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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFIED FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
IN
PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation,

Plaintiff-counter-defendant – Appellant,

v.

SEATTLE SCHOOL DISTRICT, NO. 1, et al,

Defendants-counter-claimants – Appellees.

No. 72712-1

MOTION FOR RECONSIDERATION

I. INTRODUCTION

The majority of the court have concluded that the scope of I-200 should be confined to "stacked deck" affirmative action programs – programs that favor a less qualified applicant of one race over a better qualified applicant of another race.[1] PICS respectfully submits that, en route to its conclusion, the majority opinion has overlooked and misapprehended several crucial points of law and fact whose proper consideration and analysis would lead to a different conclusion and also significantly clarify and thereby aid statewide implementation of I-200. The decision should therefore be

[1] Opinion (hereafter "Opn.") at 35-6.

reconsidered out of fairness both to the parents of Seattle school children and to the 60% of Washington voters who voted in favor of I-200.

II. PICS' CLAIMS HAVE BEEN DESCRIBED INACCURATELY

First, contrary to the majority opinion, PICS does *not* claim that I-200 bans all race-conscious action by state and local government,[2] but on the contrary that I-200 bans only those race-conscious government actions that are within its scope and that discriminate against or grant preferences to either a group or an individual on the basis of race, etc.[3] Second, PICS does not challenge the Seattle School District's open choice plan,[4] but applauds it.[5] What PICS challenges is the racial tiebreaker used by the School District to implement the open choice plan (in lieu of other possible tiebreakers).[6] PICS does not claim that the tiebreaker discriminates against or grants preferences to any *group* on the basis of race, but on the contrary claims that the tiebreaker discriminates against *individuals* whom the tiebreaker disfavors while at the same time granting preferences to *individuals* whom the tiebreaker favors.[7] Lastly, PICS' case does not depend on whether Seattle neighborhoods are racially integrated,[8] for although PICS contends that they are[9] – and observes there is no finding to the contrary[10] – the crucial issue in this case is

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[2] See Opn. at 10-11, 29. At p. 10, the majority opinion gets completely backwards what PICS counsel said at oral argument about a hypothetical gubernatorial commission. PICS counsel stated *twice* that race-based appointments to the commission would *not* violate I-200 because they did not involve the "operation" of public education. Later in the argument counsel gave two other examples falling outside the scope of I-200: laboratory schools and medical school research. (Those examples were derived from *Hunter v. Regents of Univ. of Calif.,* 190 F.3d 1061 (9th Cir. 1999).) The accuracy of this footnote can be verified by viewing the videotape of the argument. Presumably the court has this videotape, but if not, PICS will furnish a copy.

[3] *E.g.*, Brief of Appellant (hereafter "PICS Br.") at 21.

[4] See Opn. at 3.

[5] The Brief of Appellant and the Reply Brief contain not a single word of criticism of the open choice plan, which was expressly commended by PICS counsel during oral argument.

[6] *E.g.*, PICS Br. at 21-2, 41; Reply Brief of Appellant (hereafter "Reply Br.") at 1.

[7] *E.g.*, Reply Br. at 1-3, 10.

[8] See Opn. at 6, n. 2, & 8. Assignment of all students to the closest high school could produce segregated schools only if the neighborhoods where students live were segregated.

[9] PICS Br. at 9 (citing census data) & 12. To avoid unnecessary repetition of citations in this motion, the footnotes will simply refer to the pages in the Brief of Appellant and Reply Brief of Appellant where the citations are set forth and discussed.

[10] This case is an appeal from summary judgment, so there are no findings of fact.

whether Seattle *high schools* are segregated. The majority opinion overlooks this crucial issue and the uncontroverted evidence establishing that, even without the racial tiebreaker, Seattle high schools are *not* segregated.[11]

By misdescribing PICS' claims, the majority opinion builds straw men that it handily demolishes without confronting the real issues.

III. THE DUBIOUS IMPLICATIONS OF DEFINING "PREFERENCE" AND "DISCRIMINATE" TOO NARROWLY

If a preference under I-200 requires selection of a less qualified applicant, what about decisions where merit is irrelevant? May students of a particular race be required to sit in the back of the school bus? Or in the balcony of the school auditorium? May schools assign students of difference races to separate classrooms so long as no academic criteria are used? Under the majority opinion, requirements such as these would be lawful because they do not entail a preference. Moreover, such requirements would also not be discriminatory under the majority opinion because they are not imposed "in disregard of individual merit." Does this result make sense? Is this what the voters intended?

IV. STRAINED INTERPRETATIONS OF "PREFERENCE" AND "DISCRIMINATE" ARE NOT NEEDED TO ALLOW AFFIRMATIVE ACTION OR TO END SCHOOL SEGREGATION.

One reason given by the majority opinion for adopting narrow definitions of "preference" and "discriminate" is that RCW 49.64.400(3) implies the existence of race-conscious programs that are not preferential or discriminatory.[12] But that description applies to a variety of non-preferential affirmative action programs such as recruitment efforts in minority communities by public universities, public employers and public works managers. The description also applies to promotion of racial diversity by

[11] PICS Br. at 12-19 & Appendix A (High School Demographic charts).
[12] Opn. at 29-31.

establishing popular "magnet" programs at high schools with relatively large enrollments of minority students. If such actions pass muster under I-200 (and surely they do), RCW 49.60.400(3) affords no justification for limiting I-200 to "stacked deck" programs. The majority opinion goes wrong by assuming a false dichotomy, *viz.*, that any race-conscious program is either a stacked deck program or is lawful under subsection (3) as being nonpreferential or nondiscriminatory. However, the ordinary language definitions of "preference" and "discriminate" apply to race-conscious measures that are not stacked-deck programs but are nonetheless preferential or discriminatory – for example, the School District's racial tiebreaker.

The majority opinion also indicates that the ordinary meanings of "preference" and "discriminate" would bring I-200 into conflict with earlier decisions of this court approving race-based assignments as a voluntary remedy for school segregation.[13] But there is no such conflict. According to the U.S. Supreme Court, school "segregation" means the operation of a dual system of schools in which children of different races attend different schools.[14] Segregation is de jure when it results from official action; segregation is de facto if the dual system results from residential segregation without intentional governmental action.[15] Now, it is physically impossible to integrate a dual system without using race-based assignments. If all white children in a town attend one school, and all black children attend another, elimination of the dual system can be accomplished only when some white students are assigned to the formerly all black school and vice versa. Under the plain language meanings of "preference" and "discriminate," these race-based assignments do discriminate against, and grant preferences to, the individuals affected. Nonetheless, the Equal Protection Clause mandates use of racial classifications when necessary to remedy a constitutional violation

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[13] Opn. at 16-21.
[14] PICS Br. at 30-31.
[15] *Id.*

such as de jure segregation.[16] Use of race-based assignments to remedy de jure segregation does not conflict with I-200 because actions required by the federal or the state constitution are expressly excluded from the scope of I-200.[17]

And what about de facto segregation? While the Equal Protection Clause has never been held to require race-based assignments to remedy de facto segregation, many courts – this court included – have found that the Equal Protection Clause *permits* the use of race-based assignments for that purpose.[18] The opinions issued in the school assignment cases decided by the appellate courts of this State in the 1970s did not need to, nor did they in fact, discuss whether race-based school assignments were preferential or discriminatory; those opinions considered whether such assignments were permissible under the Equal Protection Clause to end de facto segregation and decided that they were permissible. By adopting I-200, the State of Washington has legislatively chosen not to use race-based assignments to remedy merely de facto segregation even if it is permitted to do so under the Equal Protection Clause. This legislative choice is effective and must be enforced by the courts unless the state constitution requires remediation of both de jure and de facto segregation. In that event, I-200 would by its terms be inapplicable, for its prohibitions would yield to the constitutional requirement.[19]

However, it is immaterial to the decision in this case whether or not the state constitution mandates remediation of de facto segregation, because segregation is not an issue in this case.

V. WHY SEGREGATION IS NOT AN ISSUE IN THIS CASE

Although PICS has presented evidence that Seattle neighborhoods are integrated,[20] residential segregation would be immaterial to the decision of this case unless it resulted

[16] PICS Br. at 36-8.
[17] RCW 49.60.400(9).
[18] Opn. at 16-21.
[19] RCW 49.60.400(9).
[20] PICS Br. at 9.

in segregation of the public high schools. But it is uncontroverted that Seattle high schools, even without the racial tiebreaker, are not segregated as defined by the U.S. Supreme Court, *i.e.*, they do not constitute a dual system of schools.[21] The School District's open choice plan is doubtless responsible in large part for the integration of Seattle high schools. Moreover, census data confirm that Seattle neighborhoods are now much more diverse than they were 20 years ago.[22] Not even the School District claims that its racial tiebreaker is needed to eliminate segregated schools. Rather, its principal stated purpose is to increase racial balance and thereby enhance diversity.

Because Seattle high schools are not segregated, segregation is simply not an issue in this case, and judicial opinions on school segregation are not relevant.

VI. STRAINED INTERPRETATIONS OF "PREFERENCE" AND "DISCRIMINATE" ARE NOT JUSTIFIED

As shown above in Part IV, strained and narrow definitions of "preference" and "discriminate" are *not* needed to allow affirmative action or to avoid conflict with earlier Washington court decisions on school desegregation. For several reasons, the narrow definitions used by the majority opinion are also not justified. First, as shown above in Part III, these definitions carry highly dubious implications that this court presumably does not intend (for example, allowing schools to establish separate classrooms for different races).

Second, the majority opinion's definition of "preference" is based on flawed reasoning. The opinion states:

> Because the School District's open choice tiebreaker applies equally to members of all races, it may limit minorities and nonminorities alike, and it cannot said to be preferential based on race.[23]

But equal applicability to all races means only that the tiebreaker does not grant preference to any particular racial *group*. I-200 expressly applies to *individuals* as well

[21] PICS Br. at 12-19, (& Appendix A) & 30-31.
[22] PICS Br. at 9.
[23] Opn. at 31.

as to groups. The law prohibits discrimination against, or granting preference to, even a single child solely because of her race. That the School District's tiebreaker prefers a white child in one case is not excused by the fact that it grants preference to a nonwhite child in another case. Two wrongs do not make a right.

Third, the majority opinion's definition of "discriminate" – distinctions made in disregard of merit – is the secondary definition given in *Webster's Third New International Dictionary*, and the primary definition is that employed not only by PICS, but also by the U.S. Supreme Court when interpreting the federal Civil Rights Act, *viz.*, treatment of one individual differently from another on the basis of a particular characteristic (in this case, race).[24] This court has held that where Washington antidiscrimination law parallels the federal act (as it does here), Washington will look to the federal law interpretation.[25]

Fourth, the majority's definition of discrimination to require a disregard of individual merit conflicts with the Washington Human Rights Commission regulation defining unfair practices under the antidiscrimination law. The regulation encompasses *any* act that directly or indirectly results in *any* distinction, restriction, or discrimination on the basis of a protected status such as race.[26] Is this regulation now invalid unless amended to exclude acts that do not proceed from a disregard of individual merit?

Fifth, the majority opinion relies on a distortion of the Voter's Guide. The opinion states:

> The general statement, "Our Laws Should be Colorblind," certainly does not overcome the specific declaration, "It prohibits *only those programs that use race or gender to select a less qualified applicant over a more deserving applicant.*"[27]

[24] PICS Br. at 25. The U.S. Supreme Court has specifically held that a policy treating individuals differently on the basis of race constitutes a form of race discrimination even though the policy "applies to all races." *Bob Jones University v. U.S.*, 461 U.S. 574, 605 (1983) (ban on interracial marriage and dating).

[25] PICS Br. at 25.

[26] WAC 162-28-030 (set out in Appendix C to PICS Br.)

[27] Opn. at 33-4.

The opinion ignores the antecedent of "those", which is found in the immediately preceding sentence of the Voter's Guide: "Initiative 200 does not end all affirmative action programs."[28] So, in the next sentence "those programs" refers to the programs just described, *i.e.*, *affirmative action* programs. What I-200 prohibits, then, is only *affirmative action* programs that use race or gender to select a less qualified applicant, etc. However, the School District's racial tiebreaker is not an affirmative action program; it is a means of increasing diversity for the benefit of all students, not just minorities.[29] Which brings us to the heart of the problem.

VII. THE USES AND ABUSES OF DIVERSITY

The gist of the majority opinion is: (a) providing a diverse learning environment is a core mission of the public schools; (b) the school District's racial tiebreaker promotes diversity; therefore, (c) I-200 should be interpreted to allow such a measure.[30]

Statutory interpretation is, of course, a proper and vital judicial task, but only within limits. By defining "preference" and "discriminate" to exclude everything but stacked-deck programs, the majority opinion, as has been shown, deviates from both ordinary linguistic usage and the court's own precedents;[31] yet that is the court's prerogative. However, as also shown (Part III above), these strained interpretations carry highly dubious implications that the court should seek to avoid. And, finally, the effect of such interpretations is to appropriate what is properly a political issue rather than a legal issue.

As segregation is, fortunately, not an issue here, there is no federal constitutional requirement for the School District to use race-based assignments to increase racial diversity.[32] As discussed below in Part VIII, there is also no such duty under the state

[28] PICS Br. at Appendix B, Arguments For and Against, p. 2.
[29] PICS Br. at 13-21.
[30] Opn. at 16-26, 36.
[31] PICS Br. at 21-7.
[32] If there is no duty to remedy de facto segregation, there is no duty to remedy social imbalance in the absence of segregation.

constitution. And whether race-based assignments are constitutionally permissible in the absence of segregation is a question not before this court in this case.[33] For the purposes of this court's decision in this case, it may be assumed that the School District's racial tiebreaker is constitutional, *i.e.*, that its use violates neither the federal nor the state constitution.

Now, whatever the State is constitutionally permitted but not required to do, it is constitutionally permitted to refrain from doing.[34] And there is no doubt that questions of educational policy are legislative questions that may be decided either at the State level or, at the discretion of the legislature, at the local level pursuant to delegated powers that the legislature may at any time limit or withdraw.[35] By adopting I-200, the people acting in their statewide legislative capacity have decided that except for nonpreferential and nondiscriminatory affirmative action, the operations of our public schools shall be "colorblind."[36]

Judicial unwillingness to accept that decision can only erode respect for the law, a result that is as unnecessary as it is regrettable. Unnecessary because there are other and better ways for the School District to increase the genuine diversity that already exists in Seattle high schools.[37]

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[33] Race-based assignment of elementary or secondary school students was not specifically addressed in the recent U.S. Supreme Court decisions involving the University of Michigan. In *Grutter v. Bollinger*, 2003 WL 21433492 (U.S. 6/23/03), the law school's admissions program passed muster on the reasoning of Justice Powell in *Bakke* (PICS Br. at 32-3), while *Gratz v. Bollinger*, 2003 WL 21434002 (U.S. 6/23/03), struck down the undergraduate admissions program as a mechanical preference based only on race.

[34] PICS Br. at 34-9; Reply Br. at 12-16.

[35] PICS Br. at 39-41; Reply Br. at 16-18.

[36] PICS Br. at 23; Reply Br. at 9-10.

[37] *E.g.*, magnet schools, assignments based on socio-economic criteria, even use of a lottery as the tiebreaker. See Brief of Appellant to 9th Circuit at 26-8. (That brief was submitted to this court as part of the record accompanying the certified questions.)

VIII. THE WASHINGTON CONSTITUTION

As reconsideration of the original decision should lead to the conclusion that the School District's racial tiebreaker violates I-200, it will become necessary for the court to construe WASH. CONST., Art. IX.

Because Seattle high schools are not segregated, the court need not address whether Article IX requires school districts to remedy de facto segregation. Nor need the court decide in this case whether Article IX *allows* the State to engage in racial balancing in the absence of segregation.

The only constitutional question for decision is whether Article IX *requires* school districts, in the absence of segregation, to adopt racial balancing measures for the purpose of increasing diversity. For two reasons, the answer must be "no."

First, to impose such an unprecedented duty would require every school district in the state to engage in race balancing, and interminable litigation would ensue to determine the sufficiency of the balancing plans adopted and implemented by the various districts. This result is hardly what the framers of our state constitution intended or what this court desires.[38]

Second, it would be downright Orwellian to find that the statutory provision set forth below in the left-hand column conflicts with the constitutional provision set forth in the right-hand column.

I-200	Art. IX, § 1
In providing public education the state *shall not* "discriminate against or grant preferential treatment . . . on the basis of race . . ."	The state *shall* provide public education "without distinction or preference on account of race . . ."

[38] Reply Br. at 19-20.

IX. CONCLUSION

On reconsideration the court should determine that the School District's racial tiebreaker violates I-200 and that I-200 as so applied comports with WASH. CONST., Art. IX.

RESPECTFULLY SUBMITTED this 15th day of July, 2003.

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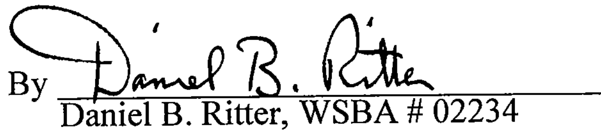

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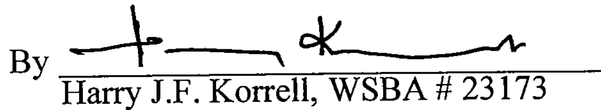

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