

8/12/02

No. 72712-1

IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

IN

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Appellees.

APPELLEES' ANSWER TO AMICUS CURIAE BRIEF OF THE  
AMERICAN CIVIL RIGHTS INSTITUTE, et al

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Appellees, Seattle School District No. 1, its board of directors and superintendent (hereinafter “the District”) submit this brief in answer to the amicus curiae brief of the American Civil Rights Institute, et al, (hereinafter “ACRI”) pursuant to RAP 10.2(g).

**1. ACRI misstates the Purpose and Effect of the Integration Tiebreaker.**

ACRI asserts that the integration tiebreaker “imposes a strict mathematical *quota* for minority and nonminority students.” ACRI brf. at 2. This assertion misstates the purpose and effect of the tiebreaker. The record reflects that there are no racial quotas for assignment to Seattle’s schools. Rather, the assignment plan allows significant variation (+/-15%) in the racial makeup of schools before the integration tiebreaker even applies. Furthermore, the integration tiebreaker applies only to those schools that are oversubscribed. In those cases where the tiebreaker is used, it does not dictate, or even attempt to dictate, how many students of a particular race will be assigned. Rather, it simply seeks to assure that students whose race is not equitably represented in a particular school, as compared to the district-wide demographic, are not excluded due to the distance tiebreaker. SER 22-37; SER 38-51.

For example, students for whom the “neighborhood” high school is Rainier Beach or Cleveland, schools that are 90% students of color, have

access to Ballard and Nathan Hale. ER 417-21, 658-70. Conversely, white students who desire a more diverse educational experience can attend Franklin. SER 125. As Judge Rothstein explained:

The school board has not yet achieved its ultimate goal of offering the best possible education in all of its high schools. Despite the district's efforts, it remains a stark reality that disproportionately, the schools located in the northern end of the city continue to be the most popular and prestigious, and competition for assignment to those schools is keen. The school board has decided that in order to afford all of the city's students - including those from predominantly minority south Seattle - access to these more popular schools, it must employ a tiebreaker mechanism that elevates race over proximity to determine who may attend these schools.

*Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 137 F. Supp.2d 1224, 1225-26 (W.D. Wa. 2000).<sup>1</sup>

**2. ACRI Seeks a Radical Change in Washington Constitutional Law.**

Although its argument on the point is—perhaps intentionally—vague, read together with PICS's brief, it appears that ACRI is arguing that if school boards are empowered to address issues of racial equality and diversity under Article 9, § 1, they may do so only where such action would be required under the Fourteenth Amendment. ACRI brf. at 9;

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<sup>1</sup> ACRI also misstates the procedural posture of the case. The Ninth Circuit has not simply “stayed its decision” in this case. *See* ACRI brf. at 1, n. 1. The opinion reversing Judge Rothstein has been withdrawn, rehearing has been granted, the injunction which the Circuit issued prohibiting use of the tiebreaker for 2002-03 assignments has been dissolved, and further proceedings before the Circuit have stayed pending this Court's review. Accordingly, Judge Rothstein's decision is the operative decision of the federal courts at this time. *See* F.R.App.Pro. 41.

PICS's brf. at 36. In this way, ACRI apparently believes that conflict between Initiative 200 and the Washington Constitution can be avoided.<sup>2</sup>

As shown in the District's principal brief, ACRI's argument was expressly rejected in *Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 128 492 P.2d 536 (1972), which held: "Reason impels the conclusion that, if the constitution supports court directed mandatory bussing [sic] to desegregate schools in a system which is dual "de jure," then such bussing [sic] is within the appropriate exercise of the discretion of school authorities in a system which is dual "de facto."

ACRI and PICS argue that *Brooks* did not cite Article 9, § 1. However, the companion case, *Citizens for Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 665, 495 P.2d 657 (1972), makes it clear that school board authority is part of its "duty" under the Constitution to "to act in the best interests of the majority of students...." The federal courts, including the Supreme Court, have understood these cases to hold that the

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<sup>2</sup> Contrary to what is implied by this argument, Initiative 200 contains no provision allowing use of race or gender to remedy either state or federal constitutional violations. To the extent such an exception exists, it can be implied only under the principal that statutes cannot impair the authority of courts to remedy constitutional violations or insofar RCW 49.60.400 (6) states that the measure does not apply where it would result in the loss of federal funds. Under the latter rationale, to the extent that Titles VI and IX of the Federal Civil Rights Act prohibit race and gender discrimination and to a certain extent mirror constitutional protections in this regard, it is possible to imply such an exception. However, Section 5 of the Initiative indicates that it is intended to preclude court-ordered remedies: "This section does not invalidate any court order or consent decree that is in force as of December 3, 1998." Thus, ACRI's argument serves only to illustrate yet another ambiguity in Initiative 200.

school board's authority to use racial measures is authorized by the state constitution in order to protect the right of equal educational opportunity, which Article 9, § 1 protects. *Seattle Sch. Dist. No. 1 v. State*, 473 F. Supp. 996, 998 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9<sup>th</sup> Cir. 1980), *aff'd sub. nom. Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 478 (1982).

With respect to ACRI's argument that integration tiebreaker at issue in this case does not address "*de facto*" segregation, both federal courts that have heard this case have found that the purpose of integration tiebreaker at issue in case is to remedy or prevent *de facto* segregation, and that it is necessary for that purpose. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 137 F. Supp. at 1225-26 ("in order to afford all of the city's students—including those from predominantly minority south Seattle—access to these more popular schools, it must employ a tiebreaker mechanism that elevates race over proximity to determine who may attend these schools."); 285 F.3d 1236, 1247 n. 12 (9<sup>th</sup> Cir. 2002); ("Racially concentrated housing patterns would no doubt lead to racially concentrated schools if school assignments were based only on the proximity of a student's residence to a given high school; that is to say, in the absence of a remedy for 'de facto segregation,' schools would become 'racially imbalanced.'). The Ninth Circuit has asked this Court to decide the certified questions based on that undisputed fact. *Id.* at 2002

U.S. App. LEXIS 11881 (“due to Seattle’s racial diversity and its racially imbalanced housing patterns, if Seattle’s children were simply assigned to the high schools nearest their homes, the high schools would become segregated in fact (*de facto*’ segregated.).

Faced with these findings, ACRI (like PICS) seeks to redefine what is meant by “de facto” segregation, such that, if the school board can use race-conscious measures, it can do so only when racial imbalance in the schools becomes so bad as to mirror the conditions that would call for judicial intervention. ACRI brf. at 8-9; PICS brf. at 31. Such a rule is ill-advised, because it would mean that school boards must sit on their hands while conditions deteriorate (as they will in Seattle without some form of intervention). It also ignores the fact that according to PICS’s expert in this case, courts in desegregation cases most often decide whether a school system has attained unitary status (and therefore no longer requires use of race-based remedies) based on whether a particular school deviates from the district’s overall racial demographic by 15%,<sup>3</sup> the same percentage used here to trigger the tiebreaker.

For these reasons, the Ninth Circuit panel implicitly rejected PICS’s similar arguments. *See Parent Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 285 F.3d at 1247 n. 12 (“It appears that any

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<sup>3</sup> *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 265 F.3d 305, 319 (4<sup>th</sup> Cir. 2001) citing David J. Armor, *Forced Justice: School Desegregation and the Law* 160 (1995).

difference between ‘remedying de facto segregation’ and ‘achieving racial diversity’ is, at least for purposes of our analysis, one of semantics.).

ACRI’s argument also suggests that school districts, which have succeeded in remedying a constitutional violation or, like Seattle, have avoided such conditions through voluntary measures, must stand by and watch that progress evaporate. The federal constitution does not mandate such a narrow view and this Court has not adopted it. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“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.”), *quoted and relied upon in Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d at 128; *see also Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2<sup>nd</sup> Cir. 2000) (compelling interest justifies use of continuing use of race to prevent *de facto* segregation); *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp.2d 358 (W.D. Ky. 2000) (formerly segregated school district, which had attained unitary status, could continue to use race to maintain benefits of integrated schools, where housing patterns would otherwise interfere with that goal).

**3. ACRI's Analysis of Post-Initiative 200 California Authorities Ignores All Relevant Differences Between the Two Measures.**

ACRI and PICS urge this to Court to follow California decisions applying Proposition 209. In making these arguments, they focus on the identical wording of the first sections of both measures, but ignore relevant structural and contextual differences between them: (1) Proposition 209 amended the California Constitution; and (2) in the official Ballot Pamphlet, California voters were expressly told that Proposition 209 would end voluntary integration plans. In contrast, Initiative 200 contains an additional clause (section three) not found in Proposition 209, which raises questions about the scope of the Washington measure. More importantly, the Washington Voters Guide contained a statement by the proponents of Initiative 200 that it would not “end all affirmative action programs. It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract, or admission to a state college or university.” ER 177.

ACRI also ignores the fact that a Washington voter could not have known of these decisions when considering how to vote on the measure. Instead, the only authoritative construction of Proposition 209 at that time was issued by the Ninth Circuit in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 707 n.16. (9<sup>th</sup> Cir. 1997), which held that it did not

apply to school desegregation programs like that at issue in the *Seattle v. Washington* litigation.

- a. **California Voters were Clearly Told that Proposition 209 would affect Voluntary Integration Programs. The Washington Voters Guide Contained no such Express Statement and Implied the Contrary.**

ACRI relies heavily on a recent California appellate court decision, *Crawford v. Huntington Beach*, 121 Cal. Rptr. 2d 96, 102 (Cal. Ct. App. 2002). *Crawford* involved a racially restricted “one for one” transfer policy, under which white students attending a particular high school could not transfer out unless another white student was willing to transfer in. Unlike Seattle’s current plan, students who lived within the attendance area for an imbalanced school were required to attend that school if their race was underrepresented, and students whose race was overrepresented could not attend. *Id.* at 98.

*Crawford* held that this plan was invalid under Proposition 209, primarily based on statements in the California Ballot Pamphlet indicating that “the measure could eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts.” *Id.* at 103.<sup>4</sup> In contrast, as we have noted, the Washington Voters Guide, especially if

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<sup>4</sup> Perhaps because it found this statement so clear, *Crawford* ignored the fact that Ninth Circuit had, at the behest of Proposition 209 proponents, reached the opposite conclusion with respect to integration plans like those previously upheld in *Seattle v. Washington*. However, *Crawford* leaves Proposition 209 vulnerable to constitutional attack on Equal Protection grounds under *Seattle*.

read in light of earlier Washington school integration cases and *Coalition's* “carve-out” of Seattle-type integration plans, contained no such statement or implication. Since, as the California Supreme Court has noted, the Voters Guide contains the materials “that voters are most likely to have consulted ... as a reliable indicator of the proposition’s meaning and effect.” *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4<sup>th</sup> 537, 582, 12 P.3d 1068 (2000), this Court should give meaning to Initiative 200’s terms consistent with the limited, traditional, scope implied by the Voters Guide materials.

**b. Because Proposition 209 amended the California Constitution, Cases Construing it have had No Occasion to Reconcile it with Other Constitutional Provisions.**

The *Crawford* court recognized applying Proposition 209 to school integration measures created a conflict with the duty of local school boards to integrate the schools under California’s Constitution. 121 Cal. Rptr. 2d at 104. However, because Proposition 209 amended the state constitution and because California’s courts are firmly committed to the rule that a later enacted constitutional measure trumps all earlier provisions, it held that conflict irrelevant. *Id.* In contrast, Initiative 200 is merely a statute and must give way if it conflicts with a constitutional provision. *Gerberding v. Munro*, 134 Wn.2d 188, 210-11, 949 P.2d 1366 (1998)

**c. California cases, decided after Initiative 200 was passed, Cannot Inform the Court's Judgment as to What a Washington Voter would have Understood.**

All of the California cases cited by ACRI were decided after Initiative 200 was enacted. An informed Washington voter could not have relied on them to understand what was meant by the ambiguous terms of Initiative 200 and accompanying Voters Guide statements. However, an informed Washington Voter could easily have understood, from other events concerning Proposition 209, that it did not apply to school integration measures, and that the statements in the Washington Voters Guide were intended to convey that limitation; e.g., the *Coalition* carve-out previously discussed,<sup>5</sup> and the fact that in a pre-Initiative 200 decision, the California Court of Appeals differentiated between types of affirmative action programs in a way that was consistent with the Washington Voter's Guide. In holding that a supplemental certification

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<sup>5</sup> As noted *Comment, Proposition 209 and School Desegregation Programs in California*, 38 San Diego. L. Rev. 661, 688 (2001):

Voluntary measures to end de facto school segregation in elementary and high schools by use of racial classifications and integration programs have been upheld consistently by both federal and state courts. These situations may be differentiated from preferential admissions to professional schools because all students are provided with a public education and no person has a right to attend segregated schools.

This was precisely the position taken in Coalition for Economic Equity by California Attorney General Dan Lungren. Specifically, Lungren argued that "busing" and "student assignment" on the basis of race" is not covered by the CCRI [California Civil Rights Initiative] because it does not "involve preferences." Lungren's position is instructive given that he was an outspoken advocate for Proposition 209 and was one of the signatories to the pro-209 ballot arguments." (Footnotes omitted.)

program designed to increase minority representation among civil service employees was barred by Proposition 209, the court in *Kidd v. California*, 72 Cal. Rptr. 2d 758, 761 (March 1998) said:

The term “affirmative action” often leads to unnecessary confusion and misunderstanding because of a failure in advance to agree upon or assume a definition for it. It can be defined either as (1) a preference for certain persons where is total equality of objectively ascertained qualifications, or (2) a preference for persons with lower objectively ascertained qualifications, to the corresponding exclusion of persons better qualified. As we will explain, supplemental certification is a species of the latter.

(Citations and internal quotations omitted.)

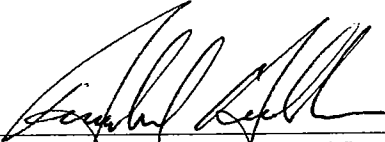
Comparison of this reasoning with the language of the Voters Guide concerning Initiative 200 leads to the conclusion that that integration programs like the District’s are not barred. “A policy of ensuring that students of all races enjoy equal educational opportunities seems the very antithesis of granting preferential treatment.” Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 Whittier L. Rev. 3, 56 (1999; see also Note, *The Constitutionality of Proposition 209 as Applied*, 111 Harv. L. Rev. 2061, 2084 (1998) (“the use of busing to achieve school integration is not a preference”).

## CONCLUSION


The Court should reject ACRI’s arguments for radical changes to Washington law and hold, consistent with Voters Guide, that Initiative 200 does not prohibit school integration programs like that at issue here.

Respectfully submitted this 12<sup>th</sup> day of August 2002.

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