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 the
United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF OF COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Ave., NW, #1250
Washington, D.C. 20036
(202) 331-2278
Counsel of Record

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INTEREST OF THE AMICUS CURIAE

The Competitive Enterprise Institute (CEI) is a nonprofit organization founded in 1984 for the purpose of advancing free market solutions to regulatory issues and protecting civil liberties.[1] Because racial preferences burden civil liberties and impose substantial costs on businesses and taxpayers, CEI believes that they should be used only as a last resort, when they are necessary to advance a compelling interest. CEI has previously participated in a case before this court involving racial preferences, filing an amicus brief in support of the petition for certiorari in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Through correspondence filed with the Clerk, the parties have granted blanket consent to the filing of *amicus* briefs in this case.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit upheld the Seattle School District's race-based limits on student assignment. It did so partly because of its decision to accord great deference to the school district, contrary to the general rule that deference is inappropriate under strict scrutiny, even in contexts where local governments otherwise exercise substantial discretion.

The School District is not entitled to a special exemption from the usual rule against deference. Far from showing that it, unlike other units of local government, deserves special deference when it uses race, the School District has publicly taken extreme, racially discriminatory positions. Its racially-charged public statements undermine

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[1] No party or counsel for a party wrote, or made any contribution to, this brief, nor did they contribute to CEI, which wrote this brief.

its argument that race is being used a temporary measure to promote integration and diversity, rather than as a permanent system of racial quotas and racial balancing.

ARGUMENT

THE SEATTLE SCHOOL DISTRICT SHOULD NOT RECEIVE DEFERENCE IN LIGHT OF ITS BIZARRE PUBLIC STATEMENTS ON RACIAL ISSUES

On its Equity and Race Relations web site, the Seattle School District, until June 2006, declared that "cultural racism" includes the following:

- "emphasizing individualism as opposed to a more collective ideology";
- "having a future time orientation" (planning ahead); and
- "defining one form of English as standard." [2]

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[2] Seattle Public Schools, *Equity and Race Relations: Definitions of Racism* (www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm) (reprinting the Seattle Schools' web page, including its definition of "cultural racism", as it existed on May 25, 2006; web page shows copyright date of 2005); John Walker, "Reading List: *The Language Police*," Fourmilog, May 29, 2006 (www.fourmilab.ch/fourmilog/archives/2006-05/000703.html) (discussing the above web page, and attaching it at the prior link); Andrew J. Coulson, *Planning Ahead Is Considered Racist?*, Seattle Post-Intelligencer, June 1, 2006, at B7 (2006 WLNR 9461453) (discussing web page's attacks on individualism and planning ahead); Debera Harrell, *School District Pulls Web Site After Examples of Racism Spark Controversy,* Seattle Post-Intelligencer, June 2, 2006, at B1 (2006 WLNR 9598870) (quoting the school district's "cultural racism" definition); Eugene Volokh, *Seattle Public Schools' Web Site Says Individualism Is a Form of "Cultural Racism,"* Volokh

In addition, the web site declared that only whites can be racists, and that minorities cannot be racist towards each other. And it derided the concept of "equality" as an outmoded aspect of assimilation. (Assimilation in turn was disparaged as the "giving up" of one's culture).[3]

After these definitions became the subject of extensive media attention, the School District withdrew the page that contained them from its web site on June 1, alleging a need to "provide more context to readers" about "institutional racism." In its place, the School District inserted a web page that criticizes the very idea of a "melting pot" and being "colorblind," emphasizing that the district's "intention is not . . . to continue unsuccessful concepts such as a melting pot or colorblind mentality."[4]

Conspiracy, May 17, 2006 (http://volokh.com/posts/1147906777.shtml) (quoting cultural racism definition).

[3] Seattle Public Schools, *Equity and Race Relations: Definitions of Racism* (www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm) (defining "racism," "equality," and "assimilation").

[4] Seattle Public Schools, *Equity & Race Relations: Definitions of Racism* (www.seattleschools.org/area/equityandrace/definitionofrace.xml) (visited August 15 & June 2, 2006) (current web page attacking colorblindness and melting pot, and citing need for more context about institutional racism); Harrell, *School District Pulls Web Site After Examples of Racism Spark Controversy*, Seattle Post-Intelligencer, June 2, 2006, at B1 (2006 WLNR 9598870) (noting that web page was dropped after weeks of controversy, and that a district spokesman claimed the web site's content was changed because it "did not have enough context for people not working" on racial issues to fully understand its definitions of racism).

In none of this Court's prior cases involving racial preferences has any local government made such bizarre statements, which show that it lacks the special insight into racial issues that might warrant deference from the courts.[5] Thus, there is no reason to accord the Seattle School District any deference.[6] Moreover, as explained below, the claims the District makes on its web site conflict with the Ninth Circuit judges' conclusions about the purpose and scope of its use of race.

Other government entities have not received deference as to their decisions to use race, even when they enjoy more discretion than school districts to restrict civil liberties. For example, "courts owe 'substantial deference to the professional judgment of prison administrators,'" and as a result, rational basis review, rather than strict scrutiny, applies when prisons limit inmates' free speech rights. *Beard v. Banks*, 126 S.Ct. 2572, 2578 (2006), *quoting Overton v. Bazetta*, 539 U.S. 126, 132 (2003).[7] But when prisons use

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[5] This Court can take judicial notice of the district's web site. *Bryant v. Avado Brands*, 187 F.3d 1271, 1280-1281 (11th Cir. 1999) (taking judicial notice of what is on internet); *Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000) (taking judicial notice of web sites); *Modesto Irrigation Dist. v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1066 (N.D. Cal. 1999) (same); *Elliott Associates v. Banco de la Nacion*, 194 F.R.D. 116 (S.D.N.Y. 2000) (same).

[6] *Cf. Concrete Pipe v. Construction Laborers Trust*, 508 U.S. 602, 626 (1993) (improper to defer to decision maker with assumed bias).

[7] *Compare Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (invalidating restriction on anti-war speech in school despite raging controversy, since material and substantial interference with school discipline must be shown to restrict speech); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) (students could wear buttons calling replacement teachers "scabs"); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (overturning hate speech ban).

race, strict scrutiny applies, and prisons lose their claim to deference. *Johnson v. California*, 543 U.S. 499, 506 n.1, 512 (2005). Thus, "deference is fundamentally at odds with our equal protection jurisprudence," which puts "the burden on state actors to demonstrate that their race-based policies are justified." *Johnson*, 543 U.S. at 506 n.1. Deference is improper even in contexts such as prisons, "where officials traditionally exercise substantial discretion." *Id.* at 512.

In deferring to the Seattle School District, the Ninth Circuit cited this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld a university's race-conscious admissions system after deferring to its conclusion that it needed to consider race in admissions. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1188 n.33 (9th Cir. 2005).

But there is a crucial difference between *Grutter* and this case: *Grutter* was "grounded . . . in the academic freedom that 'long has been viewed as a special concern of the First Amendment.'" *Grutter*, 539 U.S. at 324, *quoting Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 314 (1978) (opinion of Powell, J.). Public school districts, unlike colleges and universities, do not have academic freedom or First Amendment rights.[8]

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[8] The general rule is that the government has no First Amendment rights. *CBS v. DNC*, 412 U.S. 94, 139 (1973) (concurring opinion); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Government Ass'n v. Board of Trustees*, 868 F.2d 473, 481 (1st Cir. 1989); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989). Moreover, the Fourteenth Amendment duty not to racially discriminate trumps any First Amendment rights held by discriminatory government officials. *Creek v. Village of Westhaven*, 80 F.3d 186 (7th Cir. 1996) (Posner, C.J.).

It is not an entity's educational status, but rather its First Amendment rights, that justify giving it deference as to its selection decisions. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (according deference to the Boy Scouts' selection criteria for scoutmasters based on its First Amendment freedom of expressive association). Moreover, even private schools, which do have First Amendment rights, do not enjoy broad deference when they discriminate. *See Runyon v. McCrary*, 427 U.S. 160 (1976) (school liable for racial discrimination under § 1981).

Nor are local school boards entitled to deference under principles of federalism. This Court's categorical rejection in *Brown v. Board of Education* of racial classifications occurred precisely in the context of local school boards. And it declined to give any deference to either the local affirmative action program invalidated in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which was enacted by elected officials, or the state prison racial classification involved in *Johnson,* 543 U.S. at 512.

Judge Kozinski, concurring in the decision below, voted to uphold the Seattle schools' use of race because he viewed it as an effort to achieve the ultimate goal of a "melting pot." 426 F.3d at 1194.[9] But from their web site, it is clear that the Seattle schools do not endorse a "melting

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[9] Judge Kozinski urges that strict scrutiny not be applied because the Seattle School District restricts admissions by white and non-white students alike. *Seattle*, 426 F.3d at 1194. That contradicts this Court's decision in *Johnson*, which held that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." 543 U.S. at 506; *accord Powers v. Ohio*, 409 U.S. 400, 410 (1991) ("racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree"); *see Seattle*, 426 F.3d at 1192 (noting that "at some schools, white students are given preference over nonwhite students, and at other schools, nonwhite students are given preference").

point," but rather oppose the very concept. *See* Seattle Public Schools, *Equity & Race Relations: Definitions of Racism* (www.seattleschools.org/area/equityandrace/ definitionof race.xml) (rejecting "unsuccessful concepts such as a melting pot or a colorblind mentality"). Moreover, the Seattle schools use race in ways that are at odds with a melting pot, such as operating a school targeted at a single race (African Americans). *See* Seattle Public Schools, *African American Academy K-8* (www.seattleschools.org/area/main/ShowSchool?sid=938). Thus, the policy is invalid even under Judge Kozinski's lenient test for race-based assignment plans, which liberally permits race-based student assignments, but only if the "actual reasons" for the plan are those deemed permissible by the court. *Seattle*, 426 F.3d at 1194; *see Shaw v. Hunt*, 517 U.S. 899, 904 n.4 (1996) (reviewing court must assess what "actually" motivated the government engaged in affirmative action, not what "may have motivated" it).

Seattle's web site also shows that it focuses narrowly on race, rather than pursuing diversity in a broader sense, as this Court's decisions in *Gratz* and *Bakke* require before race can be considered. Those decisions permit consideration of race in admissions, but only if race is just one of many factors considered as part of a larger commitment to achieve an intellectually diverse student body. *Gratz v. Bollinger*, 539 U.S. 244, 272-74 (2003) (invalidating race-conscious undergraduate admissions policy because it did not consider all relevant non-racial diversity factors along with race); *Grutter*, 539 U.S. at 334 ("an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration'"), *quoting Bakke*, 438 U.S. at 317.

Far from welcoming intellectual diversity as *Bakke* and *Gratz* require, the Seattle School District is deeply

intolerant. For example, anyone who prizes "individualism," whether she is a civil libertarian, an entrepreneur, or a free market conservative, is guilty of "cultural racism" under its definition. *See* Seattle Schools, *Equity and Race Relations: Definitions of Racism* (www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm).

As the Seattle Post-Intelligencer pointed out in an editorial cartoon, the Seattle School District's racism definitions are so broad that anyone who thinks differently than its bureaucrats is likely to be branded by them as a racist. *Commentary*, Seattle Post-Intelligencer, June 2, 2006 ("After much study and discussion, Seattle Schools' multiculturalist bureaucrats settle on a simple definition of racism: A Racist is Anyone . . .Who Disagrees . . . With Us") (http://seattlepi.nwsource.com/horsey/viewbydate.asp?id=1401).

The School District's rejection of the very concept of colorblindness[10] calls into question the Ninth Circuit's unsupported finding that the school district's race-based assignment plan is only intended to be a temporary measure designed to ultimately reach a colorblind society. *Seattle*, 426 F.3d at 1192. *Compare Miller v. Johnson*, 515 U.S. 900, 904 (1995) (Constitution's "central mandate is racial neutrality in governmental decisionmaking"); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (Fourteenth Amendment's "goal' is "a political system in which race no longer matters").

Instead, the Seattle School District appears to be using race simply to promote rigid racial balancing, as

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[10] Seattle Public Schools, *Equity & Race Relations: Definitions of Racism* (www.seattleschools.org/area/equityandrace/definitionofrace.xml); Harrell, *School District Pulls Web Site After Examples of Racism Spark Controversy*, Seattle Post-Intelligencer, June 2, 2006, at B1 (quoting the Seattle School District's attack on colorblindness).

reporters have noted. *See* Charles Lane, *Court to Rule on Race-Conscious Assignment of Students to Public Schools*, Washington Post, June 5, 2006, at A3 (in the Seattle and Jefferson County cases, "each [school district] seeks to maintain racial balance") (2006 WLNR 9630527); Linda Greenhouse, *Supreme Court Roundup; Court to Weigh Race As a Factor in School Rolls*, New York Times, June 6, 2006, at A1 ("One difference between the Michigan decision and the new cases is that . . . the [Seattle and Jefferson County] school districts are trying to maintain [a racial] balance") (2006 WLNR 9652176). But "racial balancing" is "patently unconstitutional." *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), *citing Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake").

The School District's disparagement of "future time orientation" – planning ahead – as a stereotypical white characteristic[11] is a classic example of the soft bigotry of low expectations. Giving deference to a school district that has such deplorable views is a terrible idea. If we are ever to achieve a race-neutral society, we will have to overcome the pernicious idea that students who work hard, study, and make sacrifices for future advancement are "acting white."

Deference to the Seattle School District would be particularly ironic when its understanding of racism contravenes the precedents of this Court and the federal appeals courts. The Seattle Schools deny that whites can be the victims of racism and that minorities can be victims of racism at the hands of other minorities. They define racism as limited to acts against groups that have "little social power in the United States (Blacks, Latino/as, Native Americans, and

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[11] *See* Andrew J. Coulson, *Planning Ahead Is Considered Racist?*, Seattle Post-Intelligencer, June 1, 2006, at B7; Seattle Schools, *Equity and Race Relations: Definitions of Racism* (www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm).

Asians), by the members of the agent racial group who have relatively more social power (Whites)."[12]

By contrast, this Court has recognized that non-minorities can be victims of discrimination, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and federal appeals courts routinely rule against institutions that fire or harass whites, recognizing that they can indeed be victims of racism. *See, e.g., Bowen v. Missouri Dept. of Social Serv.*, 311 F.3d 878 (8th Cir. 2002) (racial harassment of white employee); *Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998) (same).

CONCLUSION

Deference to the Seattle School District's use of race played a key role in the Ninth Circuit's upholding of its student assignment plan. However, through its bizarre public statements on racial issues, the School District has forfeited any claim to deference. Therefore, this Court should subject its use of race to exacting scrutiny, and strike the plan down as unconstitutional.

Respectfully submitted,

HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1001 Connecticut Ave., NW, #1250
Washington, D.C. 20036
(202) 331-2278
Counsel of Record

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[12] *See* Seattle Public Schools, *Equity and Race Relations: Definitions of Racism* (www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm).