

NO. 03-2415

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In The  
United States Court of Appeals  
For the First Circuit

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SAMANTHA J. COMFORT, ON BEHALF OF HER  
MINOR CHILD AND FRIEND, ELIZABETH  
NAMBOUR, ET AL.,  
*Plaintiffs-Appellants,*

v.

LYNN SCHOOL COMMITTEE, ET AL.,  
*Defendants-Appellees.*

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**SUPPLEMENTAL BRIEF AMICI CURIAE FOR THE COUNCIL OF THE  
GREAT CITY SCHOOLS, PUBLIC EDUCATION NETWORK, THE  
AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, THE  
NATIONAL SCHOOL BOARDS ASSOCIATION, THE NATIONAL  
ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, AND THE  
NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF  
DEFENDANT-APPELLEES AND IN SUPPORT OF AFFIRMANCE**

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## **STATEMENT OF CORPORATE DISCLOSURE**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* – the Council of the Great City Schools, the Public Education Network, the American Association of School Administrators, the National School Boards Association, the National Association of Secondary School Principals, and the National Education Association – state that they are nonprofit organizations, and, therefore, they are not publicly held companies that issue stock.

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## INTERESTS OF AMICI CURIAE

This supplemental amicus brief in support of Appellees is submitted in response to the Court's Order of November 24, 2004 on behalf of the Council of the Great City Schools, the Public Education Network, the American Association of School Administrators, the National School Boards Association, the National Association of Secondary School Principals, and the National Education Association. These *amici* have filed two other briefs in this appeal, *see* Brief *Amici Curiae* for the Council of the Great City Schools, *et al.* In Support of Appellees and In Support of Affirmance (filed May 28, 2004) ("Educators' Brief for Appellees"); Brief *Amici Curiae* for the Council of the Great City Schools, *et al.* In Support of Defendant-Appellees' Petition for Rehearing En Banc (filed Nov. 12, 2004) ("Educators' Brief in Support of Rehearing"), and neither the descriptions of these *amici* nor the arguments made in those briefs are repeated here.

Together the *amici* represent a substantial portion of this Nation's public school boards, school administrators, teachers, and communities with diverse student populations; share a vital interest in high-quality public education and equality of educational opportunities in every community; and are strongly committed to preserving school district discretion to make appropriate judgments regarding student assignment and the promotion of racially and ethnically diverse school environments where it is desirable and practical to do so.

## ARGUMENT

To respect the proper authority of locally elected school boards and allow them to address effectively vital educational concerns shared by many communities throughout this Court's jurisdiction, the *en banc* Court should affirm the district court's decision upholding the Lynn School Committee's ("Lynn" or the "District") student assignment plan (the "Lynn Plan").

### **I. FEDERAL COURTS PROPERLY RESPECT THE BROAD AUTHORITY OF LOCAL SCHOOL DISTRICTS OVER MATTERS OF EDUCATIONAL POLICY, INCLUDING STUDENT ASSIGNMENT PLANS.**

In concluding that the Lynn Plan did not violate the Fourteenth Amendment, the district court applied strict scrutiny with appropriate deference to Lynn's authority to shape its educational policies. *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 366, 373-75 (D. Mass. 2003). The panel of this Court that initially reviewed that decision also acknowledged in principal, if not in fact, the need to respect the educational judgments of local school officials. *Comfort v. Lynn Sch. Comm.*, No. 03-2415, slip op. at 26 (1st Cir. Oct. 20, 2004) ("*Comfort* Panel Opinion"), *withdrawn*, 2004 WL 2348505 (1st Cir. Nov. 24, 2004).

The Supreme Court has emphasized consistently the importance of locally controlled public education, the need for deference to those individuals entrusted to carry out that important mission, and the important political and social purposes served by such deference. *See Educators' Brief in Support of Rehearing* at 6-7

(citing, *inter alia*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973)). In *Milliken*, for example, the Court explained, “local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’ ” *Id.* at 742 (quoting *Rodriguez*, 411 U.S. at 50). *See also* Educators’ Brief for Appellees at 15-19. Indeed, just recently, the Supreme Court again deferred to similar educational judgments in the higher education context. *See Grutter v. Bollinger*, 539 U.S. 303, 327-44 (2003). In *Grutter*, the Court deferred both to the University of Michigan Law School’s judgments that diversity is a critical component of the school’s educational mission and to the university’s efforts to narrowly tailor its admissions process to serve that interest.

Nowhere is such respect for local control and for educational judgments more appropriate than in the context of public elementary and secondary student assignment. Student assignment is a central role of elected school boards throughout the United States, which bear the responsibility for educating children from widely disparate backgrounds to be well-rounded, tolerant and contributing community members and citizens. In approaching this important task, local school

districts employ a wide range of techniques ranging from geographical attendance areas (often referred to as “neighborhood schools”) to a variety of choice-driven mechanisms, including magnet and charter schools and transfer plans. In addition, many school districts grapple with the questions whether and to what extent, in light of local needs and conditions, one or more of these various student assignment techniques should involve the consideration of race.

Because of the centrality of student assignment to the mission of public school districts, student assignment has long been specifically identified by the Supreme Court as an area in which a school board enjoys broad authority to adopt policies and procedures that best address its community’s unique needs and educational values. *See* Educators’ Brief in Support of Rehearing at 7. Indeed, even when school districts have been found to have blatantly violated constitutional rights by intentionally segregating their schools, the initial and primary authority to develop remedial student assignment plans has rested in the hands of those school officials rather than the federal courts.<sup>1</sup>

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<sup>1</sup> *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.”); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 439 (1968) (“The burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work now. The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation.”); *Morgan v. Kerrigan*, 530 F.2d 401, 409 (1st Cir. 1976) (“Upon a finding that a school system has been operated

In the exercise of its sound educational judgment and based on its own particular historical experiences and local conditions, Lynn concluded that racially isolated schools were educationally harmful and that the educational benefits of diversity were compelling. Therefore, the District designed a student assignment plan – using both neighborhood attendance areas and parental choice mechanisms – that permits a very limited consideration of race to avoid these harms and to promote the widely recognized benefits associated with integrated school enrollments.

This Court – like the court below in this case and the Supreme Court in *Grutter* – should defer to these educational judgments about how best to meet the needs of the local community with respect to student assignment. This Court has no basis in the record below to question Lynn’s determination or the district court’s findings that, as a matter of educational policy, racial integration is needed to promote positive racial attitudes, teach children to be citizens in our multiracial and multicultural society, and increase educational opportunities and outcomes for *all* students. Furthermore, in evaluating whether Lynn has successfully refined its student assignment plan to achieve these interests, this Court should likewise

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in contravention of the equal protection clause of the Fourteenth Amendment to the constitution, the burden falls upon the local school authorities to present a plan of action to the district court to remedy the violations. Only on the default of the School Committee to proffer an acceptable remedial plan is the district court empowered to fashion a remedy adequate to produce a unitary school system.” (citation omitted)).

respect Lynn’s hard-won expertise – forged through years of struggle with racial inequities and divisions in its community, local political dialogue, and sound educational judgments – regarding the appropriate, narrowly tailored means of promoting these educational benefits. *See, e.g., Comfort*, 283 F. Supp. 2d at 344.

## **II. SCHOOL DISTRICTS HAVE PARTICULARLY COMPELLING INTERESTS IN PROMOTING THE EDUCATIONAL BENEFITS OF RACIAL DIVERSITY AND AVOIDING THE EDUCATIONAL HARMS OF RACIAL ISOLATION.**

It is beyond dispute that the Lynn Plan serves compelling governmental interests by promoting the educational benefits of racially diverse student enrollments and avoiding the educational harms associated with racially isolated schools – both the district court and the panel of this Court have already so found based on extensive record evidence. *Comfort* Panel Opinion at 34; *see Comfort*, 283 F. Supp. 2d at 376, 386, 391. Indeed, even the plaintiffs have “concede[d] the importance of these goals” and “agree[d] that Lynn schools are considerably better and safer than they were before the Plan was instituted.” *Id.* at 376.

Although some educational interests are common to both elementary and secondary *and* higher education, K-12 student assignment plans serve a broader and stronger set of compelling interests than do university admissions plans. In the higher education context, the Supreme Court has left no doubt that diverse enrollments produce “substantial” educational benefits, including promoting cross-racial understanding, breaking down racial stereotypes, improving classroom

discussion, “promot[ing] learning outcomes,” and helping to prepare students for a racially and culturally diverse workforce and society. *Grutter*, 539 U.S. at 330. But in the K-12 context, as both the court below and a panel of this Court recognized, the “benefits to be derived from a racially diverse educational milieu are *more compelling*.” *Comfort* Panel Opinion at 32 n.7 (emphasis added).

To take but one example, local public schools – even more so than colleges or professional schools such as those at issue in *Grutter* – serve a critical function in shaping children to be citizens in our multiracial and multicultural democracy. As the district court explained, “*the purpose of the public school system is as much to teach citizenship to its students as it is to teach academic subjects*. Indeed, at the elementary school level, . . . teaching citizenship – the proverbial effort to ensure that students ‘work and play well with others’ – is one of a school’s *highest* educational priorities.” *Comfort*, 283 F. Supp. 2d at 375-76 (emphasis added); *see also id.* at 353-58 (summarizing expert testimony regarding the educational benefits of racial diversity); Educators’ Brief for Appellees at 7-12 (citing studies showing the educational benefits of diverse school enrollments).

Racially diverse school enrollments also promote additional educational benefits “not contemplated in *Grutter*.” *Comfort* Panel Opinion at 33. For example, integrated schools help to eliminate the educational and social harms caused by segregation and racial isolation, which may imperil educational

achievement, trigger the defection of middle-class children to private schools, or undermine fiscal support for local school districts. *See Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., joined by Stewart, J., and Rehnquist, C.J., dissenting from per curiam decision dismissing writs of certiorari as improvidently granted). Integrated schools can also improve student safety, promote educational opportunities by providing a higher set of expectations and career options for all students, and increase levels of educational achievement and test scores, particularly for minority students. *See* Educators' Brief for Appellees at 13-15; *Comfort* Panel Opinion at 33; *Comfort*, 283 F. Supp. 2d at 335, 355. Both Congress and the President also have recognized the compelling need for school districts to address in particular the persistent achievement gap between minority and non-minority students and have mandated targets for student achievement defined in explicitly racial terms as one method of addressing this pressing issue. *See* No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. § 6311(b)(2)(C) (requiring school and district goals for adequate progress for racial and ethnic subgroups).

Thus, the initial panel erred in assuming that the only educational purpose properly served by the Lynn Plan was the free exchange of ideas allowed by a "critical mass" of minority and non-minority students. Although some evidence does suggest that these benefits can accrue when the minority (or non-minority)

group represents at least 20% of the population, there is nothing talismanic about this 20% figure. As the district court found, although some studies establish a “critical mass estimate of 20% . . . as a prerequisite to making a meaningful amount of intergroup contact possible. . . . 20% is *not* a magical shut-off point for gains from intergroup contact.” *Comfort*, 283 F. Supp. 2d at 357.<sup>2</sup>

The advantages of intergroup contact are just *some* of many desired benefits of racially integrated public schools. For example, none of the 18 notable social-science studies of the short- and long-term benefits of desegregation and racially diverse school enrollments cited in the Educators’ Brief for Appellees, *see id* at 7-12, even discuss the 20% number relevant to intergroup theory.<sup>3</sup> Instead, many of

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<sup>2</sup> *See also Smith v. University of Washington, Law School*, No. 02-35676, slip op. at 17077 and 17087 (9<sup>th</sup> Cir. Dec. 20, 2004) (quoting *Grutter*, 539 U.S. at 318 and 330) (emphasizing the Supreme Court’s conclusion in *Grutter* that, even in the higher education context, “there is no number, percentage, or range of numbers or percentages that constitute critical mass” and that “the ‘concept of a critical mass is defined by reference to the educational benefits that diversity is designed to produce’”).

<sup>3</sup> One such benefit is maintaining widespread community support for public schools, and both this case and others demonstrate that such support would be difficult to achieve if a plan sought only to produce schools at least 20% minority or 20% non-minority. For example, many white and middle-class students likely would not remain in local public schools if a school district were to limit its pursuit of diversity in a way that would produce schools that were only 20% non-minority. *See* Educators’ Brief in Support of Rehearing at 13 (discussing problem of “white flight”). In fact, the district court in this case expressly found that, “before the Lynn Plan’s implementation, . . . the overall number of students in the Lynn public schools began to decline – a direct result of the decline in white enrollment,” and that, “after the Plan’s implementation, this trend began to reverse.” *Comfort*, 283 F. Supp. 2d at 350-51.

these studies demonstrate the academic benefits for minority students attending majority White schools, evaluate the negative impacts of high concentrations of low income and minority students in individual schools, or examine the educational benefits of cooperative learning in diverse classrooms. As these studies and the findings below both make clear, the educational benefits of racially diverse K-12 student enrollments are much broader than the free exchange of viewpoints allowed by a “critical mass” of majority or minority students.

As both the district court and the initial panel opinion correctly found, the Lynn Plan thus clearly serves a variety of compelling interests by promoting a variety of the educational benefits of racially diverse student enrollments and limiting the educational harms of racial isolation.

### **III. THE NARROW-TAILORING ANALYSIS OF A RACE-CONSCIOUS STUDENT ASSIGNMENT PLAN MUST RECOGNIZE THE UNIQUE CONTEXT OF ELEMENTARY AND SECONDARY EDUCATION.**

Race-conscious government policies like the Lynn Plan do not violate the Equal Protection Clause as long as they are narrowly tailored to serve the identified compelling governmental interests. *Grutter*, 539 U.S. at 331. The purpose of this narrow tailoring requirement is limited, according to the Supreme Court, to ensuring that “the means chosen ‘fit’ . . . th[e] compelling goal so closely that *there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.*” *Id.* at 333 (internal quotation marks omitted) (emphasis

added). Here, the tight fit between the Lynn Plan and the educational interests it serves demonstrates that no “illegitimate racial prejudice” lies at the Plan’s root.

The Supreme Court also has set forth a number of criteria for courts to adapt to each unique context in assessing the fit between the identified compelling interests and the means chosen to further those interests: (1) the need for race-conscious means to achieve the goal; (2) the flexibility of the program; (3) the availability of exceptions or waivers; (4) the impact of the plan on third parties; and (5) the duration of the program. *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987). In analyzing these factors, the Court has emphasized that “context matters” and that courts must consider the “relevant differences” in programs that use race as a factor. *Grutter*, 539 U.S. at 327.

The district court’s analysis of the Lynn Plan in this case provides a good example of a narrow-tailoring inquiry “calibrated to fit the distinct issues” raised by K-12 student assignment, as required by the Supreme Court. *Id.* at 334. First, given both the broad educational benefits of racial diversity in the K-12 context and the palpable harms caused in Lynn and other communities by racial isolation,<sup>4</sup> it is not surprising that the District here found race-neutral measures inadequate for

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<sup>4</sup> In assessing this first factor, it would be an error for this Court to assume, as did the initial panel, that Lynn, like a college or university, simply sought the free exchange of diverse viewpoints allowed by a “critical mass” of minority students. *See* Educators’ Brief in Support of Rehearing at 11-14. As noted above and in the Educators’ Brief in Support of Appellees, the compelling interests served by racial diversity in the elementary and secondary context are far more extensive than that.

its purposes. *Comfort*, 283 F. Supp. 2d at 387-89; *Comfort* Panel Opinion at 44-45 (acknowledging that the school district “did seriously consider, and plausibly reject, a number of race-neutral alternatives”). Moreover, when a particular school district, like Lynn, reaches such a conclusion based upon its own unique circumstances, it is irrelevant that in some other districts, more integrated residential areas or other local demographic conditions might make it unnecessary to employ race-conscious measures to have similarly diverse school enrollments.

Second, the assessment of overall flexibility of a K-12 student assignment plan should also recognize the distinct context of elementary and secondary education. The Lynn Plan, like many race-conscious student assignment plans, is designed to be flexible in its consideration of race in several important respects and in ways that are different than university admissions procedures. In Lynn, for example, all parents are free to send their children to their neighborhood schools. The only race-sensitive aspect of the Lynn Plan is just a “further option” allowing transfers that promote racial diversity. *Comfort*, 283 F. Supp. 2d at 347, 377. Moreover, even this aspect of the Plan does not seek to achieve a specific racial balance or quota, but instead uses broad ranges of plus-or-minus ten or fifteen percentage points of District-wide minority enrollment as its goal.

The contention that the Lynn Plan nevertheless is faulty because it does not involve precisely the same type of individualized consideration as higher education

admissions programs is meritless. Narrow tailoring does not require school districts to transform their student assignment methods into mini-college admissions processes requiring personal statements, letters of recommendation, transcripts, and similar materials irrelevant to the K-12 context. *See* Educators' Brief in Support of Rehearing at 8-11. If narrow tailoring of an elementary and secondary student assignment policy must require exactly the same type of individualized consideration the Supreme Court required in *Grutter* for selective university and professional school admissions policies, as opposed to an individualized consideration that is practicable at the K-12 level, such a strict scrutiny analysis would be impermissibly "strict in theory" and "fatal in fact." *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 202 (1995).

The Lynn Plan does give students individualized consideration in a manner appropriate to the specific circumstances of K-12 student assignment and, like many other race-conscious student assignment plans, involves the evaluation of a series of individual race-neutral factors: student residence; family choice; space availability; language proficiency; disability; sibling enrollment; and safety, medical, and other hardships. *Comfort*, 283 F. Supp. 2d at 347-49.

Third, most K-12 student assignment plans (those that are race-conscious in some respect and those that are not) – and Lynn is certainly no exception – provide for exceptions and waivers. For example, Lynn provides exemptions in cases of

individual hardship and special provisions for students who participate in bilingual or special education programs. *Id.* at 349. The Plan also includes a meaningful appeals process for transfer denials. *Id.* (finding that the “appeals process is not an empty formality,” as transfer denials are frequently overturned on appeal).

Fourth, in the K-12 context, student assignment plans typically do not impose an unacceptable burden on third parties because such plans, unlike university admissions procedures, do not involve the allocation of a scarce resource. The contrast between this case and *Grutter* with respect to this factor is clear: While colleges and universities limit access to their services, public schools – by definition – guarantee access to theirs. Each student in Lynn, for example, receives an education at a school that is equal to any other school in the District in terms of its resources, standards, curriculum, and policies. As the parties stipulated, “Lynn’s schools, and the educational benefits they provide, are essentially fungible.” *Comfort*, 283 F. Supp. 2d at 365 n.72, 373, 378; *see also McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004).

Finally, K-12 student assignment plans – like the one at issue here – also are narrowly tailored because they are temporary in duration. School boards across the Nation are continuously re-evaluating student assignment plans to account for shifting demographics, school openings and closings caused by increasing or declining enrollment, and the pressures of local (and more recently national, *see*

NCLB, 20 U.S.C. § 6316(b)(1)(E) (requiring public school choice programs where schools fail to meet identified benchmarks)) politics. Lynn, for example, routinely gathers data “to continuously monitor the need” for its plan so that it can be modified or eliminated as necessary. *Comfort*, 283 F. Supp. 2d at 350.

Thus, all of the indicia of narrow tailoring are present in this case, and this Court can comfortably affirm the district court’s conclusion that a genuine desire to provide educational advantages to all of its students – not an illegitimate racial purpose – underlies the Lynn Plan.

### CONCLUSION

For all of the above stated reasons, *amici* urge the *en banc* Court to affirm the lower court’s decision.

Respectfully submitted,



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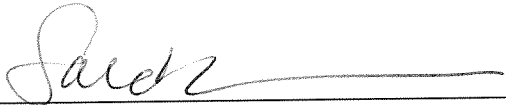
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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 37(a)(7)(C), this attached Brief *Amici Curiae* in Support of the Defendants-Appellees and In Support of Affirmance is proportionately spaced, has a typeface of 14 points or more and contains 3,632 words, not including the Statement of Corporate Disclosure, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 22nd day of December, 2004.

  
\_\_\_\_\_  
Sarah M. Berger

## CERTIFICATE OF SERVICE

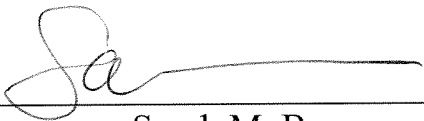
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