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NO. 01-35450

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Plaintiff/Counter-Defendant/Appellant,

v.

SEATTLE SCHOOL DISTRICT, NO. 1,

Defendants/Counter-Claimants/Appellees.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON (SEATTLE)
DC NO. CV-00-01205-R

AMICUS CURIAE SUPPLEMENTAL BRIEF ADDRESSING *GRUTTER V. BOLLINGER* AND *GRATZ V. BOLLINGER*

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization of approximately 14,000 members, affiliated with the national American Civil Liberties Union, and dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. In support of these principles, the ACLU has appeared before this Court in numerous cases involving defense of civil rights, including cases involving racial diversity in public schools.

The ACLU submits this *amicus curiae* brief in support of Appellee Seattle School District, urging this Court to uphold the constitutionality of the school district's use of a racial tiebreaker in its school assignment policy. The ACLU has a substantial interest in the proper resolution of this case because of its belief that affirmative steps are still needed to overcome the vestiges of segregation and discrimination in public education. The decision in this case will affect what affirmative steps a public school district may properly take to ensure that all students in the school district, regardless of race, enjoy its resources and opportunities equally. The outcome of this case is, therefore, a matter of great concern to the ACLU and its members.

The ACLU files this *amicus curiae* brief with the consent of all parties.

INTRODUCTION

Appellant Parents Involved in Community Schools ("PICS") challenges the Seattle School District's (the "District") "open choice" enrollment plan (the "Plan") for its ten public high schools. Specifically, PICS alleges that the use of a tie breaker that considers whether an assignment enhances the diversity of a school violates the Equal Protection Clause of the Fourteenth Amendment.

On September 22, 2003, the Court requested supplemental briefing addressing the effect on this case of the United States Supreme Court's recent decisions in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (referred to as "the Michigan cases"). In *Grutter*, a majority of the Supreme Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." 123 S. Ct. at 2337. Although PICS and its *amici* portray *Grutter*'s holding as limited, it is definitive and decisive support for affirmative action measures in higher education.

Because the Michigan cases involve competitive admissions programs in post-secondary education, however, they do not apply directly to the K-12 setting. In fact, the Michigan cases presented more difficult cases from an equal protection standpoint than the case at bar. The use of race in competitive admissions programs is reviewed with greater scrutiny than when used for integration

purposes.[1] *See Coalition for Econ. Equity v. Wilson,* 122 F.3d 692, 707 n.16 (9th Cir. 1997) ("Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group . . . and do not deprive citizens of rights."). Accordingly, the fact that the Michigan Law School program was upheld suggests that the Seattle Plan should be upheld.

The Michigan cases regardless provide considerable guidance to the Court in this case. Among other things, *Grutter* clarifies that an educational institution may employ a narrowly tailored race-conscious measure "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 123 S. Ct. at 2347. Furthermore, the educational benefits that flow from diversity apply with equal, if not more, force in K-12 education.

Moreover, the Plan employs a limited use of race only when necessary to reduce racial isolation, enhance diversity, and ensure as much equal educational opportunity as possible. Accordingly, the Plan must be upheld under the reasoning of the *Grutter* Court.

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[1] For this reason, some courts, including the First Circuit, have held that where differential treatment does not favor one race over another, there has been no racial classification that triggers strict scrutiny. *See, e.g., Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) ("The tem [racial classification] normally refers to a government standard, preferentially favorable to one race or another, for the distribution of benefits.").

ARGUMENT

A. CONSIDERATION OF RACE IN ASSIGNING STUDENTS TO PUBLIC HIGH SCHOOLS SERVES COMPELLING STATE INTERESTS

1. The *Grutter* Court Affirmed That Diversity in Classrooms Is A Compelling State Interest.

In *Grutter*, the educational institution at issue was the University of Michigan Law School (the "Law School"), which uses race and ethnicity as "plus factors" in admissions decisions. The Court endorsed the Law School's goal of using race and ethnicity to achieve a "critical mass" of otherwise underrepresented minorities. Relying on a diverse lineup of *amici* supporting the Law School's admissions policies, the Court identified promotion of cross-racial understanding and the breakdown of racial stereotypes among the benefits of diversity. *See id.* at 2339. The Court described as "crucial" the Law School's mission of "diminishing the force of [racial] stereotypes" and recognized that such a goal "cannot [be] accomplish[ed] with only token numbers of minority students." *Id.* at 2341.

Significantly, the Court relied on the Law School's judgment that racial and ethnic diversity is essential to its educational mission. Diversity, the Court recognized, is a critical component of the Law School's educational and institutional mission because law schools "represent the training ground for a large number of our Nation's leaders." *Id.* Thus, legal education "must be inclusive of

talented and qualified individuals of every race, so that all members of our heterogeneous society may participate." *Id.*

In light of these compelling educational goals, the *Grutter* Court concluded that the Equal Protection Clause does not prohibit "the Law School's . . . use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[2] 123 S. Ct. at 2347.

2. In Light of the District's Educational Goals, Its Use of a Race-Conscious Measure to Ensure Classroom Diversity Is Proper Under *Grutter*.

Grutter validates the District's goal (as well as its means) of achieving racial integration in its public high schools. Under the reasoning of *Grutter*, the District, like the Law School, may use narrowly tailored race-conscious measures to secure the educational benefits that flow from a diverse student body.

Whereas the Law School's educational mission is, among other things, to train the Nation's future leaders, the goals of the District are to provide students with education and skills to succeed in our diverse society and to inculcate democratic values. *See Plyer v. Doe*, 457 U.S. 202, 221-23 (1982) (noting that

[2] The Michigan undergraduate admissions policy challenged in *Gratz* did not fare as well. In *Gratz*, the Supreme Court rejected a point-system plan that automatically distributed 20 points, or one-fifth of those needed to guarantee admission, to every "underrepresented minority" applicant. The Court held that this plan was not narrowly tailored to the asserted compelling state interest in achieving educational diversity.

public education perpetuates the political system and the economic and social advancement of state citizens). These goals are at the center of the elementary and secondary educational enterprise. *See Parents Involved In Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 162 (Wash. 2003) (stating that diversity goals such as "teaching tolerance," "molding values free of racial prejudice," and "preventing minority students from becoming isolated from the rest of the educational system" are "integral to the mission of public schools").

The District, like the Law School in *Grutter*, has determined that maintaining a diverse student body advances these educational policy goals. In its "Board statement Reaffirming Diversity Rationale," the District explains that it sees a "broader need for international awareness and cooperation" and identifies "diversity" as a "valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world." As reflected in this statement, the District's purpose in adopting the Plan "is to mitigate the historical effects on its high schools of the residential segregation of Seattle's neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers." *Parents Involved In Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1233 (W.D. Wash. 2001). Put differently, the District has concluded that exposing its students to individuals from a variety of

that such diversity is essential to its educational mission is one to which we defer."). That goal is even more compelling in the context of K-12 education.

B. THE PLAN IS NARROWLY TAILORED TO ITS PURSUIT OF A DIVERSE STUDENT BODY

PICS and its *amici* argue that the District's Plan cannot withstand strict scrutiny because the Plan does not engage in a "holistic" review of each student similar to the Michigan Law School's "individualized assessment" of applicants to the law school. Such an argument ignores the *Grutter* Court's statement that "context matters when reviewing race-based government action," 123 S. Ct. at 2338. PICS simply focuses on the wrong question. The question is not whether the Plan is narrowly tailored to achieving the specific kind of "diversity" that the Michigan schools sought to achieve in *Grutter*. Instead, the issue is whether the Plan is narrowly tailored to the Seattle school district's goal of ameliorating racial isolation and obtaining the educational benefits that flow from an integrated student body in the K-12 setting.

PICS and its *amici* fail properly to take into account two important contextual differences between the Michigan schools and the Seattle high schools. First, the Michigan plans were selective plans which limited admission to highly competitive schools. In that context, where the state was selecting among highly qualified candidates for a limited number of admission slots, the *Grutter* references

to "genuine" or "true" diversity as an expressive "diversity of viewpoints" that "encompasses a far broader array of qualifications . . . of which racial or ethnic origin is but a single though important element" applies. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978). Thus, in the selective admissions context of higher education, "the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* In that context, requiring a "holistic" approach to diversity is appropriate.

In contrast, the Seattle high school plan is not a competitive plan designed to select among highly qualified applicants. "Qualifications" as used in the Michigan plans and referenced in *Grutter* simply is not an issue. Students assigned under the Seattle plan are not selected based on their qualifications for admission to a selective educational institution.[4]

Second, the benefits of diversity to be achieved in the K-12 context are somewhat different from the diversity benefits that were achieved in the Michigan plans. *Bakke*-type diversity is not the only goal of K-12 educational authorities. K-12 educators do not use race simply as a proxy for what a child adds to the

[4] Highly capable students within the Seattle system can be assigned a school by different criteria. Thus, for example, "APP" students, students who test within the top 2% of the school population are typically assigned to James A. Garfield High School if they request that assignment.

classroom conversation, and race is not used only to ensure a multiplicity of ideas in the classroom. Instead, integration plans in addition reflect "a concern that elementary school children simply get used to being in classrooms with people different from themselves . . . [and] that the more diverse a classroom is, the more likely students will learn that all people are different no matter what their color or ethnic background." *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000).

In other words, the term "diversity" in the K-12 context is not based solely on assumptions about any groups' unique contribution to the classroom. The broader goal of integrated K-12 classrooms is to provide an environment where children can meet and meaningfully engage with other children whose mere presence challenges stereotypes, either those that exist already or those that may form. *See Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 259 (D. Mass. 1999) ("[D]iversity may well be more important at this stage than at any other—[as this] is when first friendships are formed and important attitudes shaped."). Children learn from their environments, not just their teachers, a fact implicitly recognized by the *Grutter* Court. *See* 123 S. Ct. at 2341 (noting that the force of racial stereotypes cannot be diminished "with only token numbers of minority students").

In sum, the Plan is narrowly tailored in that uses race only as frequently as is necessary to produce a measure of racial diversity meaningful enough to prepare students to live in a multicultural society. Moreover, race is not used as a criteria for admission to selective educational institutions

CONCLUSION

The Michigan cases teach that educational institutions are permitted to give direct attention to the educational environment, including the composition of the students in the classroom. The District's limited use of race in the creation of learning environments is a proper exercise of its educational policy-making authority. The District has a compelling interest in securing for its students the educational benefits that flow from a diverse student body. Moreover, the kind of diversity required to further the District's educational policy can be achieved through its narrowly tailored use of an integration positive tiebreaker.

Accordingly, the court should affirm the district court's judgment.

DATED this 12th day of November, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the opening/ answering/reply brief is

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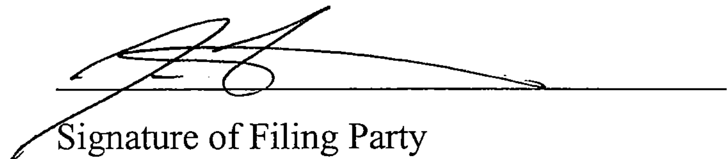

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