Nos. 05-908 and 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 Appeals for the Ninth and Sixth Circuits

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization that assists African Americans and other people of color to secure their civil and constitutional rights. For more than six decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity. LDF represented African-American plaintiffs in the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), and has litigated numerous subsequent landmark school desegregation cases. In addition to its involvement in court-ordered desegregation litigation, LDF has played and continues to play a critical role in ensuring diversity in higher education as well as racial integration at the primary and secondary school level.

LDF filed *amicus* briefs below in both of the cases now before the Court. In *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff'd*, *Meredith v. Jefferson County Bd. of Educ.*, 416 F.3d 513 (6th Cir. 2005), LDF was granted permission by the district court to participate as *amicus curiae*, submit legal briefs, attend the trial to examine and cross-examine witnesses, and present oral arguments as the court deemed necessary. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1173 (9th Cir. 2005) (*en banc*), LDF filed an *amicus* brief in support of rehearing *en banc*.[*]

SUMMARY OF ARGUMENT

These cases involve the good faith, voluntary efforts of two large, racially diverse school districts to realize the

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[*] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party in these cases authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation.

promise of *Brown v. Board of Education* in the face of pervasive, persistent *de facto* residential segregation and, in the case of Jefferson County, Kentucky, a legacy of *de jure* school segregation.

The Court need not apply strict scrutiny in this context. K-12 voluntary school integration does not emerge from the historical and legal backdrop of race-conscious "affirmative action." Rather, it is a milestone on the long and difficult road down which this nation has traveled in its quest to make real the aspiration — first articulated in *Brown* but repeated countless times thereafter — of equal, integrated public education. As relevant as the legal principles of decisions such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), may be, they do not dictate the standard of review here.

In its school desegregation cases over more than half a century, the Court has consistently emphasized the effectiveness of remedies to disestablish state-imposed segregation. It has never held that students assigned to integrated schools or denied the opportunity to attend preferred facilities have suffered cognizable harm, stigmatic or otherwise; nor has the Court treated claims of such harms as factors that might limit minority plaintiffs' right to a remedy. This history is a significant indication that heightened scrutiny is unnecessary in the voluntary integration context.

Further, at least since its unanimous ruling in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court has consistently supported the notion that state and local officials could go beyond remedies that might be judicially imposed on *de jure* segregated systems when those officials are acting to alleviate *de facto* segregation and achieve integration in their schools. This principle has never

been expressly undermined by any of the Court's subsequent decisions, and not surprisingly, lower courts and state and local governments have correctly read the pronouncements to mean that local voluntary efforts are not only constitutionally permissible, but encouraged.

The Court's school desegregation jurisprudence — and in particular, its most recent rulings that set forth standards for releasing school districts from court supervision — has also repeatedly affirmed the importance of local control and the deference that courts should afford school boards as they craft educational policies, including student assignment policies. It would be ironic, if not altogether perverse, for this emphasis on local control and deference to play a critical role in the dissolution of desegregation decrees, and yet be held insufficient to sustain good faith, voluntary efforts to promote integration in the very same schools.

Applying a more relaxed standard of scrutiny here would be not only jurisprudentially consistent with the Court's prior rulings, but also analytically and practically sound. Unlike in "affirmative action" cases, voluntary integration plans neither ration scarce or unique opportunities nor signify judgments regarding a student's aptitude, merit or value; in other words, they do not grant "racial preferences" as that term has been used in the affirmative action context. The kinds of Equal Protection concerns about the distribution of burdens and benefits, therefore, which may be germane to traditional affirmative action cases, are not triggered where school districts sensitively manage the assignment of K-12 students to public schools that are alike in material respects to achieve racial integration.

Moreover, student assignment plans in K-12 systems are the product of school authorities' consideration and balancing of numerous factors, including both operational

practicalities and multiple educational policy objectives. Their formulation and implementation occur in the context of, and often impact, each district's unique geographic patterns and demographic characteristics, of which school authorities are necessarily cognizant. In such a setting, the application of a strict scrutiny standard would sharply constrict the discretion that school boards and policymakers should have to fashion local educational goals. Application of vigorous rational basis review would avoid these consequences while affording ample protection against covert discriminatory purposes.

ARGUMENT

I. This Court Should Not Apply Strict Scrutiny To Respondents' K-12 Public School Student Assignment Policies

It is beyond question that the policies challenged here grow directly out of good faith efforts to achieve *Brown*'s vision of equal, integrated public education. Thus, "[v]iewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense." *McFarland*, 330 F. Supp. 2d at 851. Yet petitioners essentially disregard the more than five decades of school desegregation law, relying instead almost exclusively on a body of cases involving qualitatively different issues. While the relevance of those precedents cannot be denied, the Court cannot look to them alone; rather, it must reconcile them with its desegregation jurisprudence, the trajectory of which is separate and distinct from the cases that petitioners treat as controlling.

A. The Court Has Never Deemed the Application of Strict Scrutiny Necessary to Determine Whether K-12 Student Assignments to Achieve School Integration Are Motivated By Constitutionally Illegitimate Purposes

The purpose of "strict scrutiny" is to ensure that race-conscious governmental actions are not "in fact motivated by illegitimate notions of racial inferiority or simple racial politics . . . illegitimate racial prejudice or stereotype," and that "to whatever racial group . . . citizens belong, [they are] . . . treated with equal dignity and respect" in public decisionmaking. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). The Court has never found the use of strict scrutiny necessary to avoid these dangers when school systems act to promote integrated public schools.

We begin with *Brown*. That decision neither established nor supports the proposition that race may never be considered in the assignment of students to public schools. Rather, the Court there held that the use of race *for segregative purposes* is impermissible. 347 U.S. at 493, 495. Nothing in *Brown* indicates that race-conscious *integrative* student assignments violate the Equal Protection Clause. Indeed, its language and spirit (as well as the many subsequent pronouncements of this Court summarized *infra* I.B) suggest the opposite: that adoption of integrative policies would be encouraged, since the harms of racial segregation occur regardless of whether that segregation is *de jure* or *de facto*. *Id.* at 494-95.

No reference to strict scrutiny can be found in *Brown*, nor in any of the Court's later school desegregation or voluntary integration decisions. That standard has its origins in cases involving severe sanctions (civil or criminal) applied to individuals because of race, or because they crossed racial

barriers. *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964); *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967). More recently, strict scrutiny been applied in so-called "affirmative action" cases, which seek to define the permissible parameters of race-consciousness in the distribution of finite goods or benefits, such as admission to selective colleges and universities, government contracts, and public employment. *See, e.g.*, *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

These distinct jurisprudential paths have not converged. Although the Court's school desegregation rulings discussed the appropriate remedies for a constitutional violation, *see, e.g.*, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann*; *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968), it is telling that the Court never articulated a need to balance those remedies against any students' claims to a supposed "right" to attend "neighborhood" schools, or to be free from assignments to integrated schools where they would have to associate with pupils of a different racial or ethnic group.[1] To the contrary, the Court has recognized that school authorities may (and should) pursue steps to achieve

[1] In the context of a "choice" student assignment plan, the logic of such a holding would suggest that school systems were constitutionally *required* to establish at least some number of one-race schools for those who would prefer them. The Court has firmly rejected such an interpretation of the Constitution. *See, e.g.*, *Palmore v. Sidoti* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) ("It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to [private] racially discriminatory educational entities"); *Brown*, 347 U.S. at 495 ("Separate educational facilities are inherently unequal.").

racial integration because it benefits *all* students, regardless of race. *See infra* I.B.

Even as the Court began to recognize the limitations of available judicial remedies, *e.g.*, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), it expressed concern exclusively in terms of constraints on judicial authority over school boards — not any rights of individual students to be assigned to a specific school of their choice or schools closer to their homes. This despite the fact that many of these cases came before the Court as it concomitantly confronted the kinds of affirmative action challenges described above.

Nor did the Court's affirmative action rationale play a role in its most recent school desegregation cases, s*ee Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991), which were decided in the same years the Court also decided key affirmative action cases. Those rulings emphasized that courts should afford deference to school districts in evaluating requests for unitary status, *see infra* I.C, but they said nothing about any burdens that continued enforcement of desegregation orders might impose on so-called "innocent" third parties. *Cf., e.g., Wygant*, 476 U.S. at 276 (expressing concern, in the context of teacher layoffs affected by affirmative action, about "imposing discriminatory legal remedies that work against innocent people") (emphasis omitted).

These divergent approaches are not accidental and reflect the deep commitment of our Nation to the difficult and elusive goal of racial justice and equal treatment. As Judge Kozinski, in his concurring opinion below in *PICS*, reasoned, therefore, the appropriate standard of review in these cases is

not "strict — and almost always deadly — scrutiny," but rather a "robust and realistic rational basis review."[2]

That standard is especially appropriate in light of the long struggle toward the core equal opportunity principle of *Brown*, which is rightfully celebrated as the most significant ruling of this Court in the twentieth century. It is a symbol of high aspirations that has become embedded in public dialogue and policy analysis.[3] Adoption of a strict scrutiny framework as the mechanism for adjudicating challenges to the voluntary consideration of race by public school systems committed to *Brown*'s core values of equality and integration

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[2] Both of the courts below believed that application of strict scrutiny was required by this Court's recent rulings in *Johnson v. California*, 543 U.S. 499, 505 (2005), *Grutter*, and *Adarand*. *PICS*, 426 F.3d at 1172 n.12; *McFarland*, 330 F. Supp. 2d at 848-49. It is true that the Court has sometimes stated that all racial classifications are subject to strict scrutiny. *See*, *e.g.*, *Johnson*, 543 U.S. at 505. This reflects a traditional and appropriate skepticism about racial classifications and provides general guidance for lower courts. Nevertheless, such statements reflect the Court's experience with the range of factual settings in cases raising such issues that have been presented to it and do not inexorably dictate that there are not other factual contexts, in which race is given consideration, where application of the strict scrutiny standard is not required. "[T]he Supreme Court's opinions are necessarily forged by the cases presented to it; where the case at hand differs in material respects from those the Supreme Court has previously decided, I would hope that those seemingly categorical pronouncements will not be applied without consideration of whether they make sense beyond the circumstances that occasioned them." *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring). Indeed, separate opinions of individual Justices have suggested that strict scrutiny should *not* apply to every instance in which race is implicated. *See, e.g.*, *Johnson*, 543 U.S. at 516 (Ginsburg, J., concurring) (citing cases); *id.* at 538-41 (Thomas, J., dissenting). *Amicus* believes, for the reasons set forth in this brief, that public school voluntary integration plans are one such context.

[3] *See*, *e.g.*, *No Child Left Behind Act of 2001*, 20 U.S.C. §§ 6301 *et seq.*; *Magnet Schools Assistance Program*, 20 U.S.C. §§ 7321 *et seq.*

would mark a retrogressive shift that history may regard as equally unfortunate as the *Dred Scott* ruling was in an earlier day. The Court should not pursue such a course.

B. This Court Has Repeatedly Expressed Approval of Voluntary K-12 School Integration Efforts

Not only has this Court never applied strict scrutiny in the context of public school districts' voluntary integration policies, but it has expressly approved school board policies that foster integration *independent of any constitutional obligation to do so*. In *Swann*, the Court stated:

> 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 proscribed 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.*

402 U.S. at 16 (emphasis added); *accord North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (recognizing integration as a permissible goal to pursue "quite apart from any constitutional requirements"); *McDaniel v. Barresi*, 402 U.S. 39, 40-41 (1971).[4]

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[4] The dissent in *PICS* incorrectly suggests that this passage from *Swann* is taken "out of context" and does not speak to whether school authorities may consider race in student assignment in the absence of a finding that the district had engaged in *de jure* racial segregation. *PICS*, 426 F.3d at 1208-09 n.17 (Bea, J., dissenting). First, the language the dissent cites as additional context is irrelevant; it relates to limitations on the authority of courts to order remedies that exceed the scope of the violation. Second, the dissent ignores the clear language in the other opinions issued by the Court on the same day, *see North Carolina State Bd.*, 402 U.S. at 45; *McDaniel,* 402 U.S. at 40-41, which recognize the ability of state and

In the thirty-five years since *Swann*, a majority of the Court has never joined an opinion contradicting the notion that public school officials may go further than courts to foster integrated student bodies. In fact, subsequent signals from individual Justices, prior to and after the emergence of the Court's affirmative action jurisprudence, suggest the opposite — that local bodies *do* retain flexibility to make such decisions. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 488-89 n.7 (1979) (Powell, J., dissenting) (contrasting the difficult judicial considerations involved in court-ordered remedies with one state's voluntary school desegregation statute, calling the latter "the sort of effort that should be considered by state and local officials and elected bodies"); *Bustop, Inc. v. Bd. of Educ. of Los Angeles*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., in chambers);[5] *Keyes*, 413 U.S. at 242 (Powell, J., concurring) (noting that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation [beyond what a court has ordered]," and that "[n]othing in

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local officials to adopt desegregation plans "quite apart from any constitutional requirements," as well as the Court's statement in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-74 (1982), about deference to the political process to resolve the issue of the efficacy and desirability of school desegregation.

[5] *Bustop* is particularly revealing. There, in the same year that the Court decided *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), then-Justice Rehnquist rejected the emergency petition of white parents who opposed a race-conscious voluntary student assignment policy for Los Angeles County, California. He indicated that while California was under no federal obligation to order desegregation of its schools, he had "very little doubt that it was permitted . . . to take such action" pursuant to its own constitution. *Bustop*, 439 U.S. at 1383. He went on to observe that the "novel" argument advanced by the challengers seemed to depend on the errant assumption that, in the context of public education, "each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from . . . extensive pupil transportation.'" *Id.*

this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience").

Indeed, in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), not only did the Court decline to liken non-remedial, race-conscious student assignment policies to race preferences that it had condemned in affirmative action cases, but it struck down state-level efforts to ban their local adoption. There, it invalidated a statewide initiative banning all school districts from using busing to alleviate *de facto* segregation, finding that the initiative created a unique burden on racial minorities by selectively and improperly "plac[ing] effective decisionmaking authority over a racial issue at a different level of government." *Id.* at 474-75 (citing *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)). In so doing, the Court acknowledged:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." [*Brown*, 347 U.S. at 493.] When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in — and are fully accepted by — the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. . . . *[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process*.

Id. at 472-74 (footnote omitted) (emphasis added).

The *Seattle* ruling demonstrates that the Court neither viewed nor analyzed the development of its affirmative action jurisprudence as undermining the authority of school districts to establish and maintain integration policies. Significantly, *Seattle* was decided four years after the Court confronted the affirmative action policy in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and yet the opinion hardly makes mention of *Bakke* at all.[6] Instead, it refers to *Brown*'s mandate, and the responsibility of school boards to consider "the desirability and efficacy of school desegregation." *Seattle*, 458 U.S. at 474.[7]

The courts below indicated that they were informed by these and other cases. *PICS*, 426 F.3d at 1179; *McFarland*, 330 F. Supp. 2d at 851. They are not alone. For decades, federal courts across the nation have repeatedly held that state and local officials may voluntarily employ race-conscious student assignment strategies to integrate their

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[6] Regardless, *Bakke* itself does not support the argument advanced by both petitioners and the United States. As a preliminary matter, because *Bakke* presented a classic "race preference" claim — *i.e.*, race was considered in a competitive admission process for a medical school with limited openings, etc. — the presumption of its application to these cases is inapposite. Yet, even in that context, Justice Powell's opinion allowed race to be taken into account as one factor, even though he explicitly recognized that meant that race would be a controlling and the deciding factor in at least some individual instances. 438 U.S. at 316-19.

[7] *Seattle* also cited with approval *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), a case with similar facts and affirmed by this Court. As had *Seattle*, *Lee* found that "[a]lthough there may be no constitutional duty to undo *de facto* segregation, . . . 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." *Id.* at 714.

schools and reduce the harms associated with racial isolation. *See, e.g.*, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 28 (1st Cir. 2004) (Boudin, C.J., concurring) ("in the absence of a constitutional violation," decisions about whether to pursue school integration "are customarily left to legislatures, city councils, school boards, and voters"), *cert. denied*, 126 S. Ct. 798 (2005); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) ("[L]ocal school authorities have the power to voluntarily remedy *de facto* segregation existing in schools and, indeed, such integration serves important societal functions."); *Jacobson v. Cincinnati Bd. of Educ.*, 941 F.2d 100, 102 (6th Cir. 1992) (authority of school boards extends to adoption of voluntary integration policies "particularly when such a policy is implemented in order to prepare students for life in a pluralistic society"), *cert. denied*, 506 U.S. 830 (1992); *Parents Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 581 n.9 (2d Cir. 1984) (school boards permitted to adopt otherwise "constitutionally suspect measures to counteract the perceived problem of accelerated white flight"); *Clark v. Bd. of Educ. of Little Rock*, 705 F.2d 265, 271 (8th Cir. 1983) ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, . . . it may be taken into account in an attempt to promote integration."); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979) ("[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."), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) (emphasis in original); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1966) ("Although boards of education have no constitutional

obligation to relieve against racial imbalance which they did not cause or create, . . . it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm."); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) ("If [a school district] voluntarily chooses to maintain desegregated schools, it acts within the traditional authority invested in a democratically elected school board."); *Willan v. Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416, 1422 (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.") (all internal citations omitted).

States, too, have acted in reliance upon the basis of the Court's jurisprudence approving voluntary steps to integrate schools, through legislative, administrative, or judicial actions. *See*, *e.g.*, *Booker v. Bd. of Educ. of Plainfield*, 45 N.J. 161 (N.J. 1965); *Vetere v. Allen*, 15 N.Y. 2d 259 (N.Y. 1965) (*per curiam*); *Jackson v. Pasadena City Sch. Dist.*, 59 Cal. 2d 876, 881-82 (Cal. 1963); Mass. Gen. L. ch. 71, §37C; Ohio Rev. Code § 3313.98(B)(2)(b)(iii).

There is simply no adequate basis to conclude that *Swann* and *Seattle* do not remain good law. The decisions of this Court following *Brown* have emphasized that *federal courts* may act only on the basis of a constitutional violation, and that the scope of remedies available in such circumstances is limited, but it has never been supposed or suggested that the

authority of *school boards* to do what courts cannot has likewise been diminished, *sub silentio*.[8] This Court should resist petitioners' urging that it import strict scrutiny analysis to evaluate voluntary school integration policies. As Judge Kozinski observed, 426 F.3d at 1195, because the nearly uniform result of applying strict scrutiny is invalidation of the challenged policy, this will inevitably chill, and all too often effectively eviscerate, the latitude school districts have traditionally enjoyed — and indeed need — in order to make sensitive, well-informed educational policy decisions.

At bottom, respondents have done precisely what this Court has long indicated that it hoped all public school systems — including those which have attained unitary status by faithfully implementing court-ordered relief and ultimately incorporating its underlying purposes into their own plans and goals — would do: they have made a conscious effort to build upon their prior achievements, to learn from their mistakes, and to continue striving toward *Brown*'s vision of equal, integrated public schools. *See McFarland*, 330 F. Supp. 2d at 852-54.

The Court has never given any indication that it intended to transform the Equal Protection Clause into a weapon with which opponents of school integration may challenge K-12 student assignment decisions made in good faith to provide equal educational opportunity. It should not now legitimate

[8] To the extent that petitioners rely on the Court's language in cases dealing with the limitations of judicial remedial power to suggest that actions taken in the present cases are unconstitutional, *e.g.*, *Freeman*, 503 U.S. at 494 ("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."), it is readily apparent that those decisions do not undermine the Court's previous statements about the latitude afforded to school districts. "The absence of a duty [to desegregate] sheds little light on the constitutionality of a voluntary attempt." *Brewer*, 212 F.3d at 752.

that ironic outcome. *See Higgins v. Bd. of Educ. of Grand Rapids*, 508 F.2d 779, 795 (6th Cir. 1974) ("An integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs.").

C. Voluntary K-12 School Integration Is Also Consistent with This Court's Emphasis on Local Control and Deference to School Boards

The Court's cases encouraging public school districts to address racial isolation and promote racial integration through voluntary means also comport with the time-honored traditions of local control, deference to school administrators' educational judgments, and respect for the political process. *See McFarland*, 330 F. Supp. 2d at 850-51 (noting that the "deference accorded to local school boards goes to the very heart of our democratic form of government"). Even at the height of resistance to school desegregation, this Court afforded formerly *de jure* school districts the first opportunity to decide how best to remedy violations before federal trial courts could step in, despite its frustration with the perennial failure of local school administrators to take the measures necessary to desegregate their schools. *See Swann*, 402 U.S. at 13 (summarizing history); *id.* at 15-16 (allocating to local districts the initial opportunity and responsibility to formulate an effective desegregation plan).

In the years following the Court's approval of the broad judicial remedies in *Swann*, it began enlarging the goal of school desegregation from the unequivocal mandate to eliminate the vestiges of segregation "root and branch," *Green*, 391 U.S. at 438, to include as well the "end purpose [of] . . . restor[ing] state and local authorities to the control of

a school system that is operating in compliance with the Constitution." *Freeman*, 503 U.S. at 489. *See, e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."). That notion of local control and deference is now a bedrock of public school desegregation law.

The Court has conveyed several rationales for restoration of local control. It has emphasized, for example, the value of permitting the political process to determine what kinds of educational policies best suit the needs of children within each school district. *See, e.g.*, *Freeman*, 503 U.S. at 490 ("When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course."); *Dowell*, 498 U.S. at 248 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *accord PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

In the Court's estimation, local control also encourages responsiveness of local school boards to those whom they serve, *Freeman*, 503 U.S. at 490, community confidence in and support for the public school system, *Milliken*, 418 U.S. at 741-42, and "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *accord Comfort*, 418 F.3d at 28 (Boudin, C.J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

Equally as often, the Court has acknowledged the value of local authority because of its view that judges lack the competence to make sensitive, pedagogical decisions best left

to school boards and educational experts. *See, e.g.*, *Penick*, 443 U.S. at 488; *Milliken*, 418 U.S. at 744. This notion is consistent with Justice Thomas's recognition in *Johnson v. California*, 543 U.S. 499 (2005), at that in the prison context, "experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country." *Id* at 529 (Thomas, J., dissenting).[9]

Just as it provides support for ending court supervision, the emphasis on local control is similarly cogent and applicable to school authorities' *voluntary* decisions to seek and retain the benefits of integrated schools. As the *McFarland* court observed, "[i]t would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." 330 F. Supp. 2d at 851. What an unfortunate path constitutional law will have taken if the importance of local control were invoked as a primary justification to dissolve court-ordered desegregation decrees, while unitary districts, acting in good faith, were not afforded the same discretion to implement policies that prevent a return to the kinds of segregated conditions that first led this Court to reach its conclusion in *Brown*.

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[9] Also analogous here is Justice Thomas's observation that, in the prison context, the Court has given greater deference to prison officials on constitutional issues "regardless of the standard of review that would apply outside prison walls." *Johnson*, 543 U.S. at 530 (Thomas, J., dissenting). The Court has likewise consistently afforded a higher degree of deference to school boards in constitutional cases to establish educational policies. *See generally* James E. Ryan, *The Supreme Court and Public Schools*, 86 Va. L. Rev. 1335 (2000) (citing cases). Indeed, if the Court were to deem strict scrutiny appropriate here, these cases would become an exception to the thrust of constitutional law jurisprudence affecting public schools.

II. Application Of A Rigorous Rational Basis Scrutiny Standard Is Appropriate Here Because It Takes Account Of The Relevant Differences Among K-12 School Assignments, University Admissions, And True Affirmative Action Cases

Not only are affirmative action cases the wrong place for this Court to turn to find the historical origins of voluntary K-12 school integration, but those cases also provide an ill-fitting framework for analysis of the issues raised here. The differences between the two contexts — as reflected in this Court's encouragement of voluntary efforts and its consistent rejection of any students' right to attend "neighborhood" or preferred public schools, *see supra* I.A — are differences in kind and not merely degree. The Court's constitutional test should likewise recognize the differences as such.

Furthermore, as a practical matter, restricting the scope of the constitutional inquiry here to little more than a modified application of the strict scrutiny principles applied in *Grutter* would do a disservice to the multitude of interests that school districts properly must (and actually do) weigh as they formulate and operate an effective student assignment plan. Applying rational basis scrutiny instead would allow federal courts to avoid the unnecessary and somewhat artificial task of extracting race from the interwoven web of considerations, while still providing them with the necessary judicial tools to scrutinize a challenged policy's actual purposes and impact.

A. Race-Conscious Public School Assignments Are Contextually and Analytically Distinct from Racial Preferences in Affirmative Action Cases

Perhaps above all, *Grutter* teaches that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S. at 327. We recognize that the similarities between this Court's affirmative action

rulings and the cases at bar are sufficiently facially appealing to support the assumption that the test described in *Grutter*, with minor modifications, governs here. What is more, the courts below did an inspired job of resolving the differences between the two contexts while staying as faithful to strict scrutiny's analytical framework as possible. *See PICS*, 426 F.3d at 1172-92; *McFarland*, 330 F. Supp. 2d at 848-64. Yet, a closer examination of the issues raised by voluntary school integration reveals that they are entirely different from those in affirmative action cases. Indeed, the operative facts and considerations involved here share so little in common with the affirmative action context that application of strict scrutiny itself — and not merely the specific facets of it — has been characterized as forced and ultimately unpersuasive. *See PICS*, 426 F.3d at 1193 (Kozinski, J., concurring).

In affirmative action cases, at issue is the constitutionality of racial considerations in the distribution of a limited good or benefit, such as admission to a selective college or university, *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003), a government contract, *Adarand*, 515 U.S. at 211, or public employment. *United States v. Paradise*, 480 U.S. 149, 153 (1987). Often referred to as "zero-sum games," these competitions determine who will and will not receive the benefit in question, regardless of the decisionmaker's approach. Thus, the issue there is whether it is constitutionally permissible to consider race among other factors in evaluating merit, qualification, or cost, with the result of favoring some applicants over others. In short, this Court has used strict scrutiny where it perceived a "racial *preference*" is at issue.

On the other hand, in the context of K-12 public education one begins with the proposition that students are not entitled to attend any particular school. *PICS*, 426 F.3d

at 1181 n.21; *McFarland*, 330 F. Supp. 2d at 860. So long as school districts do not segregate students by race, *see Brown*, 347 U.S. at 493, the determination of where and how to assign students traditionally has been one for the political process and school authorities to resolve. *See, e.g.*, *Johnson*, 604 F.2d at 515 (citing cases). Indeed, in the vast majority of school districts across the nation, no choice whatsoever is offered to students; they are simply assigned to a school based on whatever pedagogical or practical reasons the district might have for making those assignments.

Unlike in the affirmative action context, public primary and secondary education is *not* a limited good: by law, all youth of specified ages must attend school, and those who choose to enroll in a public system will be and are assigned to a school in that system. *PICS*, 426 F.3d at 1181; *McFarland*, 330 F. Supp. 2d at 859. In both of the districts in question, the schools are resourced, staffed, and funded through the same means, and students are taught the same core curriculum. Denial of a substantially equal K-12 education is never an issue, *cf., e.g.*, *Gratz*, 539 U.S. at 251, and petitioners do not contend that it is here.

It is true that, as with affirmative action, some degree of race-conscious decisionmaking occurs here. The challenged policies are designed to promote racial integration through the use of various strategies, including managed school choice. But every student regardless of race may request any of the available choice options, and at no school does attendance hinge on a determination of merit, qualification, or entitlement. *Compare Grutter*, 539 U.S. at 315 (noting that law school's admission policy selects from qualified candidates based on numerous indicia of ability), *with PICS*, 426 F.3d at 1181 ("[N]o assignment to any of the District's

high schools is tethered to a student's qualifications."), and *McFarland*, 330 F. Supp. 2d at 859-60 (same).

Thus, concerns about the permissibility of perceived preferences or favoritism in a selective, competitive process do not arise here. *Cf. Gratz*, 539 U.S. at 270-72. Nor are the dangers of stigmatic harm implicated. *Compare Bakke*, 438 U.S. at 298 (describing the risk of stigmatic harm that can be caused if affirmative action plans send the signal that minorities cannot succeed without "special protection"), *with Comfort*, 418 F.3d at 18 (explaining that because school assignments are not based on merit, there is no risk of causing stigmatic harm based on race).

Similarly absent are concerns that the failure to be assigned to a particular public school is the equivalent of being denied admission to the elite law school, medical, or undergraduate institutions in *Grutter,* 539 U.S. at 311; *Bakke,* 438 U.S. at 269; or *Gratz,* 539 U.S. at 249, respectively. *See Bakke*, 438 U.S. at 301 n.39 (describing medical school admissions and public K-12 assignments as "wholly dissimilar"). Nor are these cases like *Wessmann v. Gittens*, 160 F.3d 790, 791 (1st Cir. 1998), which involved a prestigious, selective public high school, as none of the schools here provides the kind of unique, competitive educational opportunities that would distinguish it in a constitutional sense from the districts' other schools. The courts below, therefore, correctly concluded that the schools here are "basically equal." *McFarland*, 330 F. Supp. 2d at 860; *PICS*, 426 F.3d at 1169.

To be sure, parents and students may desire one school over another (they would not have identified or ranked their preferences otherwise), but this Court has never held that preference alone automatically renders the grant or denial of a public school assignment constitutionally significant. Thus

federal courts have correctly refused to recognize it as such. *See, e.g.*, *Hampton*, 102 F. Supp. 2d at 380 n.43; *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 364-66 (D. Mass. 2003), *aff'd on other grounds*, 418 F.3d 1 (1st Cir. 2004), *cert. denied*, 126 S. Ct. 798 (2005).

These analytical distinctions are hardly superficial. Taken together, they do not merely militate in favor of slight modifications in application of the strict scrutiny factors, but rather bring into question whether the kinds of concerns this Court has raised in affirmative action cases should be implicated at all. One might even think that voluntary school integration policies present not a *zero* sum game, but rather a *positive* sum game: when a district adopts such a policy, *all* students in the system gain the benefit of an opportunity to attend integrated schools, which otherwise might not have been available for some or perhaps all of the students.

B. K-12 Student Assignment Policies are Based on a Balancing of Complex Educational Objectives and Practical Considerations that Legitimately Relate to and Interact with the Goal of Racial Integration

Applying rational basis scrutiny here also makes practical sense.[10] Such a standard recognizes that race is rightly and inextricably woven into the various considerations school authorities must weigh in determining how best to educate students.[11] To rule otherwise would be to reduce *Brown*

[10] *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Court willing to revisit its prior holdings to develop more workable legal rules); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (Court considers practicality and workability of rules it fashions).

[11] Some of petitioners' arguments depend on ignoring the breadth of the varied and proper educational objectives that school systems have to focus exclusively on improving student achievement. Because, petitioners argue, racial integration does not successfully advance this goal, it has little or no pedagogical value. Apart from the questionable

from a celebrated statement of ideals to an artifact of legal history having little present-day value.

By definition, the task of student assignment connects pupils, who are potentially or actually mobile, with facilities, which are normally structures fixed to a geographic location. Every assignment-related decision — *e.g.*, to locate, repair, close or expand a school facility; to establish or alter its grade structure; to assign or move teachers to or from the school; to offer a specialized or optional program at the school; to offer transportation to the facility; to establish a geographic zone for the school or open it to a choice attendance process — has geographic connotations and, for that reason, a demographic background and demographic consequences. School administrators are unquestionably and rightly aware of those characteristics and consequences. It is why school systems are constantly studying, *inter alia*, birth rate and survival trends to predict short- and medium-term capacity needs. *See, e.g.*, *Meredith v. Jefferson County Board of Education* (No. 05-915), Joint Appendix ("*Meredith*

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empirical conclusion that underlies this argument, its narrow view of the responsibilities of a public school system ignores the plethora of democratic, social, and civil functions of public K-12 schools. More than fifty years ago in *Brown*, this Court announced that compulsory public primary and secondary education "is the very foundation of good citizenship," and "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." 347 U.S. at 493; *accord Plyler v. Doe*, 457 U.S. 202, 221 (1982). As our society becomes increasingly racially and ethnically heterogeneous, such cultural and civic lessons are ever more vital. *See PICS*, 426 F.3d at 1195 (Kozinski, J., concurring) ("Schools, after all, don't simply prepare students for further education, though they certainly can and should do that; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.").

J.A.") at 99-103. Those data almost inevitably contain racial or ethnic information.

Each assignment decision, therefore, must strike a careful balance of pedagogical concerns and interests, some but not all of which implicate race. For instance, offering students some opportunity to choose the school they would like to attend — as both respondent school systems have done here — serves the purpose not only of encouraging integration through the voluntary movement of students, but also of providing students with a variety of distinct yet basically equal educational opportunities to suit their needs. *PICS*, 426 F.3d at 1169; *McFarland*, 330 F. Supp. 2d at 860.

Furthermore, the availability of many educational options might satisfy a school board's goal of making the system as a whole more attractive to students, most often white and middle class students, who might otherwise leave the public schools to attend private or parochial institutions. *See McFarland,* 330 F. Supp. 2d at 854; *Meredith* J.A. at 104-05. Thus, a school district's ability to maintain market share also furthers the legitimate cause of stemming the flight of these students. *See, e.g.*, *Ambach*, 738 F.2d at 581 (recognizing that stemming white flight can be an important interest of school boards); *Johnson*, 604 F.2d at 516-17 (same).

Providing some specialized educational programs and encouraging choice among schools may reduce white flight from the system overall, but if unfettered, such an assignment strategy might also lead to further racial isolation in a handful of schools in a racially diverse system. *McFarland*, 330 F. Supp. 2d at 854. This fear is not an abstract one, but one of particular concern here, given the practical challenges of intense residential segregation and poverty concentration in the communities these school systems serve, as well as the history of intentional segregation in Jefferson County, which

brings with it a reasonable suspicion of enduring favoritism toward certain communities. *See also Anderson v. City of Boston*, 375 F.3d 71, 83-84 (1st Cir. 2004).

Similarly, a school district sensitive to the messages and consequences of its assignment system can also help avert the possible neglect (or even appearance of neglect) of any individual schools in the district, particularly the ones that would otherwise become predominantly minority.[12] *PICS*, 426 F.3d at 1170-71. Good faith prevention of even the appearance of such results is of critical importance to gaining public confidence and preserving a school district's unitary status. *McFarland*, 330 F. Supp. 2d at 854.

Above all else, as democratically-elected bodies, school boards are motivated by the proper interest of maintaining the ongoing support of their constituents. *McFarland,* 330 F. Supp. 2d at 854. This Court has long valued the restoration of local control and authority to state and local officials held accountable through the democratic process. *See, e.g.*, *Freeman*, 503 U.S. at 489-90; *Dowell*, 498 U.S. at 247-48;

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[12] One critique of school desegregation is that it rests on the assumption that predominantly or overwhelmingly black institutions are inherently inferior *because* they are black. *See Jenkins*, 515 U.S. at 114 (Thomas, J., concurring). While the Court said in *Brown* that racially separate schools are inherently unequal, it is not the mere fact of racial identifiability that leads to the perception of racial inferiority or reality of racial inequality. Rather, it is the practical consequences of segregated predominantly minority schools — which are statistically more likely to be centers of concentrated poverty, plagued by inadequate resources, higher teacher turnover, lower levels of parent involvement, low expectations, and fewer curricular offerings regardless of any intentions or efforts of school officials, and which history has shown are susceptible to conscious or unconscious neglect by school districts preoccupied with satisfying their most vocal constituents — that create the nexus between racial segregation and inferiority, real or perceived. *See generally*, Brief of 553 Social Scientists as *Amici Curiae* in Support of Respondents.

Seattle, 458 U.S. at 481-82; *Brinkman*, 433 U.S. at 410; *Milliken*, 418 U.S. at 741-44; *Rodriguez*, 411 U.S. at 49-53. The success that respondent school boards have experienced in this regard represents a vindication of the faith this Court's decisions have shown in the power of communities to deal with issues of race and education in the absence of a federal court order.[13]

School authorities, therefore, like state legislatures, are always aware of the racial demographics in the communities they serve. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thoughtful decisionmakers — especially in communities like Jefferson County, which has a legacy of intentional segregation, and in Seattle, which has an equally long history of struggling to overcome residential segregation — are inevitably and properly cognizant of the racial implications of their actions. *See Swann*, 402 U.S. at 20-21 (reciprocal influence of school location and neighborhood racial composition). And in many ways, their job requires them to be. *See supra* note 3.

For this reason, the mere fact that race is considered among other factors in assigning students to schools, even directly, should not itself trigger strict scrutiny's search for an overarching constitutionally compelling motive and an analysis of competing models with the goal of identifying an alternative procedure in which race is either disregarded or

[13] Results of surveys in Jefferson County reveal overwhelming support for an assignment plan that both provides the opportunity for choice and ensures that all of the district's schools are racially integrated. *See McFarland*, 330 F. Supp. 2d at 854 n.41; *Meredith* J.A. at 106-07. That the Seattle respondents have maintained a school integration plan voluntarily for more than four decades and now twice appeared before this Court to defend their policies speaks volumes of the depth of commitment to the goal of operating integrated schools of successive school boards elected over a period of decades. *PICS*, 426 F.3d at 1166.

given less consideration. This ought be especially true where that alternative may significantly impede the realization of the many other purposes of student assignment.

In the end, this Court need not involve itself in the difficult task of judging the extent to which every possible consideration of race — artificially separated from the truly complex web of pedagogical goals and motivations that drive student assignment policies — is compelling or indispensable to the whole of its assignment plan. *See Adarand*, 515 U.S. at 223 (requiring, in the context of affirmative action, "a most searching examination"). The Equal Protection Clause does not require that level of unwarranted intrusion into the educational and democratic process here. Rather, the Court should take a more holistic, unencumbered view of the challenged policies, recognizing the many interests that they properly serve. Rational basis review, not strict scrutiny, permits it to do so.

While such a standard would honor the traditions of local control and deference this Court has long valued, it would not leave the actions of school officials unchecked. The muscular rational basis test Judge Kozinski described and we propose is familiar to the Court and capable of safeguarding against violations of the Fourteenth Amendment. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *see also Johnson*, 543 U.S. at 547 (Thomas, J., dissenting) ("[T]his Court has long had 'confidence that . . . a reasonableness standard is not toothless.'") (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

Under this standard, federal courts would be able to "consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it," requiring a sufficient connection between the two but declining to

speculate about other possible justifications. *See PICS*, 426 F.3d at 1194 (Kozinski, J., concurring); *see also Romer*, 517 U.S. at 635 (closely examining stated rationales for Colorado's constitutional amendment and results that would flow from its implementation to conclude that it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

Thus, as applied here, it would require a thorough inquiry into both the school systems' objectives and the extent to which the features of the plans actually operate to further those objectives. It would be fully adequate to avoid the evils that strict scrutiny is intended to "smoke out," *Croson*, 488 U.S. at 488, and to avoid pretextual claims of benign intentions or efforts to disadvantage one group at the expense of another. Yet, it would do so without excessively deterring school districts from undertaking to achieve and operate diverse, integrated schools and programs that have long received the approbation of this Court, recognizing that voluntary school integration is "far from the original evils at which the Fourteenth Amendment was addressed," *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring).

CONCLUSION

As a nation, we honor *Brown v. Board of Education* as one of our most important constitutional decisions. In post-"unitary status" and "*de facto*" segregated public school systems, all that is left of *Brown* is voluntary integration.

These cases present the question whether it will be constitutional to consciously preserve and pursue the soul of desegregated education enshrined in *Brown* and its progeny. The Orwellian argument that voluntary integration efforts constitute racial discrimination in violation of the Fourteenth

Amendment's Equal Protection Clause, if validated by this Court, would be an unwarranted and tragic reversal of historic proportions. Nothing in law or in logic requires or supports such a course of action.

This Court should apply a rigorous rational basis review of respondents' challenged voluntary integration plans and affirm the judgments below.

Respectfully submitted,

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