

---

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

---

**BRIEF of the NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, INC. as *AMICUS CURIAE*  
IN SUPPORT OF REHEARING *EN BANC***

---

Theodore M. Shaw  
DIRECTOR-COUNSEL  
Norman J. Chachkin  
Chinh Quang Le  
NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, INC.  
99 Hudson Street, Suite 1600  
New York, New York 10013  
(212) 965-2200 Phone  
(212) 226-7592 Fax

Kimberly West-Faulcon  
Erica Teasley Linnick  
NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, INC.  
1055 Wilshire Boulevard, Suite 1480  
Los Angeles, California 90017  
(213) 975-0211 Phone  
(213) 202-5773 Fax  
  
Counsel for *Amicus Curiae*

## **STATEMENT OF CORPORATE DISCLOSURE**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae*, NAACP Legal Defense & Educational Fund, Inc., states that it is a non-profit 501(c)(3) organization, and therefore it is not a publicly held company that issues stock.

## TABLE OF CONTENTS

STATEMENT OF CORPORATE DISCLOSURE .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST .....	1
ARGUMENT .....	2
I.    The Court Should Grant the Petition for Rehearing <i>En Banc</i> Because this Case Presents a Novel Constitutional Question With Important, Broad-Reaching Consequences for the Future of Public Primary and Secondary Education. ....	2
II.   The Framework Established in <i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003), Should Not Have Been Applied Mechanistically Without Recognition of the Unique Context of K-12 Student Assignment. ....	7
CONCLUSION .....	10
CERTIFICATE OF COMPLIANCE .....	11
CERTIFICATE OF SERVICE .....	12

## TABLE OF AUTHORITIES

### Federal Cases

<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986) .....	8
<i>Brewer v. West Irondequoit Cent. Sch. Dist.</i> , 212 F.3d 738 (2d Cir. 2000) .....	1, 5, 8
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954) .....	1, 2
<i>Burris v. Rock Hill Sch. Dist. No. 1</i> , No. 0:02-1409-10 (D.S.C. filed April 30, 2002) .....	2
<i>Comfort v. Lynn School Comm.</i> , 263 F. Supp. 2d 209 (D. Mass. 2003) .....	2, 6, 9, 10
<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003) .....	1, 6
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003) .....	1, 3, 6, 7
<i>Hopwood v. Texas</i> , 78 F.3d 932 (5th Cir.), <i>cert. denied</i> , 518 U.S. 1033 (1996) .....	1
<i>Hunter v. Bd. of Regents of Univ. of Cal.</i> , 190 F.3d 1061 (9th Cir. 1999) .....	6
<i>Johnson v. Bd. of Regents of Univ. System of Ga.</i> , 263 F.3d 1234 (11th Cir. 2001) .....	1
<i>McFarland v. Jefferson County Public Sch.</i> , No. 3:02CV-620-H (W.D. Ky. June 29, 2004) .....	1, 6, 10

<i>Regents of the Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978) .....	1
<i>Washington v. Seattle Sch. Dist. No. 1</i> , 458 U.S. 457 (1982) .....	1
<i>Wessmann v. Gittens</i> , 160 F.3d 790 (1st Cir. 1998) .....	1
<i>United States v. Paradise</i> , 408 U.S. 149, 182 (1987) .....	9

**State Cases**

<i>Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1</i> , 72 P.3d. 151, 162 (Wash. 2003) .....	8
---	---

**Rules**

Fed. R. App. P. 35(a)(1) & (2) .....	6
L.R. 35-1 .....	6

**Miscellaneous**

Elliot Aronson & Shelley Patnoe, <i>The Jigsaw Classroom: Building Cooperation in the Classroom</i> (2d ed. 1997) .....	4
Elliot Aronson & Diane Bridgeman, <i>Jigsaw Groups and the Desegregated Classrooms</i> , 5 <i>Personality &amp; Soc. Psychol. Bull.</i> 438 (1979) .....	4
Marvin P. Dawkins & Jomills H. Braddock, <i>The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society</i> , 63 <i>J. Negro Educ.</i> (1994) .....	5
Christopher Ellison & Daniel A. Powers, <i>The Contact Hypothesis and Racial Attitudes Among Black Americans</i> , 75 <i>Soc. Sci. Q.</i> 385 (1994) .....	4

Erica Frankenberg, Chungmei Lee, & Gary Orfield, <i>A Multiracial Society with Segregated Schools: Are We Losing the Dream?</i> 30-34 (Jan. 2003) . . . . .	3
John R. Logan, <i>Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America</i> (Oct. 13, 2002) . . . . .	5
John R. Logan, <i>Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000</i> (revised Mar. 29, 2002) . . . . .	3
Gary Orfield & Chungmei Lee, <i>Brown at 50: King's Dream or Plessy's Nightmare?</i> 21-22 (Jan. 2004) . . . . .	4
Wendy Parker, <i>The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges</i> , 81 N.C. L. Rev. 1623 (2003) . . . . .	5
Janet Ward Schofield, <i>Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research</i> , in <i>Diversity Challenged: Evidence on the Impact of Affirmative Action</i> 99 (Gary Orfield & Michal Kurlaender eds. 1999) . . . . .	5
Janet Schofield, <i>Black and White in School: Trust, Tension, or Tolerance?</i> (1982) . . . . .	4
Lee Sigelman & Susan Welch, <i>The Contact Hypothesis Revisited</i> , 71 Soc. Forces 781 (1993) . . . . .	4
Amy Stuart Wells, <i>et al.</i> , <i>How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society</i> (Apr. 2004) . . . . .	4
Amy S. Wells & Robert L. Crain, <i>Perpetuation Theory and the Long-Term Effects of School Desegregation</i> , 64 Rev. Educ. Res. 531 (1994) . . . . .	5

## STATEMENT OF INTEREST

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”) is a nonprofit corporation that assists African Americans and other people of color secure their constitutional and civil rights. The nation’s oldest civil rights law firm, LDF has been integral in the struggle to dismantle racial segregation and pursue equal educational opportunity. It represented African American plaintiffs in the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), and has been involved in numerous subsequent landmark school desegregation cases.

LDF has also participated in litigation seeking to foster racial integration and diversity in the context of both affirmative action in higher education, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Johnson v. Bd. of Regents of Univ. System of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), and voluntary integration policies in public primary and secondary schools. *E.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *McFarland v. Jefferson County Public Sch.*, No. 3:02CV-620-H (W.D. Ky. June

29, 2004); *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 2003); *Burris v. Rock Hill Sch. Dist. No. 1*, No. 0:02-1409-10 (D.S.C. filed April 30, 2002).

As its extensive involvement in prior related matters demonstrates, LDF has a strong interest in preserving the ability of school districts to shape educational policies that ensure equal opportunity and foster racially and ethnically integrated learning environments.

## ARGUMENT

### **I. The Court Should Grant the Petition for Rehearing *En Banc* Because this Case Presents a Novel Constitutional Question With Important, Broad-Reaching Consequences for the Future of Public Primary and Secondary Education.**

This case raises the exceptionally important question of whether and to what extent school districts, acting in good faith and exercising their sound discretion, may voluntarily employ race-conscious student assignment policies in their quest to fulfill the promise of equal, integrated public education that the United States Supreme Court envisioned fifty years ago in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

In *Brown*, the Supreme Court recognized the detrimental impact of racial segregation. 347 U.S. at 494-95. Although no longer legally enforced, pervasive

racial isolation in American schools--and the harms associated with it--continue to exist today. Indeed, in recent years, this nation has witnessed not just a grinding halt in the progress of school desegregation, but a steady *resegregation* of public schools to levels not seen in nearly three decades. Today, three out of four black and Latino children attend schools in which they constitute a majority, and a remarkable one-third attend intensely segregated schools, where students of color comprise between ninety and one hundred percent of the pupil population.<sup>1</sup>

For the vast majority of students in these segregated minority schools, the guarantee of equal educational opportunity remains illusory. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (“However strong the public’s desire for improved education systems may be, . . . it remains the current reality that minority students encounter markedly inadequate and unequal educational opportunities.”) (Ginsburg, J., concurring). Predominantly minority schools are significantly more likely than their white counterparts also to be centers of poverty concentration,

---

<sup>1</sup> Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 30-34 (Jan. 2003); *see also* John R. Logan, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000* (revised Mar. 29, 2002).

plagued by inadequate educational resources, high teacher turnover, lower levels of parental participation, fewer course offerings, and low expectations.<sup>2</sup>

Integrated schools, meanwhile, offer the promise of unique educational benefits. Decades of rigorously tested social science research demonstrate that students, regardless of race, attending schools with diverse enrollments exhibit greater toleration of and appreciation for members of other racial backgrounds, have an increased sense of civic engagement, and manifest a greater desire to live and work in multiracial settings as adults.<sup>3</sup> In addition to improving cross-racial understanding and challenging racial stereotypes, integrated schools have also been found to have a positive impact on the educational achievement, educational and

---

<sup>2</sup> See, e.g., Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare?* 21-22 (Jan. 2004).

<sup>3</sup> See, e.g., Amy Stuart Wells, *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004); Elliot Aronson & Shelley Patnoe, *The Jigsaw Classroom: Building Cooperation in the Classroom* (2d ed. 1997); Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 *Soc. Sci. Q.* 385 (1994); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited*, 71 *Soc. Forces* 781 (1993); Janet Schofield, *Black and White in School: Trust, Tension, or Tolerance?* (1982); Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classrooms*, 5 *Personality & Soc. Psychol. Bull.* 438 (1979).

occupational aspirations, and social and post-educational experiences of minority students who attend them.<sup>4</sup>

Thus, it is no wonder that some school districts have sought to capture the benefits of racial diversity and stave off the harms of racial isolation through the voluntary adoption of integrative, race-conscious student assignment policies. Indeed, given the persistence and pervasiveness of residential segregation in this country,<sup>5</sup> and the release of more and more school systems from court-ordered desegregation obligations each year,<sup>6</sup> the ability of school systems to counteract the trend toward resegregation is perhaps more critical now than ever.

Although several recent rulings have sustained these voluntary policies in the face of constitutional attacks, *see, e.g., Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Hunter v. Bd. of Regents of Univ. of Cal.*, 190

---

<sup>4</sup> Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action 99* (Gary Orfield & Michal Kurlaender eds. 2001); Marvin P. Dawkins & Jomills H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 *J. Negro Educ.* (1994); Amy S. Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 *Rev. Educ. Res.* 531 (1994).

<sup>5</sup> *See, e.g.,* John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (Oct. 13, 2002).

<sup>6</sup> *See, e.g.,* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 *N.C. L. Rev.* 1623 (2003).

F.3d 1061 (9th Cir. 1999); *McFarland v. Jefferson County Public Sch.*, No. 3:02CV-620-H (W.D. Ky. June 29, 2004); *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 2003), this area of law remains unsettled, and the instant case represents the first opportunity for a federal appellate court to discuss how the landmark Supreme Court decisions of *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), impact the analysis of K-12 voluntary integration policies. This ruling is one upon which hundreds of school districts within the jurisdiction of this Court will rely and to which numerous other courts, deciding similar issues in years to come, will undoubtedly turn.

Yet, the three-judge panel did not produce a definitive pronouncement. Rather, it was deeply divided, with only one judge from this Court in the majority joined by a visiting judge sitting by designation. The “spirited and thoughtful” dissent, representing a “fundamentally divergent perspective,” Slip Op. at 10040, disagreed not only with the majority’s result, but with its legal analysis as well. *See id.* at 10056-10100. On a question of constitutional law as vital to the future of our nation’s public education system as the one presented here, greater clarity and guidance from an *en banc* panel of this Court is needed. *See Fed. R. App. P.* 35(a)(1)&(2); L.R. 35-1.

**II. The Framework Established in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Should Not Have Been Applied Mechanistically Without Recognition of the Unique Context of K-12 Student Assignment.**

As the dissent keenly noted, one of the most important lessons to emerge out of *Grutter* is that courts applying strict scrutiny must calibrate their analyses to the context in which the race-conscious action takes place. Slip Op. at 10057-58 (citing *Grutter*, 537 U.S. at 327). The majority, however, failed to heed the Supreme Court’s guidance and instead formulaically required the Seattle School District here to meet essentially the same expectations that the Supreme Court placed upon the Law School in *Grutter*, without pausing to recognize the considerable differences between admission to a selective institution of higher education and assignment to one of several nonselective public high schools within a single school system. *See, e.g.*, Slip Op. at 10018.

Perhaps the most striking distinction either overlooked or ignored by the majority is in the very interest at stake itself. In faulting the District for not “serious[ly] consider[ing] all the ways an applicant might contribute to a diverse educational environment,” *Id.* at 10019 (quoting *Grutter*, 539 U.S. at 337), the majority inaccurately conflates the District’s interest with the kind of “true” diversity sought in *Grutter*, where other factors apart from race were relevant in the analysis. The District’s interest, however, is in avoiding the *racial* isolation that

would otherwise result from Seattle's *de facto* residential patterns and in fostering racial diversity. *Id.* at 10060-69.<sup>7</sup> As the dissent rightly points out, "when the District's compelling interest is in racial diversity, it makes little sense to ask it instead to evaluate a student's musical talent, athletic prowess, or eligibility for a free lunch." *Id.* at 10078 (citing *Brewer*, 212 F.3d at 752-53). Imposing such considerations upon the District would be to replace the sound educational judgment of school officials with the majority's view of what the District should do.

Similarly, the majority's insistence on analytically awkward comparisons between higher education admissions and K-12 schools prevents it from viewing the challenged plan in its proper context: that of American public education, which unlike colleges and universities, has a tradition of compulsory assignment. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The relevant metric, therefore, is not unfettered choice or merit-driven, selective admission, but mandatory student assignment. Analyzed from this perspective, it becomes clear that the very decision to use an assignment policy that affords

---

<sup>7</sup> Indeed, as the Washington Supreme Court observed, "the justifications for racial integration are strong and lie close to the central mission of public schools." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 72 P.3d. 151, 162 (Wash. 2003).

limited student choice (as opposed to the use of mandatory assignments) is itself evidence of the District's efforts to foster racial integration in a narrowly tailored way that has a *de minimus* burden--if any--on individual students. *See Comfort*, 283 F. Supp. 2d at 377.

Lastly, the majority's failure to recognize important contextual differences leads it to downplay another fundamental principle of narrow tailoring analysis: that courts must determine whether the challenged race-conscious action imposes a harm on third parties and weigh the degree of that harm in assessing whether a constitutional violation has occurred. *See, e.g., United States v. Paradise*, 408 U.S. 149, 182 (1987) (finding significant that the challenged racial classification had a minimal impact on other applicants). The majority's contrary claim--that "the asserted degree of intrusion that a particular use of race might render" is irrelevant, Slip Op. at 10037--is plainly at odds with Supreme Court precedent.

This erroneous conclusion also conflicts with the decisions of other federal courts also grappling with "narrow tailoring" in the context of nonselective public schools within the same district.<sup>8</sup> Assessing the "impact on third parties" one such

---

<sup>8</sup> Notably, although the Supreme Court has not directly addressed this question, in the context of court-ordered desegregation, it never once mentioned a need to balance desegregation remedies with any supposed "harm" that students who wish to be free from integrated assignments might endure.

court aptly emphasized that the question in the K-12 setting is not “whether a given plaintiff will receive a limited benefit” but “whether any student is entitled to a particular school assignment at all.” *Comfort*, 283 F. Supp. 2d at 328; *see also McFarland, supra*.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court grant to grant the petition for rehearing *en banc*.

Respectfully submitted,

Theodore M. Shaw  
DIRECTOR-COUNSEL

Dated: August 17, 2004

---

Norman J. Chachkin  
Chinh Quang Le  
NAACP Legal Defense & Educational Fund, Inc.  
99 Hudson Street, Suite 1600  
New York, New York 10013  
(212) 965-2200 Phone  
(212) 226-7592 Fax

Kimberly West-Faulcon  
Erica Teasley Linnick  
NAACP Legal Defense & Educational Fund, Inc.  
1055 Wilshire Boulevard, Suite 1480  
Los Angeles, California 90017  
(213) 975-0211 Phone  
(213) 202-5773 Fax

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 40-1(a) because it contains 2100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14 point, Times New Roman font.

Dated: August 17, 2004

---

Chinh Quang Le  
Attorney for *Amici Curiae*  
NAACP Legal Defense & Educational Fund, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Support of Rehearing *En Banc* of NAACP Legal Defense & Educational Fund, Inc. as *amici curiae* was filed with the Clerk of the Court this 17th day of August, 2004, via Express Mail. I further certify that two copies of the same brief were also served via first class U.S. mail on each of the parties in this case:

Michael Madden  
Carol Sue Janes  
Bennett, Bigelow, & Leedom, P.S.  
1700 Seventh Avenue, Suite 1900  
Seattle, Washington 98108

Paul J. Lawrence  
Preston Gates & Ellis LLP  
ACLU of Washington  
925 4th Avenue  
Seattle, Washington 98104-1158

Mark S. Green  
General Counsel  
Seattle Public Schools  
P.O. Box 34165  
MS 32-151  
Seattle, Washington 98124-1165

Sharon L. Brown  
Pacific Legal Foundation  
10360 Old Placerville Road, Ste. 100  
Sacramento, California 95827

Daniel B. Ritter  
Harry J.F. Korrell  
Davis Wright Tremaine LLP  
2600 Century Square  
1501 Fourth Avenue  
Seattle, Washington 98101-1688

Dated: August 17, 2004

---

Chinh Quang Le  
Attorney for *Amici Curiae*  
NAACP Legal Defense & Educational Fund, Inc.