Appeal No. 01-35450
District Court No. C00-1205R

In the UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Plaintiff-Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington at Seattle

BRIEF AMICI CURIAE FOR THE COUNCIL OF THE GREAT CITY SCHOOLS, THE NATIONAL SCHOOL BOARDS ASSOCIATION, THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND THE PUBLIC EDUCATION NETWORK IN SUPPORT OF PETITION FOR REHEARING EN BANC BY APPELLEES

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae*, Council of the Great City Schools, the National School Boards Association, the American Association of School Administrators, and the Public Education Network, state that they are nonprofit 501(c)(3) organizations, and therefore they are not publicly held companies that issue stock.

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is submitted on behalf of the Council of the Great City Schools ("Council"), the National School Boards Association ("NSBA"), the American Association of School Administrators ("AASA"), and the Public Education Network ("PEN"). The Council 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. NSBA is a not-for-profit federation that 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. AASA, founded in 1865, is the principal professional organization for over 14,000 educational leaders across America and in many other countries. PEN is a national organization of 89 local education funds that work in more than 1200 school district to build citizen support for quality public education in low-income communities across the nation.

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 providing racially and ethnically diverse school environments, where it is feasible to do so.

ARGUMENT

To maintain the consistency of judicial decisions and resolve a matter of exceptional importance, this Court should grant the Seattle School District's ("Seattle" or the "District") petition for rehearing. *See* Fed. R. App. P. 35(a); Ninth Cir. R. 35-1.

I. THE EN BANC COURT SHOULD REHEAR THIS CASE BECAUSE THE PARAMETERS OF SCHOOL DISTRICTS' AUTHORITY TO PROMOTE THE VARIED AND SUBSTANTIAL EDUCATIONAL BENEFITS OF DIVERSE STUDENT ENROLLMENTS PRESENT A CRUCIAL AND UNSETTLED QUESTION

Student assignment is a central part of the role and responsibility of locally elected school boards throughout the United States. Such school boards also have traditionally enjoyed broad authority to establish student assignment policies and procedures that address the needs of their communities and promote their educational values.

The processes by which school districts assign students, moreover, are a matter of general public interest. In the nine states and two U.S. territories governed by rulings of this Court, hundreds of thousands of families rely on locally-adopted student assignment polices in making important life decisions, including choices about where to live, whether to purchase a house, and what school to attend.

The Supreme Court's 2003 opinions in the University of Michigan cases, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003), have clarified one major legal issue related to the student assignment policies of school districts: As the panel majority recognized, since the educational benefits of diverse enrollments constitute a compelling governmental interest sufficient to justify race-conscious admissions policies in higher education, there is no "principled basis" for concluding that the similar, although not identical, advantages of diversity in the K-12 context do not constitute such a compelling interest. Slip Op. at 10008. Indeed, the various interests that school districts may promote by ensuring racially and ethnically diverse school enrollments – including Seattle's goals of minimizing the effects of residential segregation and enhancing educational opportunities – are broader, deeper, and stronger than those at the college level. 1/

1/ *See, e.g., Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) ("Attending 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."); Pettigrew & Tropp, *Does Intergroup Contact Reduce Prejudice? in* Reducing Prejudice and Discrimination 93, 109 (Stuart Oskamp ed., 2000) (interracial contact in K-12 schools helps break down stereotypes); Dutton, et al., *Racial Identity of Children in Integrated, Predominantly White, and Black Schools*, 138 J. Soc. Psychol. 41, 42 (1998) (K-12 schools play an important role in fostering positive racial attitudes); Slavin, *Cooperative Learning and Intergroup Relations*, *in* Handbook of Research on Multicultural Education (1995).

However, because *Grutter* and *Gratz* discussed competitive university admissions policies, courts reviewing typically non-selective K-12 student assignment systems are without guidance on the context-specific issue of "narrow tailoring." The Supreme Court "has never decided a case involving the consideration of race in a voluntarily imposed school assignment program." Slip Op. at 10057. Moreover, other cases pending before this Court involving race-conscious admissions for selective colleges and universities, *see Smith v. Univ. of Wash. Law Sch.*, No. 97-3352 (W.D. Wash. June 5, 2002), *appeal docketed*, No. 02-35676 (9th Cir. July 19, 2002), and race-conscious admissions for independent schools, *see Doe v. Kamehameha Schs.*, 295 F. Supp. 2d 1141 (D. Haw. 2003), *appeal docketed*, No. 04-15044 (9th Cir. Jan. 12, 2004), also do not involve the distinct circumstances of public K-12 education.

This case, therefore, is of exceptional importance: It affords this Court the opportunity to clarify this issue and provide stability for the thousands of school districts and hundreds of thousands of families that it affects.

II. THE PANEL MAJORITY'S NARROW-TAILORING ANALYSIS DEPARTED FROM PRECEDENTS OF THIS COURT AND THE SUPREME COURT IN INCORRECTLY EQUATING ELEMENTARY AND SECONDARY STUDENT ASSIGNMENT WITH SELECTIVE HIGHER EDUCATION ADMISSIONS

Despite the fact that school districts have similar – indeed, even more compelling – interests in providing racially and ethnically diverse educational

environments, student assignment at the K-12 level, in practice, has very little in common with the higher education admissions processes. As a result, neither the Supreme Court's decisions in *Grutter* and *Gratz* nor the panel majority's mechanistic application of these decisions provide school districts with appropriate guidance about what narrowly-tailored, race-sensitive student assignment policies should look like.

First, as this Court has previously recognized on several occasions, but the panel majority rejected, student assignment at the K-12 level 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, this Court stated that:

> [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). This Court repeatedly has noted the difference between "stacked-deck" programs (such as affirmative-action admissions programs at elite graduate schools) and "reshuffle" programs (such as school desegregation). *Id.; Associated Gen. Contractors of California v. San Francisco Unified Sch. Dist.,* 616 F.2d 1381, 1387 (9th Cir. 1980). *See also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 160 (Wash. 2003). "Stacked deck" programs are analogous to the ones the Supreme Court

examined in *Grutter* and *Gratz* and use race as a factor to admit one student and deny access to another and, therefore, implicate Fourteenth-Amendment values in a way that reshuffle programs do not. *Wilson*, 122 F.3d at 708.

With "reshuffle" programs, however, there is no limited benefit or special opportunity being allocated, and this is exactly the case in Seattle, where every student receives a free public education in one of the District's high schools. As another federal court, grappling with "narrow tailoring" at the K-12 level after *Grutter* and *Gratz*, aptly emphasized: The question in that setting is not "whether a given plaintiff will receive a given limited benefit" but "whether any student is entitled to a particular school assignment at all." *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 373 (D. Mass. 2003). *See also McFarland v. Jefferson County Pub. Schs.*, No. 3:02CV-620-H (W.D. Ky. June 29, 2004).

Second, as a practical matter, school districts facing both daunting challenges under state and federal school accountability systems and declining education funding lack the resources to assign students to schools based on an individualized assessment of every student. Unlike universities, public schools do not have the resources to evaluate thousands of personal statements, letters of recommendation, transcripts, and other materials in making school assignments.

Judge Graber thus was right to highlight in dissent what Justice O'Connor wrote in *Grutter*: In applying strict scrutiny, context matters. Slip Op. at 10057

(citing *Grutter*, 539 U.S. at 327). Indeed, to ignore this criterion ironically would ensure that in the non-selective context of student assignment, strict scrutiny would be "strict in theory and fatal in fact," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995), even as it is not in the competitive context of college admissions. *See Grutter*, 539 U.S. at 326-27.

III. THE PANEL MAJORITY ALSO DISREGARDED THE PROPER AUTHORITY OF LOCAL SCHOOL DISTRICTS OVER MATTERS OF EDUCATIONAL POLICY

School districts should have the discretion to develop educational policies, including those judiciously using race as a factor, that provide educational benefits for all students. Recognizing that every community has different educational concerns and that elected school boards are uniquely attuned to the educational needs of their communities, the Supreme Court has often deferred to local school authorities even when constitutional concerns were at issue. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (reiterating the Court's "oft-expressed view that 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") (citations omitted). In *Swann v. Charlotte Mecklenburg Board of Education*, the Supreme Court specifically identified the consideration of racial diversity in student assignment as an area in which deference is due local officials. 402 U.S. 1, 16 (1971).

Likewise, this Court's prior decisions have explicitly stated that in evaluating whether the "use of race/ethnicity in [an] admissions process is narrowly tailored" courts should avoid "second-guessing legitimate academic judgments." *Hunter v. Regents of the Univ. of California*, 190 F.3d 1061, 1066-67 (9th Cir. 1999) (quoting *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990)). Instead, this Court has counseled respect for educators' "professional judgment." *Hunter*, 190 F.3d at 1067.

The panel majority, however, inappropriately second-guessed the educational judgments of local officials, suggesting that the academic benefits of diverse enrollments are somehow "tangential" or "secondary" to the District's "core goals." Slip Op. at 10043. This assertion is flatly wrong and contradicts what professional educators across the country understand about the role diversity plays in teaching and learning for all students, the central focus of public education.2 Moreover, all students in integrated schools, and particularly minority students in such environments tend to have higher academic achievement.3/ The State of Washington also has concluded that diverse learning environments

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2 Diversity in K-12 schools, for example, helps to cultivate critical-thinking skills. *See, e.g.,* McLeod, et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248 (1996).

3/ *See, e.g.,* Zirkel, et al., *The 50th Anniversary of Brown v. Board*, 60 J. Soc. Issues 1 (2004); Dawkins &. Braddock, *The Continuing Significance of Desegregation,* 63 J. Negro Educ. 394 (1994).

"further a *core mission* of public education; to make available an equal, uniform and enriching educational environments for all students within the district." *Parents Involved in Cmty. Schs.*, 72 P.3d at 166 (emphasis added).

Public schools serve a fundamental role in our democratic society. 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 work hard to cultivate positive racial attitudes and teach children how to think critically so that they can live and work in increasingly diverse communities. *See supra* note 1. Yet many school districts, like Seattle, face persistent challenges in trying to meet these goals, including racial inequities based in life opportunities, income, and housing options.

In the end, preventing school districts from adopting appropriate voluntary race-conscious plans would take away a valuable educational policy tool and help to perpetuate ongoing cycles of inequality. At the conclusion of her opinion in *Grutter*, Justice O'Connor hoped that the need for affirmative action in university admissions would end within twenty-five years. 539 U.S. at 343. That future depends, in large part, on K-12 school districts that successfully promote positive racial attitudes and close achievement gaps between 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.

CONCLUSION

For these reasons, amici urge the Court to grant rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), this attached amici brief in Support of Petition for Rehearing by Appellees Seattle School District, No. 1, *et al.*, is proportionately spaced, has a typeface of 14 points or more and contains 2092 words, not including the Table of Contents, Table of Authorities, Certification of Compliance, and Certificate of Service.

DATED this 17th day of August, 2004.

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Jason T. Snyder

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2004, two copies of the foregoing *amici curiae* brief were served on the following by First Class U.S. mail:

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