

FILE COPY

No. 01-35450

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

a Washington nonprofit corporation,

Plaintiff/Counter-Defendant/Appellant,

v.

SEATTLE SCHOOL DISTRICT, NO. 1,
a political subdivision of the State of Washington; et al.,

Defendants/Counter-Claimants/Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Barbara J. Rothstein, District Judge

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**MOTION OF PACIFIC LEGAL FOUNDATION, AMERICAN
CIVIL RIGHTS INSTITUTE, AMERICAN CIVIL RIGHTS
UNION, AND CENTER FOR EQUAL OPPORTUNITY FOR
LEAVE TO FILE A SUPPLEMENTAL BRIEF AMICUS CURIAE
IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL**

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IDENTITY AND INTEREST OF AMICI

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Amici respectfully move for permission to file a supplemental brief amicus curiae in support of Appellant's supplemental brief. *See* Order dated September 22, 2003. Appellants have consented to the filing of this motion and brief. However, Appellees declined to consent.

Pacific Legal Foundation

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Coral Gables, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska.

PLF attorneys actively engage in research and litigation over a broad spectrum of public interest issues nationwide. PLF attorneys devote substantial resources to litigation by appearing as counsel or amicus curiae in cases before federal and state courts. PLF submits this brief because it believes its public policy perspective and extensive litigation experience involving the Equal Protection Clause of the United

States Constitution will provide an additional viewpoint concerning the issues presented.

For example, most importantly, PLF attorneys are the only attorneys in this case to have participated in the cases on which this Court requested supplemental briefing: *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). PLF attorneys have participated in many cases across the nation addressing the issue of whether diversity is a compelling state interest, beginning with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); including *Boston's Children First. v. Boston School Committee*, 260 F. Supp. 2d 318 (D. Mass. 2003) (on appeal to the First Circuit Court of Appeals); *Scott v. Pasadena Unified School District*, 306 F.3d 646 (9th Cir. 2002); and *Hunter v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000). Moreover, PLF attorneys have also participated in numerous cases involving issues concerning minority preferences in public contracting, for example, *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), *reh'g denied*, 138 F.3d 1270 (1998); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Finally, PLF attorneys have participated in cases involving California's Proposition 209 which amended the California Constitution to prohibit discrimination or preferences based on race. *See Crawford v. Huntington Beach Union High School District*, 98 Cal. App. 4th 1275

(2002); *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000); and *Kidd v. State of California*, 62 Cal. App. 4th 386 (1998).

American Civil Rights Union

American Civil Rights Union (ACRU) is a nonprofit organization dedicated to protecting fundamental rights and liberties across the board. ACRU supports and defends all the rights guaranteed in the federal Constitution as written. ACRU defends equal protection, free speech, and freedom of religion, as well as private property rights, and the right to keep and bear arms. ACRU maintains that both basic morality and the Constitution require that all Americans be treated equally under the law regardless of race or national origin. Yet, that principle has been broadly undermined in American life today through racial quotas and preferences and other race-conscious programs.

American Civil Rights Institute

The American Civil Rights Institute (ACRI) is a nonprofit research, education, and public advocacy national civil rights organization created to educate the public about racial and gender preferences. Based in Sacramento, California, ACRI's initial focus is on three areas: assisting organizations in other states with efforts to educate the public about racial and gender preferences; assisting federal representatives with public education on the issue; and monitoring implementation and legal action on

California's Proposition 209. ACRI devotes significant time and material resources to the study of the prevalence of racial and ethnic discrimination by the federal government, the several states, and private entities. ACRI publicly advocates for the cessation of racial and ethnic discrimination. On behalf of this effort, ACRI participated as amicus curiae before the United States Supreme Court in *Grutter v. Bollinger*, 123 S. Ct. 2325.

Center for Equal Opportunity

The Center for Equal Opportunity (CEO) is the only think tank devoted exclusively to promoting color blind equal opportunity and racial harmony. CEO focuses on three areas in particular: racial preferences, immigration and assimilation, and multicultural education. CEO contends that racial preferences are becoming an established part of employment and education. CEO supports colorblind public policies and seeks to block the further use of racial preferences in education and employment. In its efforts, CEO has obtained admissions data from public universities across the country and publishes a series of studies that document evidence of racial and ethnic discrimination at those institutions. In addition, CEO participated as amicus curiae before the United States Supreme Court in *Grutter v. Bollinger*, 123 S. Ct. 2325.

NEED FOR FURTHER ARGUMENT

Amici have examined the issue in this case and are familiar with the question involved and the scope of the presentation. Moreover, Amici participated previously in this Court by filing a brief in support of the Appellant's brief on the merits, and also filed a brief in support of the Appellants in the Washington Supreme Court concerning this Court's order certifying to that court the state law issue regarding the Washington Civil Rights Initiative. Amici's interests and experience will provide an additional and necessary perspective on the important issue in this case.

Specifically, Amici seek to augment the Appellant's argument by stressing the limited nature of the United States Supreme Court's ruling in *Grutter*. *Grutter* is limited, and does not apply to K-12 public education, because the Supreme Court placed particular emphasis on the fact that law schools train our nation's leaders and, thus, must open their leadership path to qualified individuals of every race and ethnicity. Likewise, the *Grutter* holding is further limited because the Supreme Court based its decision, in part, on its view that a diverse law school student body provides educational benefits by increasing classroom discussion, which facilitates a more robust exchange of ideas among our nation's future leaders. *Id.* at 2336. Thus, according to the Court, attaining a diverse student body in the unique setting of an *elite law school* serves a compelling interest. The Court did not stop there. Importantly, even though in certain limited circumstances racial classifications might

serve a compelling interest, the Court stressed emphatically that the law school must examine *each* applicant as an individual by focusing on each student's academic ability coupled with a flexible assessment of talents, experiences, and potential. *Id.* at 2343. The Court stressed, as well, that racial balancing is constitutionally forbidden. *Id.* at 2339.

Grutter's limited holding became apparent in practice in *Gratz*. In *Gratz* the Court employed *Grutter's* narrow reasoning to invalidate an undergraduate admissions program that automatically awarded 20 points of the 100 points needed to guarantee admission to every applicant from an underrepresented racial or ethnic minority group. *Gratz*, 123 S. Ct. at 2415. The Court struck down the university's racial admissions policy because it did not consider each applicant as an individual, or assess all the qualities an individual possesses, or how the individual will contribute to the unique setting of higher education. *Id.* at 2416.

For the reasons above, these cases are distinguishable from this case because the factors the Supreme Court used to uphold diversity as a compelling interest in institutions of higher learning do not apply in the secondary and elementary school setting. Justifying a racial admissions program to promote a robust exchange of ideas among teachers and students in an elite law school or an elite university simply does not apply in the secondary and elementary school setting. First, the role and purpose of the American public school system has traditionally been to *teach* fundamental

values necessary to the maintenance of a democratic system. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). The Supreme Court recognizes that public schools provide the important function of preparing students for citizenship, which includes teaching the important principles of our Constitution. *Id.* Such instruction necessarily includes a lesser degree of the “robust exchange of ideas.”

Moreover, this case is distinguishable because the administrative requirements inherent in the admissions program the Supreme Court approved, and required, in *Grutter* cannot work in the Seattle School District (School District). The School District consists of many tens of thousands of students. Accordingly, the School District’s assignment plan cannot provide the individualized consideration required by the Supreme Court in institutions of higher education where each individual application is scrutinized separately on its own merits. For example, the School District’s plan does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. Instead, the School District assigns students to schools based *only* on the students’ *race*. Therefore, the School District’s unconstitutional program does not pass muster even under *Grutter*.

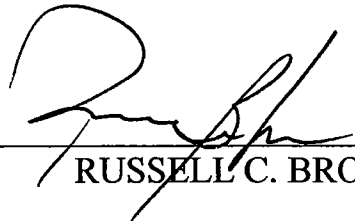
CONCLUSION

As identified above, Amici are particularly well suited to address this issue of great public importance that reaches far beyond the immediate parties to this appeal. Accordingly, Amici respectfully request that they be permitted to participate in this important case.

DATED: October 14, 2003.

Respectfully submitted,

SHARON L. BROWNE
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By 
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed with the Clerk this 14th day of October, 2003, via first-class mail. I further certify that two copies of the foregoing motion were served this day via first-class mail, postage prepaid, upon each of the following:

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