

NO. 04-5897

United States Court of Appeals
For the Sixth Circuit

DAVID McFARLAND, ET AL.,
Plaintiffs,

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND
NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Plaintiff-Appellant,

v.

JEFFERSON COUNTY PUBLIC SCHOOLS, ET AL.,
Defendants,

JEFFERSON COUNTY BOARD OF
EDUCATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for
the Western District of Kentucky, Louisville Division

**BRIEF AMICI CURIAE FOR THE COUNCIL OF
THE GREAT CITY SCHOOLS, ET AL., IN SUPPORT OF APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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INTERESTS OF AMICI CURIAE

This brief *amici curiae* is submitted, with the consent of all parties, on behalf of the Council of the Great City Schools (“Council”), the American Association of School Administrators (“AASA”), the National School Boards Association (“NSBA”), the National Education Association (“NEA”), the Public Education Network (“PEN”), and the National Association of Secondary School Principals (“NASSP”).

The Council – the only national organization representing the needs of America’s urban public schools – is a coalition of sixty-two of the nation’s largest urban public school systems, incorporated in 1961 for the purpose of improving the quality of urban education through research, legislation, technical assistance, and advocacy. Council members include school systems in Chicago, Los Angeles, Detroit, Miami-Dade, and Houston. Of the seven million students enrolled in the Council’s members’ schools, 38.4% are African-American, 31.4% are Hispanic, 23.2% are White, 6.4% are Asian/Pacific Islander, and 0.7% are Alaskan/Native American. To assist its members and the larger education community in understanding issues and best practices in urban education today, the Council collects data on public education and publishes regular reports. The topics of recent Council reports have ranged from the progress of urban school districts in closing achievement gaps to efforts to recruit highly qualified teachers.

AASA, founded in 1865, is the professional organization for over 14,000 educational leaders across America and in many other countries. AASA's mission is to support and develop effective school system leaders who are dedicated to the highest-quality public education for all children. AASA's major focus is standing up for public education.

NSBA is a not-for-profit federation of 49 state associations of school boards, together with the Hawaii State Board of Education and the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA thus represents the nation's 95,000 school board members, who, in turn, govern the 14,890 local school districts serving more than 47 million public school students. NSBA believes that school boards should take positive actions to support integration and provide equal educational opportunities. To do so effectively, school boards must be able to adopt policies that take race into consideration when necessary to foster the educational benefits of racial and ethnic diversity.

NEA is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA's highest governing body, the Representative Assembly, has adopted Resolution B-8, which recognizes that "a racially diverse student population is essential for all elementary/secondary schools" because it helps "promote racial acceptance, improve academic performance, and foster a

robust exchange of ideas.” The Resolution also expresses NEA’s belief “that a racially diverse student population may not be achieved or maintained in all cases simply by ending discriminatory practices and treating all students equally regardless of race . . . [and] that to achieve or maintain racial diversity, it may be necessary for elementary/secondary schools, colleges, and universities to take race into account in making decisions as to student admission, assignments, and/or transfers.”

PEN is a national organization of local education funds (“LEFs”) and individuals working to build public demand and mobilize resources for quality public education in low-income communities across the nation. PEN believes that public education is the cornerstone of our democratic way of life. PEN represents 89 LEFs working in 33 states and the District of Columbia on behalf of 11.5 million children attending 18,000 schools in 1,600 school districts. On average, 57% of children in LEF communities are poor and minority. PEN seeks to bring the community voice into the debate on quality public education in the firm belief that an active, vocal constituency is necessary to ensure every child, in every community, a quality public education.

NASSP – the preeminent organization and national voice for middle level and high school leaders, assistant principals, and aspiring school leaders – provides its members the professional resources to serve as visionary leaders. NASSP

promotes the intellectual growth, academic achievement, character and leadership development, and physical well-being of youth through its programs and student leadership services. NASSP sponsors the National Honor Society™, the National Junior Honor Society™, and the National Association of Student Councils™.

The *amici* share a vital interest in providing high-quality public education and supporting equality of educational opportunities in every community. They are also committed to preserving for their members the discretion to make judgments about how students are assigned to schools, including with respect to the importance of providing racially and ethnically diverse school enrollments where it is feasible to do so.

SUMMARY OF ARGUMENT

The federal courts have long recognized both the importance of locally controlled public education and the need for deference to those individuals entrusted to carry out that important mission. Nowhere is judicial deference to the sound educational judgment of local school officials more appropriate than in the context of student assignment. Not only is student assignment a central part of the role and responsibility of school boards throughout the United States, but it is also an area in which those boards have traditionally enjoyed broad authority to adopt policies and procedures that best address each community's unique needs and educational values. Accordingly, the court below correctly deferred to the

Jefferson County Public Schools' ("JCPS") determination that it could best serve the needs of its community – and further its educational mission of preparing its students to live, work, and learn in a diverse society – by adopting a narrowly tailored student assignment system that serves the compelling government interests of promoting the educational benefits of racially integrated student enrollments and preventing the harmful effects of racial isolation.

The court below also correctly applied the Supreme Court's teachings in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), to the unique context of public elementary and secondary education. In concluding that JCPS's student assignment plan was narrowly tailored to its compelling interests, the court below properly heeded the Supreme Court's admonition that "[c]ontext matters." *Grutter*, 539 U.S. at 327. The district court appropriately tailored its analysis of the JCPS student assignment plan to the specific context of public elementary and secondary education.

This Court should adopt the same analytical approach, which acknowledges the fundamental differences between student assignment at the elementary and secondary level and the competitive higher education admissions at issue in

Grutter and *Gratz*.¹ For example, public schools serve a vital role in educating children to be contributing members of our increasingly pluralistic democratic society. The interests that school districts may promote by seeking racially and ethnically diverse school enrollments – including, for example, the promotion of civic values essential to participation in our multiracial and multicultural democracy and the maintenance of the community support for the public schools that is essential to their success – are broader and even more compelling in the context of public elementary and secondary education.

Moreover, the assignment of students to elementary and secondary schools is fundamentally different from the competitive admissions process used at selective colleges and universities like the University of Michigan Law School. First, unlike college admissions decisions, public elementary and secondary student assignment normally does not involve the allocation of a scarce benefit or unique opportunity. As the lower court found, both in the decision below and in prior desegregation litigation, JCPS’s equal and integrated schools are essentially fungible, such that assignment to one school instead of another does not cause constitutional harm. Second, public school student assignment has never involved the kind of detailed analysis of individual applicants undertaken by college

¹ As JCPS and other *amici* have argued persuasively, these fundamental differences may support application of a standard other than strict scrutiny when the challenges at issue involve public school student assignment.

admissions departments. Although the kind of process used in the University of Michigan Law School’s admissions process is inapposite in the unique setting of public elementary and secondary school assignment, the court below correctly found that JCPS’s student assignment process is appropriately nuanced and tailored to the precise context of elementary and secondary education.

This Court should affirm the lower court’s decision finding the JCPS student assignment plan narrowly tailored to serve the compelling government interests of promoting the educational benefits of racially integrated student enrollments and avoiding the harms associated with racially isolated schools.

ARGUMENT

I. Given Our Nation’s Long Tradition of Local Control of Public Education, Courts Rightly Defer to the Professional Judgment of School Officials with Respect to Matters of Educational Policy.

The Supreme Court has repeatedly recognized that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.” *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see, e.g., Dayton v. Brinkman*, 433 U.S. 406, 410 (1977) (“[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.”). Because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges,” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), courts have long deferred to the

professional judgment of local school districts regarding matters of educational policy. The Supreme Court, for example, has concluded:

[E]ducational policy . . . is [an] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973).

Not only is local control a longstanding tradition in the United States, but it also serves important interests. For example, according to the Supreme Court, “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.’ ” *Milliken*, 418 U.S. at 742 (quoting *Rodriguez*, 411 U.S. at 50).

JCPS provides a perfect example of the benefits, extolled by the High Court in *Milliken*, of local control over public education. From 1973 to 2000, while JCPS was under court order to desegregate its schools, it “demonstrated extraordinary good faith through its dedication to quality education in an integrated setting,” *McFarland v. JCPS*, 330 F. Supp. 2d 834, 841 n.9 (W.D. Ky. 2004).

Throughout that time period, JCPS reevaluated and modified its student assignment plans, with advice from members of the community, “to maintain a fully integrated countywide system of schools.” *Id.* at 841-42. For example, JCPS “gradually increased specialized educational offerings [in the 1980s] and encouraged students to make voluntary school choices.” *Id.* at 841. Even after dissolution of the desegregation decree in 2000, there remained “strong public support for . . . an integrated school system” in JCPS. *Id.* at 855. Indeed, as the court below found, “[e]very measure of *student and public attitudes* on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students.” *Id.* at 854 (emphasis added). Thus, over the past several decades, JCPS has fulfilled the spirit of *Milliken* by carefully refining its student assignment plan to meet both legal mandates and the needs and interests of its community.

Moreover, the Supreme Court has specifically identified student assignment as an area in which deference to the judgments of locally elected school boards is particularly appropriate, and has indicated that school district officials may exercise their professional judgment to use race as a factor in assigning students to schools. According to the Court, school districts, given their “broad power to formulate and implement educational policy,” could “well conclude . . . that in order to prepare students to live in a pluralistic society[,] each school should have a

prescribed ratio of [African-American] to white students reflecting the proportion for the district as a whole.” *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). This Court has likewise recognized the discretion of local school districts to consider race as a factor in student assignment, including as needed to prevent the educational harms of racial isolation and to promote the educational benefits associated with racial integration:

[I]t is not unconstitutional for [boards of education] to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm.

Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966) (emphasis added).

Rather, “[a]n integrated school experience is too important to the nation’s children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs.” *Higgins v. Bd. of Educ. of City of Grand Rapids*, 508 F.2d 779, 795 (6th Cir. 1974).

In the exercise of its sound educational judgment and based on the particular experiences of its community, JCPS concluded that racially isolated schools are harmful. Therefore, JCPS adopted a student assignment plan that permits the limited consideration of race to avoid these harms and to promote the benefits associated with integrated school enrollments. Review of that student assignment

plan should afford considerable deference both to the school board's educational goals and to its efforts to design and employ narrowly tailored means to achieve those ends.

For example, the Supreme Court deferred to similar educational judgments even in the context of higher education admissions decisions, *see Grutter*, 539 U.S. at 327-44, which, unlike public elementary and secondary student assignment decisions, involve the allocation of a scarce benefit. There, 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. *See id.*

This Court – like the Supreme Court in *Grutter* and like the district court below – should similarly afford JCPS considerable discretion and not attempt to supplant the locally elected school board. This Court has no basis in the record below to question JCPS's determination 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 benefits for *all* students. Furthermore, in evaluating whether JCPS has successfully refined its student assignment plan to achieve its interests, this Court should likewise defer to JCPS's hard-won expertise – forged through years of court-ordered desegregation, community dialogue, and educational

judgments – regarding the appropriate, narrowly tailored means of promoting the educational benefits of racially integrated student enrollments.²

II. In Upholding the School District’s Student Assignment Plan, the Court Below Correctly Applied the Constitutional Principles of the Supreme Court’s Decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* to the Unique Context of Public Elementary and Secondary Education.

As the Supreme Court reaffirmed in *Grutter*, a race-conscious governmental policy is constitutionally permissible if it serves a compelling interest and is narrowly tailored to achieve that interest. *Grutter*, 539 U.S. at 326. In analyzing the JCPS student assignment plan, the court below followed the Supreme Court’s admonition that “[c]ontext matters,” *id.* at 327, and correctly determined that the JCPS student assignment plan satisfies both requirements and should therefore be upheld against the Appellant’s Equal Protection Clause challenge.

A. Public School Districts Have Stronger and Broader Compelling Interests in Racially Diverse School Enrollments Than Do Universities.

It is undisputed that the JCPS student assignment plan promotes compelling government interests, namely, attaining the educational benefits associated with racially integrated student enrollments and avoiding the educational harms

² The court below concluded that the JCPS student assignment plan was narrowly tailored even without affording any judicial deference to the judgment of JCPS officials regarding the proper means to achieve these compelling interests. *See McFarland*, 330 F. Supp. 2d at 856 & n.43.

associated with racially isolated schools. The court below found, in fact, that JCPS “has precisely described the academic, social and institutional benefits it achieves from integrated schools” and that this “compelling explanation” was “supported by overwhelming evidence.” *McFarland*, 330 F. Supp. 2d at 855. Indeed, the Appellant here concedes that JCPS’s asserted interests are compelling. Appellant’s Proof Brief at 37 (filed Oct. 5, 2004) (“[W]e can accept the trial court’s legal finding that diversity is a compelling state interest where a race-conscious plan can be utilized.”).

Nor could the Appellant contend otherwise. Both this Court *en banc* and subsequently the Supreme Court have found that promoting the educational benefits of diversity – including racial diversity – is a compelling government interest in the context of higher education admissions. *Grutter*, 539 U.S. at 321, 333 (discussing this Court’s *en banc* holding that promoting the educational benefits of diversity was a compelling government interest and likewise finding this interest to be compelling); *id.* at 333. As the Supreme Court recognized in *Grutter*, such racial diversity produces “substantial” educational benefits, including by 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. *Id.* at 330. As the district court found, these “benefits of racial tolerance and

understanding are equally as important and laudable in public elementary and secondary education as in higher education.” *McFarland*, 330 F. Supp. 2d at 853. In fact, these educational benefits are even stronger and more evident in the public elementary and secondary education context. The First Circuit, for example, recently concluded that “there [is] significant evidence . . . supporting the view that the benefits to be derived from a racially diverse educational milieu are *more compelling* at younger ages.” *Comfort v. Lynn Sch. Comm.*, --- F.3d ----, No. 03-2415, 2004 WL 2348502 at *22 & n.7 (1st Cir. Oct. 20, 2004) (emphasis added).³

In addition to the benefits identified by the Court in *Grutter*, racially diverse school enrollments promote educational benefits unique to the context of public elementary and secondary education. For example, integrated schools help to eliminate the educational and social harms caused by segregation and racial isolation; promote educational achievement, as measured by test scores, particularly with respect to minority students; and increase educational opportunities by providing a higher set of expectations and career options for students. The court below correctly found that these interests, although “quite

³ In fact, the Supreme Court in *Grutter* cited two cases involving public elementary and secondary education when declaring the “importance of preparing students for work and citizenship.” *Grutter*, 539 U.S. at 331 (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

different from those articulated in *Grutter*,” are “equally compelling.” *McFarland*, 330 F. Supp. 2d at 853-54.

The sections below elaborate on two of the many educational benefits associated with racially integrated public elementary and secondary school enrollments. The first, promoting the civic values upon which our democratic society relies, was recognized by the Supreme Court in *Grutter* and is even stronger in the public elementary and secondary education context. The second, fostering broad-based community support for and involvement in local public schools, is a compelling interest unique to the context of public elementary and secondary education. In these ways, among many others, the promotion of racially integrated K-12 enrollments serves stronger and broader, and thus even more compelling, interests than does racial diversity in competitive university admissions.

- 1. Public Schools Serve a Critical Role in Promoting Civic Values and Enabling Children to Participate Effectively in Our Increasingly Multiracial Society.**

Local public schools, even more so than colleges or graduate schools, serve a critical function in educating children to be citizens in our multiracial and multicultural democracy. For example, as the Supreme Court has long recognized, “education . . . is the very foundation of good citizenship” and a “principal instrument in awakening the child to cultural values, in preparing him for later

professional training, and in helping him to adjust normally to his environment.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Indeed, the Court has proclaimed “the public schools . . . a most vital civic institution for the preservation of a democratic system of government and . . . the primary vehicle for transmitting the values on which our society rests.” *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal citations and quotation marks omitted). Moreover, the “process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; *schools must teach by example the shared values of a civilized social order.*” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (emphasis added).

Racial diversity in public school enrollments thus can enhance students’ civic values by bringing them together, from an early age, in ways that can reduce racial fears and stereotypes; teach students how to interact comfortably and respectfully with people who are different from them; and prepare them to be good neighbors, colleagues, and citizens in our increasingly pluralistic democracy. This is a uniquely critical role of public elementary and secondary education. The civic values that are the glue holding the disparate parts of our diverse society together are inculcated principally in our nation’s elementary and secondary schools.

Because “[a]ttending an ethnically diverse school may help [in] preparing minority children for citizenship in our pluralistic society while, we may hope,

teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage,” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) (internal quotations omitted), the JCPS student assignment plan, which seeks to promote just such racial and ethnic diversity among its school enrollments, serves compelling government interests. *See, e.g., Comfort*, 2004 WL 2348502 at *22 & n.7 (1st Cir. Oct. 20, 2004); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. (“PICS”)*, 377 F.3d 949, 964 (9th Cir. 2004) (“*Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions. . . . Those benefits are as compelling in the high school context as they are in higher education.”).

2. Racially Diverse Student Enrollments Also Can Foster the Type of Broad-Based Community Support for and Involvement in Public Schools That Is Critical to Their Success.

Because racially diverse schools are associated with educational benefits – including stronger civic values and, as the Supreme Court also recognized in *Grutter*, promoting “learning outcomes,” *Grutter*, 539 U.S. at 330 – racially diverse student enrollments also serve the vital interest of fostering community support for and involvement in local public schools. Conversely, resegregation, and the subsequent loss of community support for the public school system,

imperils educational achievement, can trigger the defection of middle-class children to private schools, and may undermine fiscal support for local school districts:

The general quality of the schools . . . tends to decline when substantial elements of the community abandon them. The effects of resegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the [local school district] lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.

Estes v. Metro. Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from per curiam decision dismissing writs of certiorari as improvidently granted).

This Court has likewise acknowledged the importance of community support to the success of the public schools, particularly with respect to voluntary plans for racial integration. *See Higgins*, 508 F.2d at 794 (“[I]t does not follow that a board must ignore the probability of white flight in attempting to formulate a voluntary plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public.”).

Given the growing trend toward school resegregation over the past decade, *see generally* Gary Orfield & Chungmei Lee, Harvard Civil Rights Project, Brown

at 50: *King's Dream or Plessy's Nightmare?*, at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf> (Jan. 2004), it would be truly unfortunate to impair local school districts' ability to combat the educational harms associated with such segregation – particularly where the local community itself recognizes the need for such action. In JCPS, for example, as the district court found, “[e]very measure of student and public attitudes on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students.” *McFarland*, 330 F. Supp. 2d at 854.

Accordingly, it is clear that JCPS's student assignment plan serves compelling interests – of both the school system and the broader community – by promoting the educational benefits associated with racially diverse student enrollments, including by “invest[ing] parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole.” *Id.*

B. Appropriate Methods of Student Assignment in Public Elementary and Secondary Education Are, by Necessity, Fundamentally Different from Competitive Admissions Processes at Selective Universities.

The court below correctly held that the JCPS student assignment plan is also narrowly tailored to achieve the compelling government interests of promoting racially integrated schools and avoiding the educational harms associated with

racial isolation. In so concluding, the lower court adhered to the Supreme Court's admonition regarding the importance of context to the strict scrutiny analysis. This Court should likewise apply the important lesson of *Grutter* that "[c]ontext matters," *Grutter*, 539 U.S. at 327, and uphold the JCPS student assignment plan.

Despite the fact that school districts have similar – indeed, broader and even more compelling – interests in providing racially and ethnically diverse educational environments, student assignment at the elementary and secondary levels, in practice, has very little in common with higher education admissions. As a result, the Appellant's argument for the mechanistic application of the Supreme Court's narrow tailoring analysis in the context of competitive admissions to selective higher education institutions, on the one hand, to the far-different public school assignment context, on the other, *see* Appellant's Proof Brief at 38-43, is profoundly misguided.⁴

⁴ Although panels of the First and Ninth Circuits recently concluded, in challenges involving facts different from those presented here, that the defendant school district had in each case failed to promote their compelling government interests in racially diverse student enrollments in a narrowly tailored fashion, *see PICS*, 377 F.3d at 969-70, *petition for reh'g pending* (filed Aug. 17, 2004); *Comfort*, slip op. at 40 (acknowledging, however, that "the question [was] close"), these courts did not adequately acknowledge the significant, fundamental differences between competitive higher education admissions and public elementary and secondary student assignment. Accordingly, these decisions failed to give full shrift to the Supreme Court's admonition that "[c]ontext matters." *Grutter*, 539 U.S. at 327.

First, as the court below recognized, student assignment in the context of elementary and secondary education typically does not involve the allocation of a scarce resource, and that distinction must inform a court’s narrow tailoring analysis.

In *Coalition for Economic Equity v. Wilson*, for example, the Ninth Circuit stated:

[S]chool desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.

122 F.3d 692, 708 n.16 (9th Cir. 1997). Thus, unlike the law school in *Grutter*, the JCPS student assignment plan does not deny anyone the benefits of a public education. Rather, each student in JCPS receives just such an education at a racially integrated school that is, for all intents and purposes, “equal” to any other school in the district in terms of its resources, standards, curriculum, and policies. *See McFarland*, 330 F. Supp. 2d at 862. The district court found, after reviewing the extensive record below, that “all [JCPS] schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools,” and therefore concluded:

As between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible.

Id. at 860, 862 (quoting *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000)). The district court also correctly noted that in this

context, “most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school.” *Hampton*, 102 F. Supp. 2d at 380 (citing cases).

Second, as a practical matter, K-12 student assignment does not involve an individualized assessment of detailed applications from students competing for a scarce benefit. Thus, the methods of narrow tailoring are necessarily different from those used by university admissions departments in the context of competitive higher education admissions. In the realm of public elementary and secondary student assignment, as the district court found, the goal is not to “creat[e] elite and highly selective school communities,” but to “create more equal school opportunities for educating all students.” *McFarland*, 330 F. Supp. 2d at 859. Just as the narrow tailoring analysis does not “require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups,” *Grutter*, 539 U.S. at 339, so, too, does it not obligate local school districts to transform their student assignment methods into a mini-college admissions process that would require review of personal statements, letters of recommendation, transcripts, or other materials not relevant to the compelling interests in racial integration that those districts are seeking to promote. Rather, as explained in Section I above, determining the appropriate factors to consider in assigning students to schools –

particularly schools that, as here, have been found to be fundamentally equivalent – is a matter of educational policy that should be left largely to the discretion of local school districts.

As the record evidence makes clear, moreover, JCPS engages in a far more nuanced and time-consuming process for assigning students to schools than do most school districts. For example, the parties stipulated that elementary school assignment decisions are made by JCPS’s “Director of Elementary Student Assignment and the principals of the schools within each cluster” and “are based on available space within the schools and the racial guidelines in the District’s current student assignment plan.” *McFarland*, Civil Action No. 3:02-CV-620-H, Joint Stipulation of Facts ¶ 65, at 23. Moreover, the court below expressly found, based on the extensive record:

Like the law school [in *Grutter*], the JCPS assignment process focuses a great deal of attention upon the individual characteristics of a student’s application, such as place of residence and student choice of school or program. It is individualized attention of a different kind in a different context

McFarland, 330 F. Supp. 2d at 859 (emphasis added).⁵

⁵ By contrast, where JCPS used race more mechanistically in assigning students to traditional schools through the use of separate racial lists, the court below correctly concluded that that specific assignment method was not narrowly tailored.

Furthermore, the court below found, based on the record evidence, that JCPS uses race flexibly – as only one of several factors affecting its student assignment decisions – and that JCPS “not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals.” *Id.* at 861. As the court concluded:

In this case, one finds neither an automatic assignment nor a “narrow band” of percentages of Black students among JCPS schools. Indeed, the range in percentage of Black students among all JCPS schools is much broader than the range in minority admissions at . . . Michigan Law School. This wide fluctuation suggests *a lesser use of race and the absence of a specific target*. Finally, even a cursory review of assignment data reveals that neither Black students nor White students are guaranteed assignment to a particular school. *Too many race-neutral factors affect assignment for that to be true.*

Id. at 857-58 (footnote omitted) (emphasis added). For example, the trial court found the JCPS student assignment plan relies on a “host of factors, such as residence, student choice, [and] capacity,” in addition to race, in determining school assignments. *Id.* at 861. The parties likewise stipulated that each of these factors played a role in student assignment decisions. *See, e.g.,* Joint Stipulation of Facts, ¶¶ 63-67, at 22-24.

Furthermore, although race may be the deciding factor in a given student assignment decision, “the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as

one of many factors.” *Grutter*, 539 U.S. at 339. As the trial court found, however, JCPS uses race flexibly and only to the extent needed to achieve its compelling interests. Thus, “[e]ven where race does ‘tip’ the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part.” *McFarland*, 330 F. Supp. 2d at 862.

The lesson of *Grutter* with respect to the narrow tailoring of race-conscious student assignment plans at the elementary and secondary education levels is the importance of *context* in assessing the constitutional permissibility of those race-conscious plans. The court below correctly applied this lesson in upholding the JCPS student assignment plan, and this Court should likewise affirm the lower court’s decision.

CONCLUSION

Public schools serve a fundamental role in our democracy. One of the public school system’s primary responsibilities is to ensure that children are prepared to be citizens and contributing members of society. In fulfilling that educational mission, schools strive to cultivate positive racial attitudes and to teach children how to think critically so that they can live and work in increasingly diverse communities. Yet many school districts, like JCPS, face persistent challenges in meeting these goals, including challenges arising from inequities in life opportunities, income, and housing options for students of different races. In

the end, preventing school districts from adopting appropriate voluntary race-conscious plans would eliminate a valuable educational policy tool and help to perpetuate ongoing cycles of inequality.

At the conclusion of her opinion in *Grutter*, Justice O'Connor expressed the hope that the need for affirmative action in university admissions would end within twenty-five years. *Grutter*, 539 U.S. at 343. Realization of that hope depends, in large part, on school districts' success in promoting positive racial attitudes and closing achievement gaps among racial and ethnic groups. School districts nationwide must be allowed to engage in the necessary efforts to make Justice O'Connor's goal of ending affirmative action in university admissions a reality, especially through the implementation of voluntary plans that promote the educational benefits of diversity. As this Court has recognized, "[a]n integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs" to achieve such racial integration. *Higgins*, 508 F.2d 779, 795 (6th Cir. 1974).

For all of the reasons expressed, *amici curiae* urge this Court to affirm the lower court and likewise uphold the JCPS student assignment plan.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I certify that this brief complies with the typeface, type style, and type-volume limitations of Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a) because it was prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font and contains 5,925 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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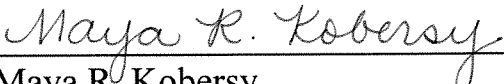
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CERTIFICATE OF SERVICE

I hereby certify that on this 9 th day of November, 2004, I mailed six copies of the foregoing brief *amici curiae* to the Clerk for the United States Court of Appeals for the Sixth Circuit by United Parcel Service, Standard Overnight Delivery. I also hereby certify that, on the same day, I served (a) two copies of the foregoing brief *amici curiae* and (b) one copy each of the Notices of Appearance of Counsel for Maree Sneed, John W. Borkowski, and Maya R. Kobersy on the following by United Parcel Service, Standard Overnight Delivery:

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