No. 10-3824

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STUDENT DOE 1, *et al.*,

Plaintiffs-Appellants

v.

LOWER MERION SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* URGING AFFIRMANCE

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STATEMENT OF THE ISSUE[1]

Whether strict scrutiny applies to a zone-based school assignment plan that does not assign individual students to elementary and secondary schools on the basis of the student's race, where school officials considered the racial impact of various zoning alternatives alongside numerous non-racial factors when developing the plan.

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[1] Our brief addresses only the judicial review of plaintiffs' equal protection claim.

INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in public education, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race or national origin by recipients of federal financial assistance. The United States Department of Education has responsibility for ensuring Title VI compliance, and also issues guidance documents and letters under Title VI regarding the permissible use of race in student assignment. Nearly every school district in the United States accepts federal funds and therefore is subject to Title VI. The United States thus has a significant interest in the resolution of the issue presented.

STATEMENT OF THE CASE

Plaintiffs are nine African-American students (and their parents) who attend public school in Lower Merion School District (Lower Merion). A2. In January 2009, following a capital improvement program that necessitated equalizing enrollment at Lower Merion's two high schools, the school board adopted a zone-based plan (Plan) that reassigned about 350 students from Lower Merion High School (LMHS) to Harriton High School (HHS). A13, A46. Under the Plan, plaintiffs lost the option to attend LMHS. A40-A43.

Plaintiffs brought this action, alleging that the Plan violates the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and 42 U.S.C. 1981 and seeking to restore plaintiffs' choice of schools. A124-A141. After a bench trial, the district court upheld the Plan and entered judgment in favor of Lower Merion. A93-A95.

STATEMENT OF FACTS

1. Facts

A. Lower Merion has six elementary schools, two middle schools, and two high schools. A6. In 1997, Lower Merion embarked on a capital improvement program to modernize its schools. A12. In 2004, the school board adopted the program committee's proposal to renovate the two high schools and balance enrollment at 1250 students per school. A12-A13. Pre-renovations, LMHS had approximately 1600 students and HHS had approximately 900 students. A12. Equalizing high school enrollment allowed students at each school to benefit from increased faculty-student interaction and equal course offerings, co-curricular activities (clubs, teams, etc.), and facilities. A13. It also took advantage of existing real estate, and alleviated traffic and parking problems at LMHS. A13. Plaintiffs have not alleged that racial considerations motivated the decision to equalize high school enrollment. A124-A141.

The decision to equalize high school enrollment forced Lower Merion to rezone about 350 students from LMHS to HHS. A13. The rezoning process was complicated by the fact that the overwhelming majority of the school district's students live much closer to LMHS than HHS. A51 n.22, A2127 (map). Prior to reassignment, African-American students comprised approximately 5.7% of HHS's student population and 13% of LMHS's student population; African-American students comprise approximately 10% of the district-wide high school population. A13.

B. In April 2008, the school board adopted five "non-negotiables," or mandatory criteria, for rezoning students: middle and high school enrollments would be equalized; elementary students would be assigned to avoid overcrowding; the number of buses would not increase; high school students could stay in their present high school; and assignments would be based on current and anticipated needs. A15-A16. No criterion discussed race or African-American student assignments. A15-A16. In May 2008, Lower Merion hired consultants to identify those "community values" that should be considered in the reassignment process. A16-A17. After conducting public forums and collecting online surveys, (A16) the consultants concluded that important values included being able to walk to school, reducing travel time for non-walkers, and "explor[ing] and cultivat[ing]

whatever diversity—ethnic, social, economic, religious, and racial—there is in Lower Merion." A17 & n.9.

Between June and September 2008, school officials developed six assignment plans, choosing one to present at a public school board meeting as Plan 1. A19-A27. The Board rejected Plan 1 because it resulted in excessive travel times for rezoned students. A32. Rejection of Plan 1 led to the creation of three additional plans (Plans 2, 3, and 3R), developed serially after each public Board meeting. A19-A20. All plans attempted to equalize high school enrollment while taking into account travel time to HHS and some level of peer continuity (*e.g.*, assigning elementary school classmates to the same middle school or middle school classmates to the same high school). A32-A33. Over time, members of the public stressed the importance of a plan that allowed many students to walk to school, and to transition to middle and high school with the same peers. A34, A40. Thus, in addition to equalizing overall high school enrollment and minimizing travel times, the plans increasingly emphasized retention of the school district's walk zones, and K-12 peer continuity. A34, A40.

In developing the plans, school officials compared each high school's projected enrollment by race, ethnicity, socioeconomic score, and the number of students with individualized education programs. A20, A28. Five of the six earliest plans equalized enrollment while tracking the total number of African-

American students anticipated at each high school as a percentage of the overall student body. A22.

Lower Merion's African-American students are geographically concentrated in a neighborhood known as Ardmore. A10 & n.2. In considering the impact of the various plans, school officials became reluctant to assign both North and South Ardmore to the same high school; because Ardmore had the highest residential concentration of African-American students in the district, assigning the entire neighborhood to one high school would leave only a very small number of African-American students at the other school. A24. In addition, assigning both North and South Ardmore to LMHS prevented school officials from equalizing enrollment at 1250 students per school unless residential areas farther away from, and with longer bus rides to, HHS were rezoned to HHS. A39, A42 (map), A87. Because each plan increased the level of racial diversity at HHS, (A21) school officials faced criticism at every public Board meeting from some minority parents who felt that their neighborhoods were being rezoned for racial and ethnic reasons. A31-A32, A34, A40.

C. In January 2009, the Board adopted Plan 3R. A46. The Plan primarily assigns students to schools according to two feeder patterns that attempt to equalize high school enrollment while fostering K-12 peer continuity. A38-A42. The Plan contains two exceptions to the feeder patterns. First, any student zoned

to LMHS can attend HHS for its special academic programs, which include the International Baccalaureate (IB) program and a partnership with Penn State. A43, A194. Second, any student zoned to HHS who resides in the "official, historic LMHS walk zone" can attend LMHS. A43, A44 n.21. The "walk zone" immediately surrounds LMHS and encompasses students who live less than a mile from LMHS and are not bused to school. A14. The Plan zones students as follows:

- Students attending Gladwyne, Belmont Hills, and Penn Valley Elementary Schools attend Welsh Valley Middle School and HHS. Students living in the LMHS walk zone can attend LMHS.
- Students attending Penn Wynne, Cynwyd, and Merion Elementary Schools attend Bala Cynwyd Middle School and LMHS. Students assigned to LMHS can elect to attend HHS.

A194-A195, A223. Under the Plan, all students stay with their elementary and middle school peers for high school unless they opt out of their assigned feeder pattern to walk to LMHS or to attend HHS's special academic programs. A194.

Lower Merion assigned Penn Wynne Elementary School (which includes North Ardmore students) to LMHS, and Penn Valley Elementary School (which includes South Ardmore students) to HHS. A42. Under the Plan, students in three areas—Northwest Penn Valley, South Ardmore, and North Narberth—can no longer attend LMHS because they (a) attend an elementary school in the HHS feeder pattern and (b) live outside of the LMHS walk zone. A14, A50, A195.

While students in all three areas previously had the choice of attending LMHS, they are all now zoned to HHS. A50, A54. Unlike the students in South Ardmore, the student population in the other two areas is predominantly white. A50, A246.

In the first year under the Plan, African-American students comprised 8.25% of HHS students and 12.6% of LMHS students. A50. These percentages include students who moved voluntarily between schools on account of the walk zone option, limited grandfathering provision, and special academic programs. A50.

2. District Court Proceedings

A. The district court held a bench trial focused on the manner in which Lower Merion considered race in developing the Plan. A3. The court found that Lower Merion rezoned students because of the capital improvements that increased student capacity at HHS and reduced student capacity at LMHS. A13. The court also found that school officials developed and recommended the plans based on many legitimate educational factors, including "helping students achieve educational excellence, attaining equal student populations at the two high schools, minimizing travel time, developing the 3-1-1 feeder pattern, and also closing the achievement gap that [school officials] perceived to exist between African-American and white students." A51.

As to school officials' consideration of the projected racial demographics of each high school as one factor among many in recommending various zone-based

plans, the district court found that in addition to achieving "overall numeric equality," (A53) the plans "reflect[ed] a specific concern about the African-American student population" (A23). The court also found that Lower Merion's use of race followed sound educational policies. A53.

While the district court found that school officials who drew up the plans allowed neighborhood racial demographics to influence to some respect which plans they presented to the Board, the court found that Board members were unaware of the role racial considerations had played in formulating the plans. A3. The court found that the Board did not vote for the Plan based on racial grounds; rather, Board members voted for or against the Plan based on whether they believed K-12 peer continuity outweighed dividing a few neighborhoods into separate feeder patterns. A47-A50. The court credited Board members' testimony that racial considerations did not influence their votes. A55.

The court then ordered the parties to brief the applicability of *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), in light of the court's findings of fact. A56-A57.

B. On June 24, 2010, the district court upheld the Plan. A64. The court stated that a basic principle underlying the case was that "pure 'racial balancing' at the high school level, standing alone, would be improper, but that considering racial demographics alongside numerous race-neutral, valid educational interests

* * * has never been held unconstitutional." A66. The court also stated that the Plan did not use individual racial classifications to assign students to schools. A69.

In determining the level of scrutiny to apply, the court stated that each of the Supreme Court cases applying strict scrutiny that Plaintiffs cited was distinguishable, thus "indicating that strict scrutiny may not be the operative standard to evaluate the constitutionality of [the Plan]." A68-A69. The court stated that in *Parents Involved*, the Supreme Court had repeatedly emphasized that the school districts had relied on the race of individual students in making assignment decisions and ruling on transfer requests. A70. The district court concluded that because Plan 3R did not use individual racial classifications, it "falls outside the facts and holding of *Parents Involved*, and is not subject to strict scrutiny in light of *Parents Involved*." A72.

The district court then analyzed Lower Merion's actions under this Court's decision in *Pryor* v. *National Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002), and under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). A76-A80. The district court questioned the applicability of *Pryor* in light of *Parents Involved*, stating that the Supreme Court's "focus on applying strict scrutiny to * * * individual racial classifications calls into question whether *Pryor*'s pronouncement on the broad applicability of strict scrutiny to policies motivated in part on race, applies to student assignment

plans that do not involve individual racial classifications." A77-A78 n.6. Yet the district court felt bound to apply *Pryor* as Circuit precedent. A77.

The district court stated that under *Pryor*, strict scrutiny applied if race was a motivating factor in the school district's reassignment plan, and that, in order to avoid strict scrutiny, *Arlington Heights* required school officials to show they would have implemented the same plan absent any consideration of race. A77, A80. The district court concluded it would apply strict scrutiny, noting that if Lower Merion satisfied that standard, it would also survive intermediate scrutiny and rational basis review. A80-A81.

The court reasoned that because the Plan (a) aimed to satisfy the "compelling educational interests" of equalizing high school enrollment, minimizing travel time and transportation costs, fostering peer continuity, and promoting walkability, and (b) was the only plan that simultaneously met these goals, the Plan was narrowly tailored and survived strict scrutiny. A83. The court emphasized that "[a]n opposite conclusion is not warranted by the mere fact that [school officials] considered the racial demographic makeup of [South Ardmore] during redistricting." A83-A84. According to the court, North and South Ardmore were "natural candidates for redistricting" because of their proximity to HHS; rezoning South Ardmore also promoted K-12 peer continuity. A87-A89. Thus,

the court concluded that South Ardmore "would have been selected for redistricting regardless of its demographic makeup." A89.

The court also addressed school officials' use of racial demographics to assess the merits of certain plans, and concluded that school officials considered the racial impact of the plans alongside numerous non-racial objectives. A92. The court stated that school officials took race into account only to address the achievement gap between African-American students and their peers, and the racial isolation African-American students experience when their classes contain only a few students of their race. A53, A91. The court held that "the mere fact that [school officials] considered racial demographics in redistricting students * * * does not render * * * Plan 3R unconstitutional. [Lower Merion] has established that Plan 3R would still have been adopted even had racial demographics not been considered." A92-A93. The court held that the Plan survived strict scrutiny and was therefore constitutional. A93.

STANDARD OF REVIEW

This Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *McCutcheon* v. *America's Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009). This Court may affirm the district court's decision on alternate grounds, provided the record supports the judgment. *Storey* v. *Burns Int'l Sec. Servs.*, 390 F.3d 760, 761 n.1 (3d Cir. 2004).

SUMMARY OF ARGUMENT

Lower Merion's school assignment plan must be analyzed under *Parents Involved*, the most recent Supreme Court decision to address the use of race in elementary and secondary school assignments. The majority in *Parents Involved* applied strict scrutiny to two student assignment plans that relied on racial criteria to assign individual students to schools; it did not hold, however, that strict scrutiny applies whenever a school district considers the racial impact of a school assignment plan. Rather, as Justice Kennedy, who provided the critical vote to the majority holding, recognized in his opinion concurring in part and concurring in the judgment, a race-conscious school assignment plan is not likely to demand strict scrutiny if it does not use individual racial classifications to provide students the educational benefits of racially diverse schools.[2]

Lower Merion rezoned students primarily to equalize high school enrollment, minimize travel times, and foster K-12 peer continuity. School officials considered race incidentally and in a non-individualized way in an effort

[2] Justice Kennedy's concurrence addressed race-conscious measures to promote diversity and avoid racial isolation, not to segregate students. That context is critical to his statement that strict scrutiny is unlikely to apply where school districts consider the racial impact of their general policies. This appeal arises in such a context, and thus differs significantly from a school district's efforts to segregate students on the basis of race. See, *e.g.*, *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973).

to promote diversity and reduce racial isolation at HHS. Accordingly, strict scrutiny does not apply, and the Plan satisfies constitutional standards.

ARGUMENT

LOWER MERION'S SCHOOL ASSIGNMENT PLAN IS NOT SUBJECT TO STRICT SCRUTINY AND SATISFIES APPROPRIATE CONSTITUTIONAL SCRUTINY

A. School Assignment Plans That Rely In Part On Neighborhood Racial Demographics To Promote Diversity And Avoid Racial Isolation Do Not Demand Strict Scrutiny

1. Parents Involved *Distinguished Between Classifying Individual Students By Race And Other Race-Conscious Measures To Promote Diversity And Avoid Racial Isolation*

a. In *Parents Involved*, the Supreme Court addressed whether school districts in Seattle, Washington, and Jefferson County, Kentucky, could voluntarily rely on the race of individual students to determine which public schools those students could attend. See 551 U.S. at 709-710. In Seattle, rising ninth graders ranked district high schools in order of preference. See *id.* at 711. For oversubscribed high schools, the school district employed a series of "tiebreakers," first selecting students with a sibling in the school, next selecting students according to how their individual race affected the racial composition at designated schools, and then selecting any remaining students based on their geographic proximity to the school. *Id.* at 711-712. Similarly, Jefferson County made elementary school assignments and transfer decisions based in part on whether an

individual student would disrupt the school's "black/other" racial guidelines. *Id.* at 710, 716-717. Both school districts took account of the race of individual students in an effort to overcome residential segregation and promote diversity. See *id.* at 712, 716-717.

In the portion of Chief Justice Roberts' plurality opinion that Justice Kennedy joined to create a majority holding, the Court stated that both assignment plans were subject to strict scrutiny because they assigned some students to schools on the basis of an individual student's race. See *Parents Involved*, 551 U.S. at 720. While the Court disagreed on the extent to which school districts can rely on either express racial criteria or racial considerations to promote K-12 student body diversity, compare *id.* at 726-732 (plurality) with *id.* at 783-789 (Kennedy, J., concurring) and *id.* at 834-845 (Breyer, J., dissenting), Justice Kennedy agreed with the plurality that neither school district had provided sufficient evidence to show that assigning students to schools based on the individual student's race was necessary to achieve racial diversity. See *id.* at 733-735.

b. While Justice Kennedy agreed with the plurality that the specific plans at issue failed strict scrutiny on narrow tailoring grounds, he rejected what he viewed as the plurality's suggestion that "the Constitution requires school districts to ignore the problem of *de facto* resegregation." *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring). Significant to the issue on appeal here, Justice Kennedy

explained that school districts may in some instances consider racial demographics without triggering strict scrutiny:

> In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. * * * If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systemic, individual typing by race.
>
> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; *drawing attendance zones with general recognition of the demographics of neighborhoods*; allocating resources for special programs; recruiting students and faculty in a targeted fashion; *and tracking enrollments, performance, and other statistics by race*. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. * * * Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Id. at 788-789 (citations omitted and emphasis added).

Thus, reflecting concern for the special harms imposed by state action that subjects individuals to different treatment based on individual labeling by race,

Justice Kennedy would apply strict scrutiny to assignment plans that rely on the race of individual students to achieve racially diverse schools. See *Parents Involved*, 551 U.S. at 783; see also *id.* at 719, 746 (plurality) (describing race-based harms). However, Justice Kennedy correctly recognized that school districts should be allowed to consider the racial impact of zone-based and other generalized assignment plans on the education offered to their students. Thus, five Justices (Justice Kennedy and the four dissenters) agreed that schools must have some flexibility in designing policies that endeavor to achieve the educational benefits of increased racial diversity and decreased racial isolation, and, at least where those policies do not classify individual students by race, can do so without triggering strict scrutiny. See *id.* at 788-789 (Kennedy, J., concurring); *id.* at 863-868 (Breyer, J., dissenting).[3]

Indeed, even the *Parents Involved* plurality appeared to apply this principle. The majority briefly described Jefferson County's system of assigning students by neighborhood to designated "resides" schools, which were then clustered with

[3] Even in situations where strict scrutiny applies because a school district uses individual racial classifications to assign students, Justice Kennedy and the four dissenters recognize that promoting K-12 diversity and avoiding racial isolation are compelling educational interests. See *Parents Involved*, 551 U.S. at 797-798 (Kennedy, J., concurring); *id.* at 838-843 (Breyer, J., dissenting). Under strict scrutiny, however, school districts must show that they assigned students to schools based on the individual student's race only after considering race-neutral alternatives to achieving these compelling interests. See, *e.g.*, *id.* at 790. As explained *supra*, the issue of whether Lower Merion had a compelling interest need not be addressed here.

other schools to facilitate integration. 551 U.S. at 716. While the Court went on to address whether the school district could make *individual* assignment decisions on the basis of race, the plurality did not discuss—or disturb—the use of zones and clusters to promote racial diversity. *Ibid.* See also *id.* at 738-739 (distinguishing two state court cases as factually inapposite because they involved facially neutral, but race-conscious, assignments ultimately reviewed under the rational basis test). And as set forth above, neither Justice Kennedy nor the four dissenters would subject such use of zones or clusters to strict scrutiny. See *id.* at 788-789 (Kennedy, J., concurring); *id.* at 863-868 (Breyer, J., dissenting).

c. In stating that not all race-conscious action demands strict scrutiny, Justice Kennedy acknowledged that school officials are nearly always aware of racial patterns in their school systems, and must be permitted the flexibility to consider those patterns when developing school assignment plans that seek to offer an equal educational opportunity to all students. See *Parents Involved*, 551 U.S. at 788-789.

Indeed, federal law *requires* school districts to track data such as enrollments, performance, and other statistics by race, to help evaluate how well federal funding recipients are ensuring that all students have equal access to education. For example, the purpose of Title I of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, is to

"ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. 6301. Academic accountability lies at the core of the Act, which focuses on the educational success of all students while aiming to improve academic outcomes for disadvantaged students, including by closing the achievement gap between minority and nonminority students and between disadvantaged students and their more advantaged peers. See 20 U.S.C. 6301(1)-(4). The Act requires each funded State to establish annual measurable objectives regarding academic proficiency, and requires States and school districts to report and be held accountable for the disaggregated achievement of "economically disadvantaged students; *students from major racial and ethnic groups*; students with disabilities; and students with limited English proficiency." 20 U.S.C. 6311(b)(2)(C)(v) (emphasis added); 20 U.S.C. 6311(h)(1)(C)(i) and (h)(2)(B).

Moreover, under the federal Magnet Schools Assistance Program, school districts may seek grants to support schools that use specialized curricula to increase academic achievement and bring together students of different backgrounds and races. See 20 U.S.C. 7231-7231j. In light of federal law, school districts must be able freely to consider the effect of assignment plans and magnet programs on the racial composition of schools and the academic achievement of all students.

Justice Kennedy and the four dissenters also recognized the significant educational benefits of diversity and the critical role schools play in preparing students to live and work in a pluralistic society. See *Parents Involved*, 551 U.S. at 782, 797-798 (Kennedy, J., concurring); *id.* at 840-843 (Breyer, J., dissenting); *Grutter* v. *Bollinger*, 539 U.S. 306, 330-332 (2003). Allowing schools to consider the racial impact of zone-based assignment plans helps ensure the creation of diverse classrooms that often will promote cross-racial understanding and tolerance while reducing racial prejudice and the experience of minority students as "token" representatives of their race. See *Parents Involved*, 551 U.S. at 788-789 (Kennedy, J., concurring); *Grutter*, 539 U.S. at 330. See generally 553 Social Scientists Amicus Br., *Parents Involved*, Nos. 05-908 & 05-915, 2006 WL 2927079 (Oct. 10, 2006). Diversity-related policies also combat the unequal educational opportunities often associated with predominantly minority schools and, in some instances, help lessen the achievement gap between minority and nonminority students. See *Parents Involved*, 551 U.S. at 839-841 (Breyer, J., dissenting); 553 Social Scientists Amicus Br. at 10-12.

Justice Kennedy's framework permits school officials to take action that brings together students of diverse backgrounds and races and reduces the educational harms of racial isolation. Conversely, applying strict scrutiny whenever school administrators take the racial impact of their decisions into

account would discourage schools from implementing policies aimed at improving the education offered to all students or taking steps necessary to promote equal educational opportunities. Accordingly, this Court should hold, in accordance with Justice Kennedy's pivotal opinion in *Parents Involved*, that a school district's consideration of neighborhood racial demographics in drawing a school assignment plan that promotes diversity and reduces racial isolation does not trigger strict scrutiny. Such a holding properly enables school districts to offer an equal educational opportunity to all students, while still providing enhanced judicial scrutiny for systems that reduce individual students "to an assigned racial identity for differential treatment." *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring).

2. Neither Arlington Heights *Nor* Pryor *Demands Strict Scrutiny Here*

This Court must analyze the nature of a school district's use of racial demographics in accordance with Justice Kennedy's pivotal opinion in *Parents Involved*. Plaintiffs overlook that opinion and instead rely on *Arlington Heights* and *Pryor* to argue that racial considerations may *never* play a role in developing school assignment plans. Compare Appellants' Br. 29-30 ("This appeal directly challenges the district court's legal conclusion that although Lower Merion's actions were not 'color blind,' they were neither unconstitutional nor illegal."), with *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) ("In the real

world, * * * ['color-blindness'] cannot be a universal constitutional principle."). Plaintiffs' reading of those cases is simply incorrect.

a. In *Arlington Heights*, the Supreme Court addressed a racial discrimination challenge to a village's refusal to rezone property to allow for low-income and middle-income housing. See 429 U.S. at 254. Because the village denied it acted on discriminatory grounds, the Court had to determine to what extent, if any, racial discrimination motivated the village's decision. See *id.* at 266-268. In doing so, the Court discussed the process by which a court should consider procedural and substantive departures from existing processes to uncover discriminatory motive. *Ibid.* *Arlington Heights* is often cited as the starting point for a judicial determination of whether a facially neutral law or policy is motivated by a racial purpose. See, *e.g.*, *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999); *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-489 (1997); *Miller* v. *Johnson*, 515 U.S. 900, 913-914 (1995). In this appeal, the district court found that school officials did consider racial attendance patterns to a limited extent, and the school officials do not challenge the finding on appeal. Thus, *Arlington Heights* has little relevance here.

In *Pryor*, this Court applied *Arlington Heights* to the dismissal of a Title VI challenge to the NCAA's scholarship and athletic eligibility criteria for incoming freshman. See 288 F.3d at 552. The NCAA asserted that its goal in adopting these

criteria was to increase graduation rates among black student athletes, and thus that its only purpose was "to help black athletes * * *, not [to] harm them." *Id.* at 565. Acting at the pleading stage, this Court rejected that assertion because the plaintiffs "sufficiently allege[d] that the NCAA adopted [the new criteria] for the malevolent purpose of excluding black student athletes." *Id.* at 567. The Court explained that "well-intentioned or not, express or neutral on its face, a law or policy that purposefully discriminates on account of race is presumptively invalid and [must] survive" strict scrutiny. *Id.* at 566. This Court also distinguished situations in which decision makers have a "mere awareness of the [racial] consequences of an otherwise neutral policy" and made clear that such awareness "will not suffice" to trigger heightened review. *Id.* at 562 (citing *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 277-278 (1979)).

b. Appellants read *Arlington Heights* and *Pryor* as holding that any consideration of race in developing student assignment plans necessarily demands strict scrutiny. But neither the Supreme Court nor this Court has applied the discriminatory intent doctrine to demand strict scrutiny of every consideration of race. To the contrary, the Supreme Court and this Court have applied strict scrutiny only when governmental action classifies individuals on the basis of race or is intended to impose a disadvantage on a particular racial group. Thus, in *Pryor*, this Court concluded that strict scrutiny applied (at the pleading stage)

because the plaintiffs had alleged that the defendants had increased eligibility requirements in order to decrease the number of black athletes at NCAA schools. See 288 F.3d at 565-567.

In its higher-education affirmative action cases, the Supreme Court has applied strict scrutiny to programs that classify individual applicants on the basis of race—whether race is considered through a rigid point system or as a factor in a more holistic analysis. See *Grutter*, 539 U.S. at 326, 337; *Gratz* v. *Bollinger*, 539 U.S. 244, 270 (2003). But it has not applied that scrutiny to programs that do not classify individuals on the basis of race; indeed, the Court has said that governments must consider these sorts of facially race-neutral alternatives as a means of achieving the compelling interest in student body diversity before adopting the sorts of classifications that trigger strict scrutiny. See *Grutter*, 539 U.S. at 339-340. In cases involving affirmative action in public contracting, the Court has similarly stated that governments must consider race-neutral means of increasing minority business participation before adopting the racial classifications that are subject to strict scrutiny. See *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237-238 (1995); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 509-510 (1989) (plurality). The permissible alternatives that the Court cited in these cases (decreased emphasis on standardized tests, simplification of bidding procedures, relaxed bonding requirements, etc.) are often implemented precisely

because they will increase minority enrollment and minority business participation. Yet the Court has not applied strict scrutiny to them.

Similarly, in its racial gerrymandering cases, the Supreme Court has rejected claims that the Constitution mandates "a 'color-blind' electoral process." *Shaw* v. *Reno*, 509 U.S. 630, 641-642 (1993). Rather, the Court has applied strict scrutiny only when a districting plan intentionally dilutes minority voting strength, see *Rogers* v. *Lodge*, 458 U.S. 613 (1982); *White* v. *Regester*, 412 U.S. 755 (1973), or when it "classif[ies] citizen[s] by race," *Shaw*, 509 U.S. at 644. See also *United States* v. *Hays*, 515 U.S. 737, 745 (1995) (voter cannot challenge non-dilutive racial gerrymandering unless "the plaintiff has personally been subjected to a racial classification").[4] The Court has held that "race consciousness" in redistricting does not alone trigger strict scrutiny. *Shaw*, 509 U.S. at 646. Because "the legislature always is *aware* of race when it draws district lines," the Court has applied strict scrutiny, absent vote dilution, only when electoral districts "rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." *Id.* at 642, 646. See *Miller*, 515 U.S. at 913.

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[4] Indeed, in his concurrence in *Parents Involved*, Justice Kennedy cites *Bush* v. *Vera*, a post-*Shaw* case of nondilutive racial gerrymandering, for the proposition that strict scrutiny likely does not apply to "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that * * * define[s] [individuals] by race." *Parents Involved*, 551 U.S. at 789 (citing *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality)).

B. Lower Merion's Assignment Plan Is Not Subject To Strict Scrutiny

Lower Merion's assignment plan is not subject to strict scrutiny because it does not assign students to schools on the basis of an individual student's race. Here, Lower Merion merely used neighborhood racial demographics as one relevant factor among many in determining how best to assign students to schools while also maximizing the education offered to all students.

1. The Plan Does Not Use Race To Assign Individual Students To Schools

Lower Merion's zone-based assignment plan does not use race as a criterion for assigning individual students to schools and, as indicated in Justice Kennedy's concurrence, is not subject to strict scrutiny on that basis.

Rather, Lower Merion assigns high school students according to two feeder patterns that draw from existing elementary and middle school assignments. See p. 7, *supra*. All students follow the feeder patterns unless they are either (a) zoned for HHS and opt to attend LMHS under the walk zone option, or (b) zoned for LMHS and elect to attend HHS for its special academic programs. Thus, neither the initial assignments nor the option programs take account of an individual student's race.

Consequently, the Plan subjects similarly situated students of different racial backgrounds to the same treatment. There are two relevant classes of students in the HHS feeder pattern: (1) students residing inside the walk zone; and (2)

students residing outside of the walk zone. All students zoned to HHS who live inside the walk zone can elect to attend LMHS. All students living outside of the walk zone must attend HHS. While students in South Ardmore and two heavily white redistricted areas previously had the choice of attending LMHS despite living outside of the walk zone, they are all now assigned to HHS. Thus, the Plan treats similarly situated students of different racial backgrounds identically.

Thus, this appeal clearly implicates different considerations than the Supreme Court's education cases invalidating plans that linked individual admissions and assignment decisions to a student's race. While Plaintiffs analogize their case to the plans struck down in *Parents Involved*, it is beyond dispute that the Plan does not assign individual students to schools on the basis of their race. Thus, the Plan bears no resemblance to the admissions and assignment plans that the Supreme Court has subjected to strict scrutiny on the basis of their sole reliance on an individual student's race. See, *e.g.*, *Parents Involved*, 551 U.S. at 710; *Gratz*, 539 U.S. at 270; *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315-317 (1978).

2. Lower Merion Used Routine Assignment Principles To Develop Its Zone-Based Plan And Considered Race Only To Assess The Impact Of Various Alternatives On The Education Offered To Its Students

Lower Merion's actions are consistent with Justice Kennedy's vision of drawing attendance zones with general recognition of neighborhood demographics.

Indeed, in reassigning students to equalize overall high school enrollment, Lower Merion explicitly relied on routine zoning principles when drawing its attendance zones, and considered the racial impact of various alternatives for the limited purpose of maximizing the education offered to all students. Indeed, this type of plan, considering race alongside routine districting principles, appears to be the very type of zoning action Justice Kennedy envisioned.

The parties do not dispute that Lower Merion rezoned students to equalize enrollment at 1250 students per high school. Nor can they dispute that legitimate, non-racial principles governed the reassignment process. Lower Merion sought to achieve multiple non-race-based objectives while equalizing overall enrollment: keep schools at or under capacity; ensure the same number of school buses; minimize travel times; retain walk zones to the extent possible; and foster some level of peer continuity. Thus, in developing the Plan, school officials constantly analyzed the impact of various alternatives on factors having nothing to do with race, *e.g.*, changes in bus routes, increased travel time, loss of peer continuity, and projected overall attendance at each school. While the district court found that school officials considered the projected racial compositions of LMHS and HHS throughout the reassignment process, the record shows that the racial impact of the plans was only one consideration among many in rezoning students. Thus, the

district court's conclusion that the Plan could be fully explained on non-racial grounds is unsurprising.

Lower Merion's consideration of how adopting one plan over another might affect its ability to implement educational programming to increase student achievement and reduce African-American students' feelings of racial isolation is consistent with Justice Kennedy's concurrence in *Parents Involved*. In taking such considerations into account, Lower Merion merely reflected on how its many rezoning alternatives impacted the education offered to its students. Indeed, in light of Lower Merion's efforts to ensure the educational success of all students and to combat the achievement gap between minority and nonminority students, the school district rightfully considered the racial impact of its plan. By failing to do so, Lower Merion could have missed an important opportunity to capitalize on the educational benefits of increased diversity and decreased racial isolation.

Recognizing as much, Plaintiffs rely heavily on the district court's finding that Lower Merion sought to achieve "racial parity" between LMHS and HHS. In doing so, Plaintiffs engage in a myopic reading of the record. The district court's finding that the school district sought to balance the racial compositions of its high schools must be understood in the context of the court's other findings that multiple non-race-based factors motivated the Plan and that at least some, if not all, of Ardmore was certain to be reassigned because of its proximity to HHS.

Because most of the school district's African-American students live in North or South Ardmore, the assignment of those areas inevitably affects the level of diversity at both high schools. Assigning the entire area to one high school would result in the isolation of African-American students at the other high school, a situation that could lead to negative educational experiences for those students. See p. 20, *supra*. Conversely, assigning Ardmore students according to the feeder patterns divides the majority of the school district's African-American students between two high schools, thereby increasing racial diversity at LMHS and HHS while reducing racial isolation for African-American students at HHS. When the findings are understood in the context of Lower Merion's neighborhood demographics, it is clear that the district court used "racial parity" in a sense entirely different from the arbitrary "racial balancing" the plurality condemned in *Parents Involved*, see 551 U.S. at 729-731.

Plaintiffs' argument that Lower Merion engaged in impermissible racial balancing because the racial compositions of LMHS and HHS mirror the overall percentage of African-American students in the school district also fails. Based on the district court's findings, approximately 85% of the school district's African-American students reside in some portion of Ardmore. Because Ardmore is assigned to two elementary schools that feed into different high schools of roughly the same size, any zone-based attempt to reap the educational benefits of diversity

is likely to result in a similar percentage of African-American students at each high school. Having similar numbers of African-American students at LMHS and HHS does not mean the Plan is defined by race, however. Significantly, because the Plan is zone-based and also allows for the voluntary movement of students under the option programs, it is impossible for Lower Merion to ensure the racial or ethnic composition of its high schools. Thus, the Plan is unlike the racial quotas and guidelines struck down in *Bakke* and *Parents Involved*.

At bottom, Lower Merion considered the impact of various zone-based plans on the possible classroom experience of African-American students at HHS, and on the school district's ability to offer achievement-related programming at both high schools, as one factor among many in its decision of how best to equalize enrollment at 1250 students per school. That Lower Merion considered which plan best allowed it to reap the educational benefits of increased diversity and reduced racial isolation while achieving multiple non-race-based objectives does nothing to change the fact the Plan does not define individual students by race and does not use race in disregard of traditional assignment principles. Accordingly, strict scrutiny does not apply.

CONCLUSION

The judgment should be affirmed on alternate grounds.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel to the United States.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 31.1(c), I hereby certify that the foregoing Brief For The United States As *Amicus Curiae* Urging Affirmance complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

I further certify that the foregoing Brief For The United States As *Amicus Curiae* Urging Affirmance complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies of this brief. I further certify that a virus detection program (TREND MICRO™ OfficeScan™ Version 8.0) has been run on the electronic brief, and that no viruses were detected.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2011, I electronically filed the Brief For The United States As *Amicus Curiae* Urging Affirmance with the Appellate CM/ECF system for the United States Court of Appeals for the Third Circuit. I further certify that on February 2, 2011, ten (10) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by Federal Express. The following counsel will be served electronically by the Appellate CM/ECF system:

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