in its *amicus brief* filed in support of the Respondents in *Meredith* and *Parents Involved*. "A similar challenge to a voluntary, race conscious integration program was brought in Massachusetts in the case of *Comfort* v. *Lynn School Committee*." *Brief Amicus Curiae of the Commonwealth of Massachusetts In Support of Respondents*, (**Exhibit A**) p. 1. The Commonwealth went on to explain how the decisions in *Comfort*, *Parents Involved* and *Meredith* were each based on the same legal principles, principles the Supreme Court has now overturned.

> The Sixth Circuit affirmed the constitutionality of Jefferson County, Kentucky's race-conscious K- 12 school assignment policy for educationally comparable schools in *McFarland* v. *Jefferson County Public Schools* . . . In *Parents Involved in Community Schools* v. *Seattle School District No. 1* . . . , the *en banc* Ninth Circuit upheld the constitutionality of Seattle, Washington's voluntary integration plan for high school assignments. Similarly, the *en banc* First Circuit in *Comfort* v. *Lynn School Committee* . . . , relied on *Grutter* in holding that the Lynn, Massachusetts school district satisfies constitutional requirements under strict scrutiny when implementing its race conscious school transfer plan that racially integrates its elementary and secondary schools.

Brief Amicus Curiae of the Commonwealth of Massachusetts In Support of Respondents, pp. 4-5. *See also*, *Id*. at p. 6 ("Similarly, the First, Sixth, and Ninth Circuits concluded that students in Lynn, Massachusetts, Jefferson County, Kentucky, and Seattle, Washington receive these benefits when educated in integrated K-12 schools. *Comfort*, 418 F.3d at 15-16, 16 n.8; *Parents Involved*, Pet. App. 20a-27a, *Meredith*, Pet. App. B3, C37, C45-C47").

In its *Parents Involved* decision, the Court agreed to this similarity.

> The dissent refers to an opinion filed by Judge Kozinski in one of the cases now before us, and that opinion relied upon an opinion filed by Chief Judge Boudin in a case presenting an issue similar to the one here. See *post*, at 35 (citing 426 F. 3d 1162, 1193.1196 (CA9 2005) (concurring opinion) (citing *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 27.29 (CA1 2005) (Boudin, C. J., concurring))).

Parents Involved, WL 1836531, *51 (Kennedy, J., concurring) (emphasis added). The majority opinion noted that the *En Banc* Panel of the First Circuit rested its decision in this matter on the same interpretation of *Grutter* upon which the Sixth and Ninth Circuit's based their decisions. "After *Grutter*, however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII*, 426 F. 3d, at 1166; *McFarland II*, 416 F. 3d, at 514; *Comfort* v. *Lynn School Comm.*, 418 F. 3d 1, 13 (CA1 2005)." *Parents Involved*, WL 1836531, *17. The Commonwealth also noted that the *Comfort* decision rests on the same, now discredited, underpinning as the *Parents Involved* and *Meredith* cases:

> The Sixth and Ninth Circuits correctly relied on *Grutter* v. *Bollinger* in holding that the Jefferson County and Seattle school districts have compelling educational interests in using race conscious means to integrate their schools.[2]
>
> [2] The First Circuit in *Comfort*, 418 F.3d at 13-16, also properly relied on *Grutter* in concluding that Lynn's educators have compelling educational, race relations, and student safety interests in racially integrating their elementary and secondary schools . . .

Brief Amicus Curiae of the Commonwealth of Massachusetts In Support of Respondents, p. 5 & n. 2.

II. Timeliness of the Motion

The one year time frame for motion under Rule 60(b)(1), (2) or (3) is not applicable to motion under Rule 60(b)(5). "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed.R.Civ.P. 60(b).

While it has been almost two years since the mandate in this matter was issued by the First Circuit on July 15, 2005, the Supreme Court has approved the granting of relief from final judgments entered over much longer time periods. In *Agostini* v. *Felton*, *supra*, the Court held that a Rule 6(b)(5) motion should have been granted 12 years after the entry of a final judgment. The filing of this motion within days of the Court's decision in *Parents Involved* satisfies requirement that the motion be made within a reasonable time.

III. Equitable principles require that the Plaintiffs be given relief from the judgment

If the Plaintiffs were to challenge Lynn's use of race in student assignments based on the principles articulated in *Parents Involved*, they would face arguments based on *res judicata* – making the Plaintiffs the only school children in America not entitled to the Equal Protection rights recently established by the Court.

Lynn could further argue (although the Plaintiffs would not concede the validity of such an argument) that any future challenge to the Lynn Plan by students who were ***not*** parties to the present actions should be subject non-mutual collateral estoppel. The first Circuit has recognized the non-mutual collateral estoppel – in which a party seeks to apply a decision in one case to preclude claims by other parties over the same issue – as a valid defense under federal issue preclusion principles in *In re El San Juan Hotel Corp*., 841 F.2d 6 (1st Cir. 1988). Leaving the

judgment in this matter undisturbed would isolate the Plaintiffs (and potential Lynn itself) as an island to which the Equal Protection principles articulated in *Parents Involved* would not apply.

IV. The principles articulated in *Parents Involved* requires a finding that Lynn's Plan is unconstitutional

Lynn's student assignment plan is similar to Seattle's plan at issue in *Parents Involved*. Both plans were adopted to address striking similar demographics and housing patterns. Both cities have student populations that are approximately 60% minority. Both Lynn and Seattle face nearly identical *de facto* segregated housing patterns. In both cities, white children are concentrated in the north and minority children concentrated in the south. Compare, *Parents Involved*, WL 1836531, *12, 60 with *Comfort* v. *Lynn School Committee*, 418 F.3d 1, 7 (1st Cir. 2005). Both assignment plans utilize similar methods to address their *de facto* segregated housing by restricting school choice with the goal of having all subject schools fall within $^{+}$/-15% of the minority student population. Compare, *Parents Involved*, WL 1836531, *66 with *Comfort*, 418 F.3d at 7-8 (describing the operation of the Plans). See also *Comfort ex rel. Neumyer* v. *Lynn School Committee*, 283 F.Supp.2d 328, 389 (D.Mass. 2003) ("While I conclude that the defendants are wrong to suggest that the Lynn Plan is compelled by *Brown*, since there is no evidence of ongoing *de jure* segregation . . ." (emphasis added)).

The Court has now found assignment plans that use racial restrictions on student assignments as a tool to maintain racial diversity to be in violation of the Equal Protection Clause.

> The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial

> integration—they offer no definition of the interest that suggests it differs from racial balance.

Parents Involved, WL 1836531, *21; *Parents Involved*, WL 1836531, *54 (Kennedy, J. concurring) ("The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward").

The Lynn Plan falls squarely within the types of plans barred by the *Parents Involved* decision. As described by the *En Banc* Panel of the First Circuit, Lynn's Plan restricts assignment choices by race:

> [A]bsent certain exceptions, students may not make "segregative" transfers. A segregative transfer is one that would exacerbate racial imbalance in the sending or receiving school (i.e., a white student may not transfer to a racially isolated school, and a nonwhite student may not transfer to a racially imbalanced school).

Comfort, 418 F.3d at 8.

Given the similarities between the Lynn Plan and the Seattle Plan, and of the similarities in reasoning by the *En Banc* Panels of the First and Ninth Circuits in finding those Plans to be constitutional, it can only be said that the Lynn Plan bears the same constitutional defects identified by the Supreme Court in *Parents Involved*.

The rights established in the Court's *Parents Involved* decision should be given effect "with all deliberate speed" and without the kinds of delays and obfuscations that accompanied the implementation of the right protecting children from *de jure* segregation in public schools that was announced in *Brown* v. *Brd. of Ed*., 349 U.S. 294, 300 (1955) (*Brown II*) (requiring the defendant school systems "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed"). See, *Griffin* v. *County School Board of Prince Edward*, 377 U.S. 218, 234 (1964) ("The time for mere 'deliberate speed' has run out").

CONCLUSION

This Court should grant the Plaintiffs' relief from the final judgment in this matter and enter a new judgment consistent with the holding of *Parents Involved*.

Dated: July 3, 2007

Respectfully submitted,

SAMANTHA J. COMFORT, *et al.*,

By their Attorneys,

/s/ Michael Williams

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CERTIFICATE OF SERVICE

I hereby certify that this Document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on July 3, 2007.

/s/ Michael Williams