Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are faculty members at Howard University School of Law, supervising attorneys and student attorneys of the Civil Rights Clinic at the Law School, and faculty members at law schools throughout the country. While Howard University is usually regarded as one of the historically black colleges and universities, the truth is, both at the university and law school level, Howard has always been one of the most racially integrated higher education institutions in the United States. In fact, at its founding in 1867, Howard University was designed to educate blacks *and* whites in an integrated setting. Today, Howard has achieved a racial and ethnic diversity in student body and faculty consistent with its mission that the benefits of higher education "should be made available to all persons, without regard to distinctions of race, sex, creed, or nationality."[1] It is from that integrated perspective that we submit this brief in support of the Respondent school boards in order to respectfully urge this Honorable Court to continue the great work of racial integration begun by *Brown v. Board of Education,* 347 U.S. 483 (1954), and affirm the decisions of the Sixth and Ninth Circuit Courts, finding that the school boards' narrowly tailored race-conscious transfer policies serve the compelling state interest of diversity in primary and secondary education.[2]

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[1] Rayford W. Logan, Howard University, The First Hundred Years 1867-1967 i (1969).

[2] Amicus, Howard University School of Law, recognizes that some individuals might find the arguments herein contradictory because Howard is a predominantly black institution. However, amicus' arguments are consistent with its current and historical mission for several reasons. First, institutions such as Howard came into existence not to foster segregation, but rather to remedy the lack of opportunity that was available to minorities elsewhere. Second, the development of successful black institutions serve to combat the negative perceptions that are

Seventy-one years ago Charles Hamilton Houston, a former law professor and Dean at Howard law school, conceived of a legal strategy dedicated to the proposition that the social violence of racial segregation could never be reconciled with the constitutional imperative of equality before the law. Between 1930 and 1954, Houston recruited, trained and nurtured a cadre of Howard law students, professors and lawyers who, under the leadership of the NAACP Legal Defense and Education Fund, (LDF) systematically litigated the dismantling of the constitutional, intellectual and moral foundations of the pernicious separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Though Houston, the founder, did not live to see the fulfillment of his strategy, in 1954 this Court, at the urging of one of Houston's original protégés, then LDF Chief Counsel Thurgood Marshall, issued the decision in *Brown* and set this country on a path to racial integration.

Now, the present companion cases have raised the question whether the use of race by a school district as one factor to voluntarily achieve an integrated student body violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We find ourselves at a critical moment that will determine whether we grant public school districts the irreplaceable tool they need to construct an environment for children to associate with peers of all backgrounds, or deny children the opportunity to internalize at an early age what Judge Kozinski of the United States Court of Appeals for the Ninth Circuit called the "live-and-let-live spirit that is the essence of the American experience." *Parents Involves In Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005).

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otherwise directed toward minorities. Third, contrary to popular misconception, Howard has always been open to and enrolled students from all races and ethnicities. Finally, as noted above, in comparison to most historically white institutions, Howard has always been and today remains wholly integrated.

But in a larger sense, though these companion cases do not directly challenge the plain holding of *Brown* that separate is inherently unequal, they do place before the Court the question whether *Brown* will continue as a viable precedent, and whether *Brown*'s fundamental goal of meaningful racial integration and diversity in primary and secondary schools will remain a valued public good. It is, therefore, fitting that, as this Court once again takes up the unfinished work of racial integration, it not just consider its own opinion in *Brown*, but that it also revisit the arguments and goals of *Brown*'s founding attorneys, who fifty-two years ago first made it possible for the Court to open the door of equal educational facilities and opportunities for all students.

For *amici curiae*, the present companion cases come to this: Voluntary school integration plans are consistent with the vision of *Brown*'s founders, represent the natural evolution and necessary continuation of this Court's *Brown* opinion, and stand as the last best chance of achieving meaningful school integration. Petitioners' very challenge to these plans unmistakably demonstrates that *Brown*'s goals and purposes have yet to be fulfilled. We are here today asking that this Court renew its commitment to the great task of racial integration by denying Petitioners' claims, and upholding the decisions of the Sixth and Ninth Circuit courts of appeals.

SUMMARY OF ARGUMENT

Two years ago, this country celebrated the 50th anniversary of one of the most important cases in the nation's jurisprudential and political history: *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown* did nothing less than recall the nation to its founding principle of constitutional equality by forbidding states from segregating public education on the basis of race. Although *Brown*'s holding spoke most directly to the elimination of *de jure* racial segregation in public school education, in the minds of both the founders

and this Court, its ambitions were greater: *Brown* promised actual meaningful social integration.

By emphasizing the importance of education and the role it plays in good citizenry, this Court's decision in *Brown* contemplated actual, effective integration of public schools, not merely the removal of *de jure* segregation. Beginning with *Brown*, the Court recognized that equal educational opportunities should be available for all children, no matter their race, and that equal educational opportunities could only be achieved by eliminating inferior, racially identifiable schools. Subsequent to *Brown*, this Court consistently recognized the goals of not just eliminating *de jure* segregation but promoting meaningful school integration. *See, e.g., Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. New Kent Co.*, 391 U.S. 430 (1968). In the Court's own words, integration "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable.'" *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

And yet, in the years following *Brown*, integration plans achieved limited and halting success, such that even more than fifty years later it is difficult to claim with any seriousness that as a society we have achieved *Brown*'s promise of meaningful public school integration. To the contrary, in recent years, this country has experienced a dramatic trend toward resegregation. Voluntary integration plans are the one encouraging corrective to that trend, and the last best chance to achieving *Brown*'s promise. But, without the conscious use of race as one of multiple factors to achieve that goal, public schools districts will find themselves, as did Respondent, the Seattle Board of Education, falling back into re-segregation. If, as this Court held in *Grutter*, 539 U.S. at 325, diversity in education is a compelling state interest, then the voluntary use of race by local school boards as one of

multiple factors to achieve that interest is constitutionally permissible.

Fifty-two years ago, this Court rejected segregation by state action; today it must decide whether it will embrace integration by state action.

I. THE COURT'S DECISION IN *BROWN* CONTEMPLATED ACTUAL, EFFECTIVE INTEGRATION OF PUBLIC SCHOOLS, NOT MERELY THE ABROGATION OF *DE JURE* SEGREGATION.

Brown was a watershed in the long struggle to realize the principles upon which this country was founded. It was the fruit of a legal campaign undertaken by the Howard University School of Law, its Dean, Charles Hamilton Houston, his most famous student, Thurgood Marshall and the pioneering lawyers of the NAACP Legal Defense Fund. The task they undertook was a reshaping of American society as profound as the reshaping accomplished by the Constitution itself. As the late Justice Thurgood Marshall remarked on the Bicentennial of the Constitution, ". . . the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making." Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 5 (1987). If our Court and profession have anything of which to be proud, it is that *Brown* is one of the great transformations of our nation's Constitutional life, and is "of our own making."

One of the earliest steps in our legal racial transformation was initiated by Charles Houston in 1937 when he filed a suit to compel the University of Missouri to admit a black applicant to its law school. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). It was the beginning of a fight for "identical quality and quantity of educational opportunity [for] all citizens regardless of race, color or creed." Charles

Hamilton Houston *as quoted in* Genna Rae McNeil, *Groundwork* 134 (1983). The final objective, however, was not just an "equalization" of the sort contemplated by *Plessy*:

> "[E]quality of education is not enough. There can be no true equality under a segregated system. No segregation operates fairly on a minority group unless it is a dominant minority. . . . The American Negro is not a dominant minority; therefore he must fight for complete elimination of segregation as his ultimate goal."

Id. Hence, the founders'[3] seventeen year struggle to bring *Brown* to fruition was not merely a struggle to prohibit Jim Crow's system of inequality. Their endeavor was to replace it with something better.

The ultimate aspiration of *Brown* and subsequent school desegregation litigation was for black and white children to finally sit together, learn together, and grow up together in the public schools. If it could achieve this end, these children would build the foundation for a society in which black and white Americans who, although born of different circumstance and subjected to different legal constructs, could ultimately participate in citizenship, as well as employment, housing and society, as equals. The Court's decision in *Brown* and subsequent cases courageously embraced this aspiration and took a giant step toward bringing the "miracle" of our Constitution to life. *See* Marshall, *supra*, at 5.

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[3] This brief shall refer to Howard University School of Law, Charles Hamilton Houston, Thurgood Marshall, NAACP Legal Defense Fund and their clients collectively as "the Founders." Amicus deems such a reference appropriate, as it was only through the concerted effort of these individuals that the issues in *Brown* and its progeny were brought before this Court. Moreover, it was their efforts, analyses and perspectives that drove and molded the Court's jurisprudence at every stage.

A. *Brown* Culminated a Long, Strategic Campaign for Integration and This Court Has Long Endorsed That Goal.

The Founders began their battle against segregation in education with an attack on its presence in state university law schools. In deciding for the petitioners, the *Brown* Court relied on four of these foundational cases, *Gaines*, 305 U.S. 337 (holding that a state that provides legal education to whites within its borders, must provide the same for blacks within its borders); *Sipuel v. Bd. of Regents of Univ. of Oklahoma*, 332 U.S. 631 (1948) (holding that a state is required to provide a legal education to black students if it does so for white students); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a state has not fulfilled its Equal Protection obligation to black students by providing a separate law school); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that black students must be treated equally once admitted). In the context of graduate schools, the patent thesis was that separate could never be equal because of the differential prestige and any number of other intangible benefits that follow from attending the "preferred" or "white" school. Consequently, the Court in *Sweatt* held in favor of the plaintiffs, stressing the importance of a school's reputation and other "qualities which are incapable of objective measurement but which make for greatness in a law school." 339 U.S. at 634. These qualities have a significant effect on the educational opportunities and position enjoyed by students.

Relying on and analogizing to *Sweatt*, the Court in *Brown* extended its reasoning to primary and secondary schools declaring that, "[s]uch considerations apply with added force to children in grade and high schools." *Brown*, 347 U.S. at 494. Thus, from the first day that a child enters public school to the final day that they might depart with a law or medical degree, the Court recognized that access to the intangible is

often the most determinative factor in shaping their opportunity to learn life's most important lessons.

The appellants' and amicus briefs in *Brown* and Thurgood Marshall's opinions after he ascended to the Court further demonstrate that the final goal of comprehensive integration was always paramount. Implicitly demanding integration, the appellant's brief declared,

> [R]acial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately 90% of the population of the society in which they live; to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population.

Brief for Appellants, *Brown*, 347 U.S 483, 1952 WL 47265 at 9. Educators agreed saying, "We cannot give separate training to two segments of society and then expect that some magic will merge the individuals from these segments into equal citizens having equal opportunities." Brief of the American Federation of Teachers as Amicus Curiae, *Brown*, 347 U.S 483, 1952 WL 82043 at 8. Still appealing for the realization of this goal twenty years after *Brown*, Marshall warned, "[u]nless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

From the beginning, this Court endorsed integration, both as a remedy to a constitutional violation and a societal imperative. To begin with, *Brown* recognized a distinction between the constitutional violation perpetrated by discriminatory laws, on the one hand, and the harms incident to segregated schooling on the other. The analysis had two distinct parts: first, *de jure* segregation in the public schools deprives the minorities of the equal protection of the laws, *Brown*, 347 U.S. at 495, and second, "[s]egregation of white

and colored children in public schools has a detrimental effect upon the colored children." *Id.* at 494 (internal citation omitted). Moreover, it is important to note that the Court also recognized that segregation itself created an injury, regardless of whether it occurred as a result of a constitutional violation, but of course, the constitutional violation exacerbated that injury. As the Court wrote, "[t]he impact is *greater* when it has the sanction of law." *Id*. at 494 (emphasis added). Thus, although the Court in *Brown* recognized that *de jure* segregation created a constitutional harm that must be remedied, it also recognized that segregation, regardless of cause, could and did harm blacks.

In *Brown* and its progeny, the Court was explicit in concluding that the remedy to the injury must be more than the mere abrogation of the discriminatory law, but requires actual integration. Although the Court has consistently used phrases such as creating a "unitary system," eliminating "vestiges of discrimination root and branch," and eliminating "racially identifiable" schools, at their heart these have been a requirement that the schools integrate and a recognition of the value in such action. For instance, the facts upon which the Court relied in finding against the school board in *Green* demonstrate its endorsement of integration. Despite having made its schools available to all students, the Court found against the board because "[n]ot a single white child has chosen to attend [the black school] and . . . 85% of the Negro children in the system still attend the all-Negro . . . school." 391 U.S. at 442. The duty to produce schools that were integrated in contrast to this fell "squarely on the School Board" and was not a "burden" to be placed on "children and their parents" *Id.* at 442-43. Thus, it was of no accord that the board had repealed or eliminated its discriminatory laws. "[T]he fact that . . . the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has" remedied its constitutional violation and harm. *Id*. at 437.

The school board's duty was to make "meaningful and immediate progress toward" integration. *Id*. at 437, 442-43.

In *Swann*, the Court likewise encouraged school boards to pursue integration on their own, writing that "in order to prepare students to live in a pluralistic society [school boards might decide that] each school should have a prescribed ratio of Negro to white students. . ." 402 U.S. at 16. In the same school district that is before this Court today, this Court, referring to its long struggle to achieve integration, formerly declared,

> When [the societal] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by 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 (1983) (internal citations omitted). In short, whether it is a demand in regard to remedying a constitutional violation or simply wisdom in regard to how schools should best respond to the harms of segregation, this Court has repeatedly endorsed integration as a precious goal.

B. The Necessity of Integration Can Be No Greater Than in Education Because of This Court's Repeated Recognition of the Correlation Between Access to Educational Opportunities and Effective Citizenship

1. *Public Education and Its Relationship to Citizenship Is of Paramount Importance to Both Our Society and Individual Citizens.*

In this Court's earliest attempts to define the role of public education in our country, it wrote that the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). It holds this importance because "education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). In *Plyler v. Doe*, the Court again recognized that the education we deliver in our public schools lies at the very heart of national interests, as our schools are "vital civic institution[s] for the preservation of a democratic system of government." 457 U.S. 202, 221 (1982) (citing *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

Most important to the instant case, the Court in *Brown*, in what may be its most famous lines, framed its decision and its own duty to finally intervene in segregation based on the importance of education to society and to the individual to which equal education had been denied. Addressing the societal interest, the Court wrote:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of educa

> tion to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship.

Brown, 347 U.S. at 493.

However, the Court likewise recognized the personal interest of the individual in education and its relationship to citizenship and later opportunities. Equal educational opportunities, of course, are required for the individual if he or she is to have an equal opportunity to take advantage of citizenship. *Id*. Moreover, on a more basic level, education is the "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." *Id.* at 493-94. These ideas have carried forward in the Court's jurisprudence. As it later wrote, without education, individuals are not "prepare[d] . . . to be self-reliant and self-sufficient participants in society." *Plyer*, 457 U.S. at 222

2. *Racial Isolation in Education Undermines* Brown's *Focus on Fully Opening Citizenship and Society to All Our Nation's Members.*

a. Our National Interests Require That Everyone Has Equal Access to the Same, Singular Path of Citizen-ship Through Education.

Our national interests not only require that we educate our citizens so that they might participate in and preserve our democratic system, but in so far as individuals have a personal right in that education and the fruits of citizenship, so too must their access to citizenship be equal. As the Founders, *amicus*, the Court, and history have shown us, equal citizenship simply cannot be obtained when school systems are racially isolated.

As the Appellants in *Brown* argued, "our public school systems have grown and improved as an American institution. And in every community it is obvious that children of all levels of culture, educability, and achievement must be accounted for within the same system." Reply Brief of Appellants, *Brown II*, 349 U.S. 294 (1955), 1954 WL 45730 13. Our teachers, who through experience and expertise know far better than we, reached the same conclusion. In *Brown*, the American Federation of Teachers wrote "[w]e cannot give separate training to two segments of society and then expect that some magic will merge the individual from these segments into equal citizens having equal opportunities." Brief of American Federation of Teachers, Brown, 347 U.S. 483, 1952 WL 82043. This Court has likewise adopted similar reasoning and wisdom in subsequent decisions. As the Court recently wrote in *Grutter*, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. Thus, an education system that provides differential access to civic life is inimical to our national unity and progress.[4]

[4] Although the facts in *Plyler* presented disparities of a different degree because immigrant children were completely denied an education, the principle behind the Court's statements are analogous. There the Court stated that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." 457 U.S. at 221.

b. Our National Interest in Equal Citizenship Cannot Be Obtained in Racially Isolated or Segregated Schools, Which Often Threaten to Reduce Minority Students to Second Class Citizenship.

When racial isolation and segregation unfortunately occur, unequal access to citizenship and education almost necessarily follow. The primary practical result and possibly the greatest evil of racial segregation in the south was a system of superior and inferior schools. The existence of such schools, and their concomitant perpetuation of dual paths to citizenship, was foremost in the Court's motivation to prohibit segregated schooling. The Court realized that meaningful and equal citizenship could not be effectuated within tiered school systems, where some schools are superior and some are inferior. Such a system inevitably leads to two levels of citizenship: first class and second class.

When *Brown* came before the Court, superior white schools and inferior black schools were the dominant state of affairs. Most notably, the facts of the companion cases that comprised *Brown* demonstrated gross inequalities between white and black schools and the resulting serious effects on black children. *See Brown v. Bd. of Educ. of Topeka*, 98 F. Supp. 797 (D.C. Kan. 1951); *Briggs v. Elliott*, 103 F. Supp. 920 (E.D. S.C. 1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952); *Davis v. Co. Sch. Bd.*, 103 F.Supp. 337 (E.D. Va. 1952). Although the Court's decision did not rest on these facts, as it ultimately held "separate" was inherently unequal, the facts of these cases demonstrate a practical reality: so long as separation occurs, our society will exercise a license to treat blacks unequally. Sixty years of experience following *Plessy* proved that a system of "separate but equal" will operate only in theory and will produce no level of equality.

Because of this past, predominantly black schools are perceived as inferior no matter how equal they might be in other measurable aspects. Thus, even once school systems had eliminated "whites only" or "blacks only" schools and had equalized resources, the Court remained concerned with whether a school was racially identifiable. *See, e.g.*, *Swann*, 402 U.S. at 18-19. Among other things, the Court would query whether the a school was perceived as a "black" or "white" school, because so long as such a perception persisted, whites would not attend a "black" school and the schools were apt to become unequal if they were not already. *See, e.g.*, *United States v. Lowndes County Bd. Of Educ.*, 878 F.2d 1301, 1306 (11th Cir. 1989) (assessing whether there was sufficient perception of a school as "black" to cause whites to not attend it). In addition, despite the Court's sensitivity and concern for these issues, the Court has likewise seen "black" schools lead to "black" districts, from which whites have fled for the same reasons. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467 (1992); *Milliken*, 418 U.S. 717. In short, the Court knew and history has shown that racially isolated or identifiable schools, even when not *de jure*, threaten equal educational opportunities for blacks and the goals of *Brown*.

The Court and the founders, moreover, demonstrated that the harm to blacks was not merely unequal facilities, instruction, and resources, but rather was an indelible harm that operated to shrink blacks' overall life opportunities, including the basic rights to participate in society and citizenship equally. Describing the overall restrictions that segregation placed on blacks, the Founders stated, "[w]hat is achieved educationally and culturally, we now know to be largely the result of opportunity and environment." 1954 WL 45730, 12-13. Similarly, the Court in *Brown*, recounting previous higher education decisions, found that even with all tangible factors being equal a racially isolated learning environment restricts a black student's "ability to study, to engage in

discussions and exchange views with other students, and, in general, to learn his profession." *Brown*, 347 U.S. at 493-494 (citing *McLaurin*, 339 U.S. at 641). The Court concluded that elementary school minority school children were also disadvantaged in these respects, if not more so than college students. Moreover, at this "pivotal" point in minority children's development, racial isolation spawns feelings of "inferiority as to their status in the community" at large, "affect[ing] their hearts and minds in a way unlikely ever to be undone." *Id.* Even the Kansas District Court that found that segregation was not legally objectionable could not deny the manner in which racial isolation limits black students to fundamentally different opportunities, finding:

> [s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Id. at 494.

Thus, if Brown is correct that education "is the very foundation of good citizenship," "awaken[s] the child to cultural values," and allows a child to "adjust normally to his environment," *Brown*, 347 U.S. at 493, 494, the above inequality, harm, and deprivation of the intangible aspects of education can have no other effect than to impose second class citizenship on minorities.

Again, the fact that the schools in the instant case are not racially isolated under the sanction of law does not then mean that these harms are not a threat or that *Brown's* promise has

been achieved. In fact, that wide isolation exists after all the courts' remedial efforts is evidence that *Brown's* struggle to eliminate racial stigma and the relevance of racial identifiability has not been achieved and that the harms of isolation persist. To conclude, as the Petitioners do (Petr's Br. at 31), that the racial isolation is not seriously problematic because the isolation is not *de jure* or intentional is to be as blind to reality as the majority was in *Plessy* when it wrote "the underlying fallacy of the plaintiff's argument [is] the assumption that the enforced separation of the races stamps the colored race with a badge of inferiority." 163 U.S. at 551. The majority simply denied the harm that the Court in *Brown* made manifest fifty years later. Just as "[e]veryone kn[ew in *Plessy*] that the statute in question had its origins in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons," so too do we know that inequality and stigma continue to proceed hand-in-hand with racial isolation due to a myriad of factors, including those discussed above. *Id.*, at 557.

II. THE COURT'S LONGSTANDING DEFERENCE TO SCHOOL DISTRICTS IN REMEDYING THE HARMS OF RACIAL ISOLATION IS NECESSARY TO ACHIEVE THE UNFINISHED PROMISE OF *BROWN*.

By compelling the use of race to integrate schools, the decisions in *Brown* and subsequent cases achieved resounding success at times. Although integration was essentially non-existent in the years immediately following *Brown*, after the Court announced affirmative desegregative obligations on the part of school districts in *Green* and Congress created financial consequences for the failure to desegregate in the Civil Rights Act of 1964, the southern states began a rapid process of desegregation. *See* Gary Orfield and Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, 9 (Jan. 2006), *available at* http://www.civil

rightsproject.harvard. edu (hereinafter *Racial Transformation*). Throughout the 1970's and into the mid 1980's, this progress in desegregation continued both regionally and nationally. *Id.* at 31.

The Court was clearly the first to act and a driving force in desegregation, but ironically its first instructions regarding desegregation placed the obligation, discretion and flexibility in the hands of school districts. In *Brown II*, the Court wrote that the "primary responsibility for elucidating, assessing, and solving th[e] problems" of desegregation rested with "school authorities." 349 U.S. at 299. The Court continued to adhere to this principle throughout its desegregation jurisprudence. *See, e.g., Green*, 391 U.S. at 437-38 (placing the duty of desegregation on school boards); *Milliken*, 418 U.S. at 744 (expressing concern over depriving schools of local control). As years of court supervision passed, however, the Court became increasingly concerned with its role in monitoring and constraining local control of school operations. Thus, rather than continued coercion of school districts, the Court indicated that the time was coming for lower courts to withdraw from these cases. For example, the Court emphasized in *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995), that "local autonomy of local school districts is a vital national tradition" and "a district court must strive to restore state and local authorities to the control of [their] school system." *See also Bd. of Educ. of Oklahoma City Public Schs. v. Dowell*, 498 U.S. 237, 247-48 (1991) (indicating desegregation decrees "are not intended to operate in perpetuity" and focusing on "necessary concern[s] for the important values of local control of public school systems").

Unfortunately, as the courts began effectuating this withdraw in the late 1980's, our nation's public schools began experiencing dramatic resegregation, which has continued to the point that the level of segregation today is similar to that which existed when the schools initially began efforts to desegregate. *See Racial Transformation, supra*, at 31. This

trend is most startling in our urban school districts where a majority of schools are almost exclusively attended by students of color and predominantly by students of the lowest income levels. These schools are the most racially isolated in the nation, with "more than half of the nation's African American and Latino students attending public schools in which at least three-quarters" of their peers are of color. Nancy Kober, *A Public Education Primer: Basic (and Sometimes Surprising) Facts about the U.S. Education System* 7 (Center on Education Policy 2006). Tragically, it is not only the segregation in schools that has reemerged but also the inequality that has always accompanied it. These same urban minority students are "much more likely than white students to attend high-poverty schools." *Id.* at 6. Moreover, these schools have:

> higher percentages of students who speak a language other than English at home, deteriorating facilities, higher rates of poverty among students, low teacher salaries compared to their suburban counterparts, lower quality teachers . . . larger overall student bodies, substantially higher percentages of minority students, and higher percentages of students who were eligible for free or reduced lunch.

Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & Pol. 49, 70-71 (2006).

Due to constitutional constraints, the federal courts conclude they no longer have the power to intervene to alleviate segregation and inequality. Yet the courts' options are far more constrained than those of school districts. Again, since *Brown*, the Court has emphasized that wide authority and discretion rests with school boards as to these matters. Most important, the Court has indicated that school boards can take more action to desegregate than the courts themselves could otherwise compel. For instance, the Court in *Swann* wrote,

> [s]chool authorities are traditionally charged with broad power to formulate and implement educational policy

> and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court.

402 U.S. at 16. Similarly, when addressing a ballot initiative that would prohibit integrative busing in Seattle, this Court noted that the power to address the racial problem in the schools was within the proper power of the local school board and should not have been abrogated. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982).

If *Brown's* promise and purpose is to live on, the Court should continue to take this same deferential approach toward schools districts. That segregation and inequality have emerged in a manner eerily reminiscent of the conditions that existed at the time of *Brown* is borne out by extensive data. That since *Brown* the Court has largely left the solution to these problems to local authorities is borne out by the Court's own language above. *See also Jenkins*, 515 U.S. at 89 (reiterating that one of only two "ultimate inquir[ies]" in desegregation cases is whether the district has acted in "good faith" commitment to desegregation). The only question now is simply whether the Court will ironically stand in the way of *Brown's* continuation or whether it will allow school districts to continue the work that the Court itself compelled of them for years.

III. VOLUNTARY SCHOOL INTEGRATION PLANS ARE VALUABLE AND NECESSARY TO ACHIEVING *BROWN*'S PROMISE.

One clear lesson we have learned from the half-century of attempting to meaningfully enforce *Brown* is that school integration does not occur by benign neglect or happy accident.

Left alone to follow segregated housing patterns, school districts will resegregate. *See Racial Transformation, supra*, at 31. But, in the face of evidence that history seems to be rapidly marching backwards, one encouraging development stands as a potential corrective to the resegregation trend: In recent years, educators, communities, and institutions of higher education have voluntarily pursued racially and ethnically integrated learning environments. *See Looking to the Future: Voluntary K-12 School Integration, A Manual for Parents, Educators, and Advocates* at 20-25 (2005), *available at* http:// www.civilrightsproject.harvard.edu/resources/manual/deseg_manual.php [hereinafter *Looking to the Future*]. With-out a court mandate to desegregate, school districts around the country are using voluntary integration plans to combat the affects of segregation on the child, the classroom, and society at-large. *Id*. at 16, 20-25. These voluntary efforts have come about because communities recognize the educational and social value of integration. *Id* at 15-19, 20.[5]

A. Integration Plans Offer Educational, Occupational and Societal Benefits for Black and White Children.

Extensive research continues to prove the educational, occupational, and societal benefits to *all* students—minority and white—from racially diverse schools. *Looking to the Future, supra,* at 17-19.[6] Positive interactions with students of

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[5] *See also* Derek Black, *The Case For The New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. Rev. 923 (2002) (detailing the extensive research and data establishing the tangible benefits of integration for all students in primary and secondary schools).

[6] *See also* Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, 77 Child Development 1375-1386 (September/October 2006) (showing that white grade school and high school children attending segregated schools are more likely to develop biased attitudes toward members of other races); Carl Bankston, III & Stephen J. Caldas, *The American School*

other races and ethnicities in integrated environments promote cross-racial understanding and dialogue, higher scores on achievement tests, lower dropout rates, access to broader social networks of resources, and higher aspirations. *Id.*, at

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Dilemma: Race and Scholastic Performance, 38 Soc. Q. 423, 428 (1997) (showing racially integrated settings are linked to improved achievement for black high school students); Jomills Henry Braddock, II & James M. McPartland, *The Social and Academic Consequences of School Desegregation, in Equity and Choice* 5, 63-68 (1988) (showing both long and short term consequences of racially diverse primary and secondary schools and colleges, including improved race relations, increased academic achievement, and preparation for diverse work settings); Marvin P. Dawkins & Jomills Henry Braddock, II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394, 397-400 (1994) (reviewing studies showing that black students from majority white elementary and secondary schools are more likely to persist at majority white colleges, have higher job expectations, move into integrated neighborhoods, acquire jobs, major in scientific or technical fields, and work in desegregated work environments); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio St. L.J. 733 (1998) (providing social science evidence supporting the theory that racial diversity promotes educational benefits in primary and secondary schools and in higher education); Mathtech, Inc., *The Outcomes of Diversity in Higher Education, in Mid-Year Report Prepared for Office of Educational Research and Improvement*, VII-4 to VII-7 (1998) (concluding that racial diversity has positive effects on student cognitive growth, interaction in the diverse work environment, and breaking down racial stereotypes); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education* 597 [hereinafter Handbook] (James A. Banks ed., 1995) (providing an overview of the social science evidence, both positive and negative, behind the value of diversity in primary and secondary education); Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in Handbook, supra, 628, 632 (showing that cooperative learning in racially diverse primary and secondary schools can improve racial attitudes and academic achievement among all students); Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. Educ. Psychol. 381, 386 (1979) (showing the long term positive effects of interracial cooperative learning).

17-19.[7] Long-term benefits include a racially diverse society, reduced racial stereotypes, workplace preparation, increased civic engagement and a desire to live in integrated settings. *Id.* at 18.[8] Endorsing *Brown*'s idea of integration, this Court recently recognized the long-term benefits of educational diversity in higher education in *Grutter* when it noted that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" 539 U.S. at 330 (internal citations omitted). These benefits are even greater for children in elementary and secondary schools, and accrue to *all* children. Rather than "separate children in a way that harms both those excluded from better schools and white students in those schools who are not being prepared for success in multiracial communities and workplaces of the future," integration brings them together for the benefit of all children and society. *Racial Transformation*, *supra*, at 4.

B. A Substantial Number of School Districts Have Adopted Voluntary Integration Plans.

Recognizing their educational, occupational and societal benefits, in recent years a substantial number of school districts have actively investigated and implemented voluntary

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[7] *See e.g.* Jomills Henry Braddock, II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 Phi Delta Kappan 259, 260-61 (Dec. 1984) (discussing several studies that show white and black students who attend desegregated schools are more likely to attend diverse colleges as adults, live in integrated neighborhoods, work in diverse firms, and have friends of another racial group).

[8] *See also* Jomills Henry Braddock, II & James McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Be-tween School and Employment Desegregation*, 19 J. Black Stud. 267, 283-84 (1989) (suggesting that high school desegregation promotes positive perceptions and social contacts among blacks and whites).

integration plans. These plans use a variety of strategies "to encourage racial integration and to produce the kinds of educational benefits that flow from integrated learning" environments. *Looking to the Future, supra*, at 20. The most common strategies include, among others, attendance zones, student transfers, magnet schools, school choice, and inter-district transfer programs. *Id.* at 20-24. To date, about seventeen percent of public school students attend "schools of choice" or public schools chosen by their parents. *See A Public Education Primer*, *supra*, at 4. Two of the most popular types of school choice programs include magnet schools, which have specialized curricula designed to attract students of diverse racial and ethnic backgrounds, and charter schools, which are publicly funded schools governed by a group under a charter. Today, over two million public school students attend magnet schools. *Looking to the Future, supra* at 22.

C. The United States Department of Education Has Endorsed Voluntary School Integration Plans.

The recognition of the salutary value of voluntary integration plans is not confined to individual public school districts but has also been promoted by the United States Department of Education through its Magnet Schools Assistance Program (MSAP). *See Id.*, at 22. MSAP provides grants to "assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students." U.S. Dept. of Educ., Magnet Schools Assistance, *available at* http://www.edu.gov/programs/magnet/index.html. Nation-wide, school districts are taking advantage of MSAP by following in the footsteps of New Jersey's Montclair Magnet System, a system "dedicated to becoming the national role model for public integrated education." Montclair Magnet System, Historical Perspective, *available at* http://www.montclair.k12.nj.us/

district/magnet/history.cfm. A pioneer in the magnet school model, Montclair's school choice system was originally implemented in 1977 as a voluntary desegregation plan; today it is know for its "positive impact on the community." *See id.* Most recently, Montclair's educational system was selected by the U.S. Department of Education as one of the six best magnet systems in the country. *See* http:// www. montclair. k12.nj.us.district/magnet/index.cfm.

D. Federal Courts, Including this Court, Have Recognized the Value of Voluntary School Integration Plans.

This Court has recently recognized the benefits of integration. In *Grutter*, 539 U.S. at 330, the Court found that the University Of Michigan Law School has a "compelling interest in a diverse student body," and that race was one important factor in that diversity. Such diversity

> "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand person of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.
>
> ….
>
> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Id. (internal citations omitted)

To be sure, *Grutter*'s holding that diversity is a compelling state interest spoke specifically to higher education. However, nothing in this Court's opinion indicates that its recognition of the benefits of diversity in universities and graduate schools are somehow inapplicable to primary and secondary

public schools. The *Brown* Court originally noted, as *Grutter* later came to reinforce, that factors "incapable of objective measurement," including the ability of students of different racial backgrounds to "study [and] engage in discussions and exchange views with other students," contributed to the quality of law and graduate schools, and that, rather than being inapplicable, "[s]uch considerations appl[ied] with added force to children in grade and high schools." *Brown*, 347 U.S. at 493-94.

Similarly, for decades, federal courts have consistently noted the benefits of integration and the recognition of local school authorities to voluntarily remedy the harms of *de facto* segregation or racial isolation. *See Parents Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 581 n.9 (2d. Cir. 1984) (school boards may take otherwise "constitutionally suspect measures to counteract the perceived problem of accelerated white flight"); *Clark v. Bd. of Educ. of Little Rock*, 705 F.2d 265, 271 (8th Cir. 1983) ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, it may be taken into account in an attempt to promote integration."); *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504, 518 (7th Cir. 1979), *vacated and remanded on other grounds*, 457 U.S. 52 (1982) ("[T]he absence of a constitutional duty on the part of the school authorities to establish racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change."); *Deal v. Cincinnati Bd. of Educ*., 369 F.2d 55, 61 (6th Cir. 1966) ("Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, . . . it is not unconstitutional for them 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.")).

IV. ALLOWING SCHOOL DISTRICTS TO USE RACE-CONSCIOUS MEASURES IS THE LAST BEST CHANCE OF ACHIEVING *BROWN*'S PROMISE.

While the trend toward voluntary integration is a welcome development, the threat of school segregation is neither obsolete nor speculative. *Racial Transformation*, *supra*, at 4. School segregation is increasing nationally, regionally and in individual school districts due to residential segregation, concentrated levels of poverty, and repeals of desegregation plans beginning in the 1990s with this Court. *Id.* at 37. Moreover, no public school district has ever succeeded in integrating its schools without consciously using race as a tool. In light of that real-world experience, race-conscious measures stand as the last best chance of realizing *Brown*'s promise of equal education and opportunity for all.

A. Narrowly Tailored Race-Consciousness Is an Irreplaceable Tool in Voluntary School Integration Plans.

This Court validated the use of race or race-conscious measures to achieve integration in *Grutter* where it found that "diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. At this point, in addition to the Sixth and Ninth Circuits, the Third Circuit has also applied *Grutter*'s holding to primary and secondary education. In *Comfort v. Lynn Sch. Cmty.*, 418 F.3d 1 (1st Cir. 2005) *cert. denied*, 126 S. Ct. 798 (2005), the First Circuit upheld a race conscious student transfer policy that provided students with an opportunity to attend another school within the district if doing so either reduced racial isolation or improved racial diversity.

As the courts below noted, the race-conscious policies adopted in Seattle and Louisville are permissible because they are narrowly tailored to serve the compelling interest of

diversity. Like the law school in *Grutter*, the Seattle and Louisville schools "consider[] race as one factor among many" in assigning students to schools. *Grutter*, 534 U.S. at 340. Furthermore, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id*. at 339. This Court observed in *Grutter*,

> "The District Court took the Law School to task for failing to consider race-neutral alternatives such as 'using a lottery system' or 'decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.' But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."

Id. at 340. Similarly, using alternatives such as a lottery system, or attempting to integrate by socio-economic status, would not ensure diversity in the public schools in Seattle and Louisville.

In the Louisville case, for example, the district court found that narrow-tailoring did not require the school district to attempt to integrate using a lottery system, noting that "[s]uch a system . . . would require a 'dramatic sacrifice' in student choice, geographic convenience and program specialization." *McFarland v.Jefferson Co. Bd. of Educ.*, 330 F. Supp. 2d 834, 861 (W.D. Ky. 2005). The Ninth Circuit also addressed the possibility of a lottery system for the Seattle school district, and observed that it would not serve the goal of integration because

> [d]istrict patterns [in Seattle] indicate that more people choose schools close to home. That would mean that the pool of applicants would be skewed in favor of the demographic of the surrounding residential area. That is, the applicant pool for the north area oversubscribed high schools would have a higher concentration of white students and the applicant pool for the south area oversubscribed high school would have a higher concentration of nonwhite students. Thus, random sampling from

> such a racially skewed pool would produce a racially skewed student body.

Parents, 426 F.3d at 1190. The court also pointed out that the Seattle school board had considered achieving integration by using poverty as a proxy for race, but determined that such a method may be ineffective and would have adverse effects. *Id*. at 1188-89. Since integrated schools will not be attained without these race-conscious methods, the paramount vision conceived in *Brown* will not be realized if they are disallowed.

B. Upholding Race-Conscious Measures in Voluntary Integration Plans Would Keep Faith with *Brown*; Denying them Would Break with *Brown*'s Promise of Full, Equal, and Integrated Educational Opportunities for All.

"History," wrote the poet Byron, "with all her volumes vast, hath but one page."[9] This page of our national history of school integration is not new. Both as a matter of constitutional jurisprudence and historical fact, this Court once before faced the choice to permit in primary and secondary school education that which it had already endorsed in higher education. With the present companion cases, the Court now confronts, in the wake of its 2003 *Grutter* decision, virtually the exact same legal landscape the 1954 *Brown* court faced in the wake of its 1950 decision in *Sweatt*. Just as *Grutter* endorsed the judgment that *integration* is vital in the law school classroom, *Sweatt* established that *segregation* was unsupportable there. 339 U.S. at 629. Just as the *Brown* court extended the holding in *Sweatt* to primary and secondary education, so too this Court should extend *Grutter*'s holding in exactly the same way. Perhaps the remarkable

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[9] George Gordon Noel Byron, Lord Byron, Childe Harold's Pilgrimage, Canto iv, stanza 108, *in The Complete Poetical Works of Lord Byron, Volume 2* (Jerome J. McGann ed.) (1981).

factual parallel between the *Sweatt* and *Brown* decisions and *Grutter* and the present companion cases can be dismissed as mere precedential serendipity, but as a matter of constitutional jurisprudence the point comes to this: *Sweatt* is to *Brown* what *Grutter* is to the present companion cases. To uphold the decisions of the lower courts in these cases would be to keep faith with *Brown*. To reverse would be to break with its promise of full, equal, and integrated educational opportunities for all.

CONCLUSION

In 1954, this Court in *Brown* courageously set the nation on a path toward racial integration. In the more than fifty years since, the path has been neither straight nor easy and, for all of *Brown*'s successes, the truth is here and now we find ourselves at a critical point where we will either continue on the path to school integration or turn back toward resegregation. Narrowly-tailored, race-conscious voluntary integration is consistent with the vision of the founding litigators who first envisioned *Brown*, represents the natural evolution of this Court's *Brown* opinion, and stands as the last best chance of achieving *Brown*'s fundamental goal of meaningful and effective public school integration. We pray this Court not break faith with *Brown*, but instead reaffirm its promise, and uphold the decisions of the circuit courts to give local school boards the irreplaceable race-conscious tools they need to continue voluntarily integrating their schools.

Respectfully submitted,

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APPENDIX

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