No. 05-908

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

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

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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SUMMARY OF ARGUMENT

The school districts in these cases have taken seriously the purported societal commitment to achieving true racial equality. This court must not adopt any claim that the Constitution somehow prevents those schools from following plainly needed and socially valuable plans to create the very equality that our Constitution is intended to promote. As Judge Kozinski noted below, "the plan here is 'far from the original evils at which the Fourteenth Amendment was addressed.'" *Parents Involved in Comm. Schs v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1195 (9th Cir. 2005) (Kozinkis, J., concurring) (quoting *Comfort v. Lynn Sch. Comm.*, 418 F.3d 29 (1st Cir. 2005).

Amicus first notes that affirmative action and other efforts to promote true social equality are compelling governmental interests, in part because the need for such programs is reflected in the government's obligations under international law. In considering and adopting treaties, and in participating in developing the global consensus, the U.S. government has clearly acknowledged the appropriateness of efforts to promote equality and, in turn, has created a binding obligation to implement such efforts where appropriate. These obligations themselves form an additional basis for finding a compelling governmental interest sufficient to justify the programs at issue here.

Amicus further notes that the legacy of discrimination and the shameful realities some fifty years after *Brown v. Board of Education* not merely justify these policies but compel governments to take affirmative measures to promote true racial equality in our public education systems.

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The National Lawyers Guild, formed in 1937 when the American Bar Association did not permit African-Americans or Jews to join, is the oldest integrated national bar association in the United States. Throughout its history, it has struggled for genuine, not merely legal, equality for people of color. In 1964, it committed its resources to the Civil Rights Movement and opened an office in Mississippi. Dozens of Guild members traveled to the South to defend civil rights activists from attack. It is committed to insuring that the poor, disenfranchised and communities of color are afforded the opportunities necessary to better themselves.

The Guild is dedicated to elevating human rights above property interests and, through its membership in the International Association of Democratic Lawyers and its International Committee, supports the full implementation of all international human rights conventions. Included in these conventions is the internationally recognized principle that preferences afforded to particular groups for the purpose of eliminating the effects of past discrimination are both lawful and desirable. The Guild is peculiarly able to provide the Court with this perspective, exploring why it

[1] Letters evidencing consent by all parties to the filing of *amicus* briefs are on file with the Clerk of the Court. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution for the preparation or submission of this brief.

should be applied in this case and why affirmative action programs should be promoted and encouraged.

In addition, in the last three years, the Guild has addressed its own history of having an overwhelmingly white membership within the organization, including through formation of the United People of Color Caucus, open to any Guild member who is self-identified as a person of color. Caucus activities have substantially increased the numbers of people of color who are Guild members and, in some ways more importantly, the number who hold leadership positions within the organization; and this has forced its white members to confront the advantages and privileges they enjoy only because of their race. Thus, the Guild's recent experience has provided it a graphic demonstration of the importance of diversity, represented by a critical mass of non-whites, in enabling a society to overcome historic prejudice and discrimination.

ARGUMENT

I. COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS CONVENTIONS IS BOTH CONSTITUTIONALLY MANDATED AND A COMPELLING STATE INTEREST

Although *Grutter* addressed the unique concerns of colleges and universities, and found the policies and practices utilized by the law school to be acceptable, it also put to rest the doctrine that the only permissible use of racial preferences is to remedy past discrimination. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).[2] Thus, the first

[2] This is not to say that the school district's plan does not seek to remedy the effects of past discrimination. While the district may well dispute any claim that **it** has discriminated in the past (a claim on which this brief takes no position), it cannot be gainsaid that the long history of societal discrimination throughout the United States continues to have current effects, as is evident from

question to be addressed here is whether the school district had a compelling interest to institute the plan plaintiffs attacked. *Amicus* agrees with the determinations both of the district court and the appeals court that it did have such an interest, but wishes to suggest one more basis for it.

The Constitution mandates that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . ." U.S. Const. Art. VI. The United Nations Charter, 59 Stat. 1031, T.S. No. 993, *entered into force* Oct. 24, 1945, one such treaty made under the authority of the United States, establishes as one of the purposes of the United Nations "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Art. 1, (3).

More directly, the U.S. government is bound by – and accordingly has a compelling interest in enforcing – the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, which states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they

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the fact that the least desirable schools are all in African-American sections of Seattle. This issue will be addressed *infra*.

> were taken have been achieved (Art. 1(4)).
>
> States Parties shall, when the circumstances so warrant, take, in the social economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved (Art. 2(2)).

Thus, the United States is a signatory to an international covenant that specifically mandates what is referred to in this country as affirmative action. Moreover, of course, this Court has mandated and endorsed such programs provided they serve a compelling interest and do not amount to quotas. See *Grutter*, 539 U.S. at 328 (holding that using race as a "plus factor" in making individualized admissions decisions for the University of Michigan Law School was not unlawful discrimination.)

In evaluating affirmative action programs, this Court previously has noted international obligations and the persuasive articulations of compelling interest contained in those treaties. Justice Ginsburg's concurrence, joined by Justice Breyer, in *Grutter* notes:

> The Court's observation that race-conscious programs "must have a logical end point," *ante*, at 342, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial

> Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422-423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR, 20th Sess., Res. Supp. (No. 14), p. 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid.; see also* Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR, 34th Sess., Res. Supp. (No. 46), p. 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating de facto equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").

539 U.S. at 344. This reflects an understanding of the significance of our international treaty obligations and at least implies that those obligations can constitute a compelling interest. It is to that argument that *amicus* now turns.

As noted, the CERD specifically mandates the use of race-based criteria as a means of remedying the effects of past discrimination. Its language is not limited to

remedying past acts of discrimination by a particular party. Rather, its purpose is to insure "adequate advancement of certain racial or ethnic groups or individuals requiring such protection," so as to afford them "equal enjoyment or exercise of human rights and fundamental freedoms." CERD Art. 1 § 4.

The U.S. government likewise expressed its view that affirmative action could be consistent with its treaty obligations when it ratified the International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, which prohibits discrimination or distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Because the text of the covenant did not specifically sanction affirmative action, the United States adopted an understanding to the effect that it would make distinctions if rationally related to a legitimate government objective. 138 Cong. Rec. 8068 (1992). Thus, when the United States ratified the ICCPR, it did so with the understanding that affirmative action could be appropriate under the treaty (indeed, even if there were only a rational basis, not a compelling interest, to utilize it). The international community reflects a similar understanding, which the U.S. has repeatedly adopted, with the language in CERD as well as the Convention on the Elimination of All Forms of Discrimination Against Women.

Although the United States adopted a number of reservations, understandings and declarations to CERD, it never disavowed affirmative action. Congress reserved the right not to follow Article 4, which forbids racist speech, and Article 7, which requires that "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination. . ." 140 Cong. Rec. 14326 (1994). It did not,

however, preclude measures necessary to address the legacy of discrimination or promote diversity in public education and other programs. Since a prior understanding in the ICCPR specifically endorsed affirmative action, it is clear that the United States has undertaken treaty obligations – which, it must be remembered, are part of the supreme law of the land – that endorse measures taken for the purpose of achieving genuine equality.

Admittedly, our jurisprudence holds that non-self-executing treaties, like the CERD, require enabling legislation to have the force of law under U.S. CONST., Art, VI.. *See e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984) (holding that no enabling legislation was required to give the Warsaw Convention, a self-executing treaty, the force of law); *see also*, *Cook v. United States*, 288 U.S. 102, 119 (1933). However, these cases hold only that self-executing treaties are distinct from treaties that are not self-executing because they do not need enabling legislation to be enforceable in domestic courts. Nowhere is it said that non-self-executing treaties are without meaning -- a position which, if adopted, would wreak havoc with international relations. At a bare minimum, these human rights treaties serve as persuasive articulation of the compelling government interest in diversity and genuine equality; and in turn, compliance with our declarations of commitment to these high principles is a compelling state interest.

The United States has undertaken certain responsibilities by entering into the various human rights treaties that it has signed, even though they are not self-executing. For example, under CERD the United States has committed itself to provide regular reports to the U.N. Committee on the Elimination of Racial Discrimination. *See e.g.*, U.S. Dept. of State, *Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, *available on*

http://www.state.gov/g/drl/rls/55504.htm.

Certainly, the fact that a treaty entered into by the United States is not self-executing does not mean it is utterly without meaning. It imposes, at the very minimum, certain international obligations on the government. Being required to meet such international obligations, and to abide by the provisions and intent of the treaty, cannot but be a compelling interest of the United States and, thereby, the individual states and their subdivisions.

II. THE EFFECTS OF SOCIETAL DISCRIMINATION WARRANT THE MINIMAL USE OF RACE IN ASSIGNING SCHOOLS.

Human rights are indivisible. It is not sufficient to guarantee civil rights, which constitutes legal equality, without also guaranteeing fundamental social, cultural and political rights. Legal equality, no matter how assiduously guarded, is a sham if it perpetuates inequality resulting from past discrimination. Sadly, it is a sham that has gained more and more currency in the United States today.

The situation in the Seattle School District is, in this regard, a microcosm of the country. Changes have no doubt been wrought and advances made, but the overall condition of African descendants (as well as other people of color) remains inferior to that of whites.

It is a fact, determined by the lower courts, that the less desirable schools in the Seattle district are in the section of the city populated primarily by people of color:

> A majority of Seattle's white residents live in neighborhoods in the northern, historically more affluent end of the city. A majority of the city's African American, Asian American, Hispanic and Native American

> residents live in the south. . . . [I]t remains a stark reality that disproportionately, the schools located in the northern end of the city continue to be the most popular and prestigious, and competition for assignment to those schools is keen.

Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp. 2d 1224, 1225 (W.D. Wash. 2001).

These fundamental truths – the continued *de facto* segregation of the district and the fact that the preferred public schools are in the white sections of town – should be determinative of the issues presented in this case, unless this Court specifically wishes to overrule its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In that decision, this Court made several noteworthy findings that bear heavily upon this matter.

First, the *Brown* Court determined that "segregation of children in public schools solely on the basis of race" constituted a denial of equal protection even if the schools themselves were substantially "equal" as evaluated by "tangible" factors. *Id.* at 493. Absent some plan, such segregation would be inevitable in Seattle and, therefore, would deny students of color equal protection. "To separate [elementary and secondary school students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id*. at 494.

Recent testing, replicating the tests performed by Kenneth Clark famously used as part of the proof in *Brown*, also replicated the results despite more than half a century of *de jure* desegregation. Young African-Americans still preferred to play with white dolls and saw a white doll as "good" and a black one as "bad." *See* Kiri Davis, Director,

Girl Like Me, available on http://www.mediathatmattersfest.org/ 6/index.php?id=2. The promise of *Brown* has not been fulfilled, yet its ideological opponents now embrace "color blindness" as a *sine qua non* for combating discrimination.

What is consistent in the views of those who opposed *Brown* when it was decided and those who now condemn any use of race in deciding policy as "discrimination" is that the net result is the maintenance of white privilege. It is now self-evident and beyond cavil that supporters of *de jure* segregation in the 1950s and 1960s had no interest in equality. Rather, they wished to maintain the Jim Crow system of segregation and discrimination that insured that African-Americans would never, as a group, achieve genuine equality (political, economic and social) with whites as a group.

The doctrine of white supremacy has been thoroughly discredited and the belief in a separate and unequal society enjoys little currency in society today.[3] Thus, a different strategy was needed to maintain white privilege. That strategy has been the claim that *any* consideration of distinctions based upon race, even those mandated by CERD as "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms," constitute unlawful discrimination.

This position, after centuries of oppression and discrimination, is analogous to requiring one team in the Tour de France to ride unicycles for two-and-a-half weeks and, for the last three days of the race, permit it to use regular racing bicycles and claim that giving it any

[3] A notable exception to this is Herrnstein and Murray, THE BELL CURVE, Free Press (1994).

advantage to help it make up the ground it lost would be unfair and discriminatory. It is a position that necessarily maintains the advantages that whites, as a class, have enjoyed since before the founding of the United States, but now is cloaked perversely in the guise of opposing discrimination. It is a position that this Court needs to reject entirely.

CONCLUSION

Treaties, reflecting part of the supreme law of the land, require the government to live up to its purported commitment to genuine equality. They express the true purposes of Constitutional provisions advancing equality, and compliance with those obligations is itself a compelling governmental interest. Moreover, this Court must not allow principles of equality to be corrupted and used to prevent measures designed to create diversity and true racial equality. This Honorable Court should affirm the ruling of the Ninth Circuit below.

Dated: October 10, 2006.

Respectfully submitted,

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