

CASE NO. 04-5897

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID McFARLAND, Parent and Next Friend
of Stephen and Daniel McFarland; RONALD
JEFFREY PITTENGER, Parent and Next Friend
of Brandon Pittenger; ANTHONY
UNDERWOOD, Custodial Parent and Next
Friend of Max Aubrey;

Plaintiffs

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald

Plaintiff - Appellant

v.

JEFFERSON COUNTY PUBLIC SCHOOLS;

Defendant

JEFFERSON COUNTY BOARD OF
EDUCATION; STEPHEN W. DAESCHNER,
Superintendent

Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
Civil Action No. 3:02CV-620-H

BRIEF OF THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY AS
AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND
AFFIRMANCE OF THE JUDGMENT OF THE DISTRICT COURT

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CASE NO. 04-5897

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DAVID McFARLAND, et al.;	Plaintiffs
CRYSTAL D. MEREDITH	Plaintiff - Appellant
v.	
JEFFERSON COUNTY PUBLIC SCHOOLS;	Defendant
JEFFERSON COUNTY BOARD OF EDUCATION, et al.	Defendant - Appellees

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, The Civil Rights Project at Harvard University makes the following disclosure:

1. Is said party a subsidiary or affiliate of a public-owned corporation? **YES**

The Civil Rights Project at Harvard University is affiliated with Harvard University and the President and Fellows of Harvard College, which is organized as a nonprofit corporation.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

Neither The Civil Rights Project at Harvard University nor the President and Fellows of Harvard College has a substantial financial interest in the outcome of this litigation.

(Signature of Counsel)

(Date)

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SOURCE OF AUTHORITY FOR FILING, IDENTITY, AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a) and based upon motion for leave of court, The Civil Rights Project at Harvard University submits this amicus curiae brief in support of Defendants-Appellees and affirmance of the judgment of the District Court below.

Founded in 1996, The Civil Rights Project is a nonprofit organization based at Harvard University whose mission is to advance research and advocacy in pursuit of racial justice. The Civil Rights Project devotes significant attention to educational issues, including the consequences of racial and ethnic diversity in higher education, the problem of minority dropouts, the effects of high stakes testing on minority children, K-12 school reform proposals, racial disparities related to special education and school discipline, the rights of English language learners, and the problems of segregation and resegregation in the public schools.

A central focus of The Civil Rights Project's research has been the development of scholarship that provides insights into the impact of racial diversity in education. Since its founding, The Civil Rights Project has commissioned or produced dozens of studies on a range of topics, including the effects of diversity in education in both K-12 schools and higher education. As a result of these studies and numerous conferences and roundtables, several volumes focusing on legal and social science findings involving diversity and

education have been published, including *Diversity Challenged: Evidence on the Impact of Affirmative Action*, which was cited approvingly by the United States Supreme Court in its opinion in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), affirming the legality of race-conscious admissions policies in higher education.

The federal courts have often employed relevant research studies in equal protection decisions involving race, and the Court's analysis in the instant case can and should be informed by credible and reliable research findings. The Civil Rights Project has a deep-seated interest in the accurate presentation of relevant research findings addressing the benefits of racial diversity and the harms of racial isolation. Although an extensive body of desegregation research has been developed during the past forty years, much of the research, particularly on the educational benefits of diversity for *all* students, has been generated only recently. Accordingly, this brief provides highlights and citations to relevant research findings to help clarify the Court's review of the literature.

Because of its core mission and its research and advocacy work in defense of civil rights, specifically in the area of racial diversity in education, The Civil Rights Project has a strong interest in the outcome of this case. However, The Civil Rights Project does not, in this brief or otherwise, represent the official views of Harvard University.

All parties have consented to the filing of this Amicus Curiae brief.

SUMMARY OF ARGUMENT

The District Court correctly upheld the constitutionality of the Jefferson County Board of Education's student assignment plan (the "2001 Plan"). The court's conclusion that promoting racial diversity and reducing racial isolation in the Jefferson County public schools are compelling governmental interests is well supported by both the expert testimony introduced at trial and numerous research studies documenting the benefits of racially integrated student bodies and the harms of racially segregated learning environments.

Among the many benefits that accrue from racial diversity in the student body are increased academic achievement, greater educational and occupational aspirations and success, improved cross-racial understanding, a stronger sense of civic engagement, and an increased desire and ability to live and work in settings with members of multiple racial groups. The school district and broader community also benefit from an increased ability to compete effectively with private schools, an improved racial climate, and greater community support and participation.

Among the harms associated with racial isolation and segregated learning environments are adverse effects on school attendance and performance, stereotyping and racial hostility, decreased opportunities to learn from members of other racial groups, and poorer preparation to address interracial contexts as adults.

The school district and community as a whole can suffer when schools are perceived as unrepresentative and racially segregated.

Research studies and evidence introduced in the court below also support the District Court's conclusion that the 2001 Plan is narrowly tailored because of the necessity of employing race-conscious policies in attaining student bodies that can promote the benefits of racial diversity and prevent the harms of racial isolation, and because there is no undue harm to students who do not receive their school of choice. The Jefferson Plan is flexible in its efforts to maintain a minority student presence at each school that is sufficient for successful integration, and differences in test scores between schools do not accurately reflect on the quality of education that a given student has received.

Differences in context also strongly suggest that the standards for narrow tailoring in higher education, especially the requirement for individualized review, should be reconsidered in the context of elementary and secondary education.

The judgment of the district court should be affirmed.

ARGUMENT

I. PROMOTING RACIAL DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST.

In recently upholding the University of Michigan’s compelling interest in promoting student body diversity, the Supreme Court affirmed this Circuit’s decision and recognized the substantial educational benefits that result from diverse student bodies in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003). The Court paid particular attention to the substantial body of social science research documenting such benefits: “[N]umerous 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.’” *Id.* at 330.

The benefits of student body diversity in elementary and secondary education are also well documented. First, the benefits identified in *Grutter* are compelling in the area of primary and secondary education as well. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004). These benefits include increased academic achievement for minority students, greater educational and job-related aspirations and accomplishments, improved cross-racial understanding and higher comfort levels with members of racial groups other than one’s own, a stronger sense of civic engagement, and an

increased desire and ability to live and work in settings with members of multiple racial groups. Second, these and other “equally compelling” benefits are of unique or increased importance in the K-12 context. *See id.* at 853-54. It is especially important and appropriate to promote cross-racial understanding and to prepare students to work with members of other races and ethnic groups in *early* public education. The school district and broader community also benefit from integrated public schools, which can improve community participation and help the district to compete successfully with private schools.

“Like institutions of higher education, elementary and secondary schools are ‘pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society.’”¹ As the First and Ninth Circuits recently held in finding racial diversity a compelling interest in primary and secondary education: “At bottom, *Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions.”² Promoting racial diversity in K-12 education should thus be no less compelling than the interest in promoting educational diversity in higher education.

¹ *McFarland*, 330 F. Supp. 2d at 852-53 (quoting *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982))).

² *Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d 949, 964 (9th Cir. 2004); *Comfort v. Lynn School Committee*, ___ F.3d ___, 2004 WL 2348505 (1st Cir. (Mass.) Oct. 20, 2004) (No. 03-2415).

A. Expert Testimony and Evidence Introduced in the Court Below Demonstrate the Benefits of Racial Diversity.

In upholding the constitutionality of the 2001 Plan, the District Court correctly relied on expert testimony demonstrating the benefits of racial diversity in the Jefferson County public schools. *See McFarland*, 330 F. Supp. 2d at 839 n.5.

The District Court discussed the results of an extensive survey³ of eleventh grade students from the Jefferson County high schools. *See id.* at 854 & n.41. As Dr. Gary Orfield⁴ stated:

[We found] stunningly strong and parallel views of black and white students about the benefits of their school system [T]hese students feel very comfortable living and working with students . . . and working under the supervision of people from other racial and ethnic groups We found that students, both black and white . . . had very [high and similar] educational aspirations . . . and they reported similar levels of encouragement from their teachers [M]ore than 80 percent of both groups said their school experience had helped them learn how to work and relate to students from other groups.

(Gary Orfield at TR 5-28 to 5-29, 5-48). Researchers have employed the same survey instrument (a detailed questionnaire, prepared with experts from around the

³ *See* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action 111* (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Kurlaender & Yun, *Louisville Survey*].

⁴ Dr. Orfield has been involved with the Jefferson County School District since the original desegregation decree in 1975, and testified in the previous litigation. (Gary Orfield at TR 5-11 to 5-13).

country) in other major school districts, and have found similarly positive educational effects arising in racially diverse schools.⁵

Ninety-seven percent of graduates from the Jefferson County public schools agreed or strongly agreed that having students from different races and backgrounds at the same school was important for long-term success.⁶ Furthermore, 89 percent of graduates that were in college, and 88 percent of students asked to comment about the workplace, reported that going to classes with people from different cultural backgrounds while at the Jefferson County public schools had prepared them or strongly prepared them for college and the workplace respectively. (Robert Rodosky at TR 3-123 to 3-125).

Dr. Orfield documented the enhanced academic achievements of minority students at desegregated schools, as measured by test scores and improvements in the achievement gap between black and white students. (Gary Orfield at TR 5-14, 5-46 to 5-47). *See McFarland*, 330 F. Supp. 2d at 853-54. He also described the

⁵ See Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District*, available at http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport [hereinafter Kurlaender & Yun, *Cambridge Survey*]; The Civil Rights Project at Harvard University, *The Impact Of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District (2002)*, available at <http://www.civilrightsproject.harvard.edu/research/diversity/LynnReport.pdf> [hereinafter Civil Rights Project, *Lynn Survey*].

⁶ The 2002 survey was conducted by Dr. Robert Rodosky and Dr. Edward Kifer in conjunction with the Survey Research Group at the University of Kentucky. It was administered to students who had graduated from the Jefferson County high schools in 1997. (Robert Rodosky at TR 3-123).

powerful effects of racially-integrated schools on improving minority student “life chances, on the chances of finishing high school, going to college, what you do as an adult, [and] what kind of employment you get.” (Gary Orfield at TR 5-78).

Psychologists in similar cases have found that integration results in positive intergroup relations, the breaking down of racial stereotypes and tensions, and the promotion of racial harmony. “Intergroup contact theory” is a prominent and widely accepted psychological theory that posits that interaction between students of different races promotes empathy, understanding, positive racial attitudes, and the disarming of stereotypes.⁷ The benefits from intergroup contact are especially compelling in the K-12 context. Public education is a “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.” *Plyler*, 457 U.S. at 223. Justice Scalia suggested that such lessons in life are more appropriate in early education. *See Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

Maintaining racially integrated schools also “benefits the system as a whole.” *McFarland*, 330 F. Supp. 2d at 854. “One of the ways JCPS meets the competition is by offering quality education in *an integrated setting at every*

⁷ *Id.* at 356. *See generally* Gordon W. Allport, *The Nature of Prejudice* (1954); 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: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781 (1993).

school.” *Id.* (emphasis added). Integrated schools can improve the racial climate of the entire community. (Gary Orfield at TR 5-73 to 5-74). The district and community benefit when “the citizens of the community see[] all the schools as worthwhile” and not separated across racial lines: “invest[ing] parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole.” (Gary Orfield at TR 5-73). *Id.*

B. Research Studies Show that Racial Diversity in K-12 Education Produces Educational and Social Benefits for Minority Students

An extensive body of research addressing the educational and social benefits of desegregation and racially integrated schools supports the District Court’s conclusion that promoting racial diversity in elementary and secondary education is a compelling governmental interest.

1. Racial Diversity Can Increase the Academic Achievement of Minority Students.

Minority students who attend more racially integrated schools show increased academic achievement and progress.⁸ In a 1983 review of over ninety

⁸ See, e.g., 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 with Michal Kurlaender eds. 2001) [hereinafter Schofield, *Maximizing the Benefits of Student Diversity*]; 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* (James A. Banks & Cherry A. McGee Banks eds. 1995) [hereinafter Schofield, *Review of Research*]; Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement*

research studies – including over 300 samples – examining the effects of school desegregation on black student achievement, Crain and Mahard found consistent results involving enhanced black achievement (even controlling for ability and socioeconomic status). Crain & Mahard, *supra*. The greatest academic gains occurred when desegregation plans encompassed both cities and suburbs, as in the case at hand. Crain and Mahard found agreement in the literature on achievement benefits at the lower grade levels, suggesting that age at which black students enter desegregated schools is critically important; studies that have included students in desegregated schools from the primary grades have provided consistent findings of achievement gains for black students. More recent economic analyses of black students’ test score data have confirmed positive effects of student achievement arising from a school’s more diverse racial composition.⁹

2. Racial Diversity Can Have Positive Effects on the Educational and Occupational Attainment of Minority Students.

Studies: A Meta-Analysis, 88 Am. J. Soc. 839 (1983); Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 Soc. Educ. 1 (1971).

⁹ Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (2002), available at <http://www.nber.org/papers/w8741>, <http://edpro.stanford.edu/eah/papers/jpe.resubmission.feb04.PDF> (analyzing test score data and finding that “[t]he uneven distribution of blacks across school districts can explain a significant portion of the black-white achievement gap in Texas.”); Eric A. Hanushek, *Black-White Achievement Differences and Governmental Interventions*, 91 Am. Econ. Rev 24, 24-28 (2001) (concluding that national data suggests that integration has had a strong impact on narrowing the black-white achievement gap).

Racially diverse learning environments have positive effects on minority students' educational attainment and their occupational aspirations and careers. Segregated schools that are predominantly non-white often transmit lower expectations to minority students and offer a narrower range of educational and job-related options.¹⁰

Studies on the educational attainment of black students have found that blacks who attend desegregated schools have a higher college attendance rate than black students who attended segregated schools.¹¹ Desegregated schooling has a positive effect on the number of years of school completed and on the probability of attending college.¹² A study on the influence of school peers through a nationally representative sample found that both black and white students who had cross-racial friendships had higher educational aspirations than students with only same-race friendships.¹³

¹⁰ See 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. 394 (1994); Schofield, *Review of Research*, *supra*.

¹¹ See Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81 (1978).

¹² See Michael A. Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics) 269.

¹³ Maureen T. Hallinan & Richard A. Williams, *Students' Characteristics and the Peer Influence Process*, 63 Soc. Educ. 122 (1990).

The literature examining the relationship between racially diverse schools and *occupational* attainment also reveals a number of positive effects of integration. Among the positive consequences for black students are: “(a) fostering higher occupational aspirations and more consistent career planning linked to these aspirations, (b) increasing earnings modestly, and (c) increasing the likelihood that they will work in professions in which blacks have traditionally been underrepresented.”¹⁴ A 1970 study of black males found that graduates of desegregated high schools held higher status jobs and earned higher incomes than their counterparts from segregated schools.¹⁵ A 1983 study focusing on 1972 high school graduates similarly revealed that school desegregation positively influenced black males’ occupational aspirations.¹⁶ A 1992 study found that black students who attended racially isolated schools obtained jobs that were both lower paying and more racially isolated than the jobs obtained by whites. Boozer, et al., *supra*.

3. Racial Diversity Can Have Positive Effects on Minority Students’ Social Interaction and Post-Educational Experiences.

¹⁴ Schofield, *Maximizing the Benefits of Student Diversity, supra*, at 100; see also Dawkins & Braddock, *supra* (reviewing studies on the relationship between desegregation and occupational attainment, including several studies relying on longitudinal data sets measuring high school, family, individual, and workplace characteristics).

¹⁵ Robert Crain, *School Integration and Occupational Achievement of Negroes*, 75 *Am. J. Soc.* 593 (1970).

¹⁶ Marvin P. Dawkins, *Black Student’s Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 *Urb. Educ.* 98 (1983).

A related body of literature indicates that exposure to desegregation and racial diversity in elementary and secondary education can lead to more racially integrated experiences as adults.¹⁷ A recent review of twenty-one studies examining “perpetuation theory” – a theory proposing that racial segregation tends to repeat itself across an individual’s life experiences and across institutions – found that desegregated experiences for black students typically lead to increased interaction with members of other racial groups in subsequent years.¹⁸ The studies suggested that school desegregation had positive effects on both black and white students: students who attended desegregated schools were more likely to function in desegregated settings, such as colleges and universities, workplaces, and neighborhoods later in life. Desegregation has the effect of “break[ing] the cycle of segregation and allow[ing] nonwhite students access to high-status institutions and the powerful social networks within them.” *Id.* at 531. Therefore, “interracial contact in elementary or secondary school can help blacks overcome perpetual segregation.” *Id.* at 552.

C. Research Studies Show that Racial Diversity in K-12 Education Leads to Intergroup Contacts which Promote Cross-Racial

¹⁷ See, e.g., Jomills H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 Soc. Educ. 178 (1980); James M. McPartland & Jomills H. Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation*, in *Effective School Desegregation* (William D. Hawley ed. 1981).

¹⁸ Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Ed. Res. 531 (1994).

Understanding and which Challenge Stereotypes Among All Students.

Research studies addressing the benefits of racial diversity for *all* students have shown that increased intergroup contacts can promote greater cross-racial understanding and friendships and can undermine racial stereotypes.

“[D]esegregation made the vast majority of the students who attended these schools less racially prejudiced and more comfortable around people of different backgrounds.”¹⁹ The same study, which based its conclusions on data drawn from over 500 interviews of 1980 high school graduates, educators, advocates, and policy makers who were involved in racially diverse public high schools nearly twenty-five years ago, found that “the vast majority of graduates across racial and ethnic lines greatly valued the daily cross-racial interaction in their high schools. They found it to be one of the most meaningful experiences of their lives, the best – and sometimes the only – opportunity to meet and interact regularly with people of different backgrounds.” *Id.* at 6.

Recent surveys on the attitudes of current high school students toward their peers indicate that students of all racial and ethnic groups who attend more diverse schools have higher comfort levels with members of racial groups other than their own, have an increased sense of civic engagement, and have a greater desire and

¹⁹ Amy Stuart Wells, et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004), available at <http://www.tc.columbia.edu/newsbureau/features/ASWells032904.pdf>.

perceived ability to live and work in multiracial settings. Kurlaender & Yun, *Cambridge Survey, supra*; The Civil Rights Project, *Lynn Survey, supra*.

The specific survey of the Jefferson County high schools used the same instrument and yielded similar findings.²⁰ Kurlaender & Yun, *Louisville Survey, supra*, at 118, 130. In Jefferson County, both black and white students reported great educational benefits from the diversity in their schools, and the strong uniformity in responses provided evidence of a successful integration plan. *Id.* at 137. More than 90 percent of both black and white students reported being comfortable working and interacting with members of racial and ethnic groups different than their own. *Id.* at 124. Similarly, 85 percent of all students felt that they were prepared to work in a job setting where people are of a different racial or ethnic background and that they were likely to do so in the future, and more than 90 percent reported that they would be comfortable working under a supervisor of a different racial or ethnic background. *Id.* at 124, 130. Students across the board reported high levels of educational aspirations. A “remarkable” 80 to 85 percent of both black and white students reported an interest in attending a four-year college. *Id.* at 125-27. There was strong evidence that perceived opportunities to meet these aspirations cut across racial and ethnic lines. *Id.* at 136-37. More than 80 percent of both black and white students believed that *their school experiences*

²⁰ The survey was administered in 2000 to a representative sample of juniors (with an excellent response rate of over 90 percent).

have helped them to work more effectively and to get along better with members of other races and ethnic groups. *Id.* at 130.

Studies of intergroup contact and interracial friendships at the earlier grade levels confirm the importance of interracial contact in increasing racial tolerance and increasing interactions with members of other racial groups over the course of an individual's lifetime.²¹ In addition, a classroom with a positive racial climate particularly influences the stability of interracial friendships of black students. *Id.* Such friendships have important implications beyond a student's educational years, for, as one study on interracial friendships states, "[t]he tendency [among whites] to prefer whites over blacks in basic feelings of warmth and closeness and in personal social predispositions in the workplace and neighborhood does decline quite markedly . . . among whites who have both friends and acquaintances who are black."²²

²¹ See, e.g., Ellison & Powers, *supra*, at 392; Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 *Am. Educ. Res. J.* 397 (1982). For instance, the racial composition of classes has been found to have an impact on the stability of interracial friendships between white students and black students, with even stronger effects for white students. Maureen T. Hallinan, & Richard A. Williams, *The Stability of Students' Interracial Friendships*, 52 *Am. Soc. Rev.* 653 (1987) (longitudinal study of 375 students in the fourth to seventh grades in sixteen desegregated classrooms).

²² Mary R. Jackman & Marie Crane, "Some of my best friends are black . . .": *Interracial Friendship and Whites' Racial Attitudes*, 50 *Pub. Opin. Q.* 459, 470 (1986).

Elementary and secondary school settings are particularly well suited to promoting these types of positive interracial contact because of the equal status of racial groups in the schools, the support of authority figures such as teachers and staff, the existence of common goals and cooperative activities, and extensive opportunities for personalized contact to disrupt stereotypes – all of which are fully supported in the research literature on the effectiveness of contact theory. *See id.*

II. REDUCING RACIAL ISOLATION IN ELEMENTARY AND SECONDARY EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST.

Reducing racial isolation is a compelling governmental interest in the K-12 context. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), the courts have recognized the harms associated with racially segregated schools, and the strong constitutional interest in eliminating school segregation “root and branch.” In *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2d Cir. 2000), the court held that reducing racial isolation and combating de facto desegregation constitutes a compelling governmental interest, and “indeed, such integration serves important societal functions.” *Id.* at 751. Recent legislation passed by Congress has affirmed the importance of eliminating minority group isolation in the public schools. *See McFarland*, 330 F. Supp. 2d at 852 & n.34.

A. Expert Testimony and Evidence Introduced in the Court Below Demonstrate the Harms of Racial Isolation.

Racial isolation under either de jure or de facto resegregation causes significant harm to students. (Gary Orfield at TR 5-16). The compelling interest in avoiding segregation is “rooted in practicality and logic. It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.” *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) (“*Hampton II*”).

There are significant negative consequences from the interaction between poverty and racial segregation: Almost all minority children, and very few white children, end up in concentrated poverty schools. (Gary Orfield at TR 5-18). In fact, 76 percent of black students in the Jefferson County school district are from low-income families, more than double the 35 percent of all other students. (Stipulation par. 37). In the district-encompassed City of Louisville, 67 percent of black households are poor, as opposed to 44 percent of white households; and 23 percent of white households are affluent, as opposed to only 9 percent of black households. (Robert Rodosky at TR 3-89). Concentrated poverty in schools will thus disproportionately and adversely affect the black students in Jefferson County. *See McFarland*, 330 F. Supp. 2d at 853 (citing *Hampton II*).

All students in racially isolated schools, and white students in particular, suffer from the “tremendously negative” consequences of “not being able to

understand and operate in a multiracial setting.” (Gary Orfield at TR 5-15). “[A]s a result of racial isolation and segregation, these students forfeit the opportunity to learn from other groups and are less prepared to handle interracial settings as [adults].” *Comfort*, 283 F. Supp. 2d at 355-56.

Stereotyping is an especially problematic outcome of racial isolation. *All* students may be harmed by racial stereotyping, not simply those who are the objects of stereotypes. *Id.* at 356. Dr. Orfield emphasized the need to provide interracial contact in the *early* school years in order to defeat stereotyping:

[S]tudents come to school initially . . . without really well-developed racial stereotypes, and they develop somewhere after the 3rd or 4th grade in a fairly serious way [I]t’s much better in terms of the development of those stereotypes and ideals about race that children are together from [as] early as possible [T]hey learn from their peer groups, and what their peer groups are matters a lot.

(Gary Orfield at TR 5-62). If a school has an insubstantial number of minority students, these students are likely to feel isolated: “[I]f you have a class where you have one or two black students, for example, they are considered the official voice of the black community. They are expected to speak for the entire community, and they are always on the spot . . . they are [] treated as an afterthought in the discussion” (Gary Orfield at TR 5-80, 5-31).

Resegregation will also have a negative impact on the school district and broader community. *See McFarland*, F. Supp. 2d at 854 n.40 Racially-identifiable schools – and the perception that a school is “becoming black” – affect the

decisions of middle class minorities and whites, who tend to leave or stop moving into these, generally urban, neighborhoods. (Gary Orfield at TR 5-37, 5-84). It becomes difficult for segregated districts to equalize the ability of its schools to attract and hold experienced and talented teachers: “[W]hite teachers, who are the great bulk of the teaching force” will “systematically leave resegregated schools.” (Gary Orfield at TR 5-20) (citing recent studies in Texas and North Carolina).

B. Research Studies Have Demonstrated the Harms of Racial Isolation.

Segregated schools can transmit significant harms in the form of lower expectations, resources, and opportunities. *See supra* Part I.B. Racial isolation can be especially harmful because it is closely linked to concentrated poverty: “88 percent of the intensely segregated minority schools (or schools with less than ten percent white [students]) had concentrated poverty, with more than half of all students getting free lunches. That means that students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty.”²³ Concentrated poverty often leads to a myriad of detrimental effects on students:

Concentrated poverty turns out to be powerfully related to both school opportunities and achievement levels. Children in these schools tend to be less healthy, to have weaker preschool experiences, to have only one parent,

²³ Gary Orfield & Chungmei Lee, *Brown at 50: King’s Dream or Plessy’s Nightmare* 21 (Jan. 2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php>.

to move frequently and have unstable educational experiences, to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding pre-collegiate courses and more remedial courses, and to have higher teacher turnover. Many of these schools are also deteriorated and lack key resources. The strong correlation between race and poverty show that a great many black and Latino students attend these schools of concentrated poverty.

Id. at 21-22.

Recent studies of cities and school districts that have been experiencing resegregation offer specific instances of the harms of racial isolation. A 2003 study of the Charlotte-Mecklenburg school district, which until 2002 had been subject to court-ordered desegregation, found that the district has been experiencing resegregation and that increasing racial isolation is leading to harmful educational effects on students.²⁴ Racially identifiable black schools had deficiencies in teacher resources and material resources (up-to-date media centers, ample access to current technology, and newer, safer buildings), fewer Advanced Placement courses, and fewer services for gifted and talented students. *Id.* at 1547-48. Minority students were disproportionately tracked into lower level placements and special education classes. Student achievement scores in many racially identifiable schools were thus markedly lower than in the more racially integrated

²⁴ Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513 (2003).

schools. *Id.* at 1558-59. A 2004 study of the metropolitan Boston area also found significant detrimental effects on students in racially identifiable schools.²⁵

Educational outcomes for students in minority-identified schools in metropolitan Boston were predictably lower than in white-identified schools. Ninety-six percent of the students attending low-minority/low-poverty schools passed the English portion of the standardized achievement test for the state, compared to only 61 percent of students in high-minority/high-poverty schools. *Id.* at ii. Only 45 percent of the students in high-minority/high-poverty schools were estimated to graduate from high school on time, compared to 79 percent of students in low-minority/low-poverty schools. *Id.*

III. THE JEFFERSON COUNTY SCHOOL BOARD PLAN IS NARROWLY TAILORED TO THE COMPELLING INTERESTS IN PROMOTING RACIAL DIVERSITY AND REDUCING RACIAL ISOLATION.

Expert testimony and research literature also support the District Court's conclusion that the 2001 Plan is narrowly tailored to the compelling interests in promoting racial diversity and reducing racial isolation. On the one hand, there is extensive evidence that the 2001 Plan meets the standards for narrow tailoring as set forth in *Grutter* and applied by the court below. On the other hand, significant differences between K-12 public schools and schools of higher education suggest

²⁵ Chungmei Lee, *Racial Segregation and Educational Outcomes in Metropolitan Boston* (Apr. 2004), available at http://www.civilrightsproject.harvard.edu/research/metro/Segregation_Educational_Outcomes.pdf.

that a different standard should be applied to the determination of narrow tailoring in the context of elementary and secondary education.

A. Research Studies and Evidence Introduced in the Court Below Show that the Jefferson County School Board Plan is Narrowly Tailored under *Grutter*.

Sociological and historical conditions particular to Louisville and the Jefferson County public schools, and widely accepted research regarding social capital and the achievement gap, strongly support the District Court’s conclusions that the Jefferson Plan is necessary and does not cause undue harm to the appellants. Research studies provide further support for the necessity of achieving more than token integration, and demonstrate the flexibility of the 2001 Plan.

In terms of undue harm, the First Circuit correctly recognized that the problems of minority-student stigma and majority-group stereotyping discussed in *Bakke* and *Grutter*, resulting from the belief that students from the “preferred” racial group lack merit, are “far less ominous, if not altogether absent, in the K-12 setting.” *Comfort*, 2004 WL 2348505 (1st Cir. 2004) at *15.

[T]he transfer provisions of the [Assignment] Plan do not operate competitively: “X” is granted or denied a transfer on the basis of a set . . . standard, not on the basis of how he stacks up when compared to “Y.” Thus, the provisions neither skew a competitive process nor substitute race as a proxy for an applicant’s merit.

Id.

Expert testimony and social science research weigh strongly against appellants' claim that students denied their school of choice are deprived of the difference between average test scores at the school of choice and the school to which they are assigned. (Brief of Appellant, 22-23). As the court found in *Hampton II*: "It seems likely that numerous external factors – including high poverty incidence, lower levels of parental education, [and] higher incidence of families without two active parents . . . produce the disparity [in test scores]."²⁶ A large body of research establishes the relationship between such "social capital"²⁷ and test scores. (Edward Kifer at TR 3-175, 3-201). Test score comparisons are of marginal assistance in determining whether schools are equal, because they do not control for social capital.²⁸ (Gary Orfield at TR 5-14, 5-46).

Dr. Kifer and Dr. Rodosky compared the level of social capital that students were bringing to each of the Jefferson County schools to the test score data for that

²⁶ 102 F. Supp. 2d at 366; *see also United States v. City of Yonkers*, 197 F.3d 41, 54 (2d Cir. 1999) (noting the possible effects of a broad array of socioeconomic factors on such an achievement gap); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997) (finding that many causes of such an achievement gap are beyond the school system's control).

²⁷ Social capital is defined broadly as those external factors that a child *brings* to the school and is generally operationalized to include such variables as family income and whether the student is from a single or two-parent household.

²⁸ Researchers agree that studies should instead measure how individual students change over time. (Edward Kifer at TR 3-209).

school,²⁹ and found that social capital dramatically influenced test scores.

Differences in social capital predicted differences in test scores: schools with higher social capital had higher test scores, and vice versa. (Robert Rodosky at TR 3-150). Because of pre-existing student differences, higher test scores at school A than school B, do not mean that A is a better school. (Edward Kifer at TR 3-176 to 3-177). A statewide regression analysis confirmed these findings. Adjusting for free-or-reduced lunch status as a rough estimate of social capital, schools with little or no racial diversity (20 or 30 percent of the schools in the state) moved from the top of the list of highest performers on test scores down to the middle or bottom of the list, and schools with greater diversity moved up significantly. (Edward Kifer at TR 3-203).

A minimal number of students from a different race is needed in order to achieve the benefits of an integrated education and to prevent stereotyping and other adverse effects of racial isolation. Without a substantial number of black and white students in a given school, the efforts to promote cross-racial understanding lose much of their force. There is a well-established desegregation literature focusing on benchmarks, such as the twenty percent figure, that have become

²⁹ More specifically, the results were compared to the school's accountability index, which is 85 percent test scores and 15 percent nonacademic educational factors such as dropout and suspension rates. (Robert Rodosky at TR 3-153).

widely accepted among social scientists, educators, and policy makers for the effective integration of their schools.³⁰

The 2001 Plan employs a “quite flexible and broad target” (from 15 to 50 percent of the students) to determine whether its schools are avoiding racial isolation and promoting racial diversity. *McFarland*, 330 F. Supp. 2d at 857. This range is fully consistent with the research literature and provides the Jefferson County public schools with a highly flexible policy under which race can be factored into school assignment decisions. Actual percentages of black students attending each school range from 20 to 50 percent. *Id.* In *Grutter*, Justice Rehnquist expressed concern that the percentages of minorities enrolled at the law school fluctuated little, yet were proportional, year-to-year, with the number of minority applicants. *See Grutter*, 539 U.S. at 383-86 (Rehnquist, J., dissenting). Similarly, the First Circuit held that the plan in *Comfort* was problematically “calibrated toward proportional representation . . . it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population” 2004 WL 2348505 at *17. By having a broad and flexible goal that is independent of percentages in the general student population, and by

³⁰ *See, e.g.*, Willis D. Hawley, et al., *Strategies for Effective Desegregation: Lessons from Research* (1983); Schofield, *Review of Research*, *supra*. Dr. Orfield cited a comprehensive study describing a 20 percent figure below which members of a racial minority are marginalized. (Gary Orfield at TR 5-79 to 5-80).

limiting its focus to achieving substantial student representation, the 2001 Plan avoids such problems.

The school district had no other race-neutral way to achieve its compelling interest in promoting racial diversity and avoiding racial isolation. *See McFarland*, 330 F. Supp. 2d at 857. Removing the race factor from the 2001 Plan would result in resegregated schools. (Gary Orfield at TR 5-32 to 5-33; Robert Rodosky at TR 3-128, 4-45). Avoiding the resegregation that alternative plans would allow is especially important given the history of desegregation in the school district. “Jefferson County is nationally acknowledged as one of the most thorough and successful desegregation plans in the nation . . . JCPS has consistently met the many and varied challenges presented to it.” *Hampton II*, 102 F. Supp. 2d at 369-70.

B. The Jefferson County School Board Plan is Narrowly Tailored under Standards that Consider the Context of K-12 Education.

The nature of strict scrutiny and the narrow tailoring inquiry depend on the particular context in which race is being considered. *Grutter*, 539 U.S. at 327. The narrow tailoring inquiry “must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education” and “the very purpose of strict scrutiny is to take such ‘relevant differences into account.’” *Id.* at 334 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200,

228). The narrow tailoring inquiry in this case must therefore be calibrated to take account of the significantly different context of K-12 education.

In particular, the requirement of individualized consideration in *Grutter* is not as appropriate in the K-12 context. It is not necessary for the Jefferson County Public Schools to give comprehensive, individualized review to each student in this context. Unlike higher education acceptance decisions, most K-12 public school assignment decisions are noncompetitive, and are not based on differences in achievement, ability, or experiences. In addition, the managed choice plans that have been effective in maintaining integrated schools, improving student achievement, and garnering widespread support from the greater school community, involve the difficult task of coordinating the assignment of a huge student body- in this case almost 100,000 students. In this sense, public school systems with comparatively limited budgets and staff are unlikely to have sufficient time or funding to conduct individualized holistic review. Except in the comparatively rare cases of very small, highly competitive schools or programs, school districts would similarly be limited in their capacity to review the more complex array of individual characteristics appropriate for consideration in the context of higher education.

Conclusion

For all of the foregoing reasons, the 2001 Plan should be upheld as constitutional and the District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C).

1. Exclusive of the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,544 words.
2. The brief has been prepared in proportionately spaced typeface using Microsoft Word 2003 in Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of November 2004, pursuant to Fed. R. App. P. 25, I have caused a copy of the foregoing brief of amicus curiae The Civil Rights Project at Harvard University to be served by United States first-class mail, postage prepaid, on the following:

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