No. 98-1604

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GRACE TUTTLE, et al.

Plaintiffs-Appellees

v.

THE ARLINGTON COUNTY SCHOOL BOARD, et al.,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of public schools, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race and national origin by recipients of federal funds, including local school authorities. It thus has an interest in the orderly development of the law regarding the use of race in a wide variety of educational contexts.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court erred in ruling, without hearing any evidence on the question, that student diversity cannot be a compelling interest justifying the use of race and/or

national origin in student assignments at the elementary and secondary level.

2. Whether the district court erred in barring the use of family income or students' first language as lottery factors.

STATEMENT OF THE CASE

1. Prior Litigation. In addition to operating numerous neighborhood schools, the Arlington County School Board (Board) operates three system-wide alternative schools open to all students in the County: Arlington Traditional School (ATS), Drew Model School, and H-B Woodlawn Secondary School. This appeal concerns a lottery, weighted to give limited preferences to students based upon their family income, first language, and race or ethnicity, that was used to select entering kindergarten students for ATS for the 1998-1999 school year.

As the district court found, ATS offers "an educational program comparable to that offered in other elementary schools in Arlington but with an emphasis on what [the Board] calls a 'traditional' method of instruction." Tito v. Arlington County Sch. Bd., No. 97-540-A (E.D. Va. May 13, 1997), J.A. 32.[1] "ATS and the other alternative schools receive funding and resources at a level comparable to the funding and resources provided to other elementary schools" and "ATS uses the same core curriculum as other schools in the county." J.A. 32-33. The number of children applying for the kindergarten class at ATS exceeds the

[1] Citations to "J.A. __" refer to pages in the Joint Appendix in this appeal. As explained infra, Tito was a challenge to an earlier method of selecting students for ATS.

number of spaces available each year after priority is given to siblings of current students. No tests or other measures of achievement or ability are used to select students for ATS or the other alternative schools. J.A. 33. Rather, the Board conducts a lottery to fill the available places in the class. J.A. 33; J.A. 187.

The selection process for ATS in 1997 was governed by Arlington School Directive 25-6.02. Tito, J.A. 33; see J.A. 49-52. Under this policy, the Board sought to achieve enrollments in each of the alternative schools that approximated the ethnic distribution of the student enrollments of the County as a whole. J.A. 33. Because the applicant pool at ATS was disproportionately white, it was necessary to consider race in making student selections in order to attain that goal. J.A. 34-35. After siblings of then-current ATS students were admitted, a random lottery was run and numbers assigned to all remaining applicants. The first 32 students were offered admission, 23 of whom were white. The school relied on racial preferences to select the remaining 14 students. Three were Asian, five black, five Hispanic, and one Native American. Several white students were passed over in this selection process. J.A. 34-36.

The district court held the 1997-1998 selection process to be unconstitutional as applied. Tito, J.A. 36-45. The court held that the Board's interest in achieving a diverse student enrollment at ATS was not a compelling governmental interest. J.A. 38-42. "Although the advantages of composing a student body

whose racial makeup mirrors that of the community at large may be real, more is needed than the facile talisman of 'diversity' to justify infringing the constitutional right not to be discriminated against on the basis of race." J.A. 42.

The court also found that the ATS selection process was not narrowly tailored. Tito, J.A. 42-44. The process "create[d] a rigid dichotomy between white and non-white students," failing to distinguish among minority groups, and resulting in overrepresentation of certain groups such as Asians. J.A. 43-44.

2. The 1998-1999 Selection System. Following the district court's ruling in Tito, the Board undertook a review of its admission policy for all three alternative schools, and, in February 1998, adopted a new admission policy for the alternative schools. J.A. 53-58. In adopting this policy, the Board concluded that attending schools with students of diverse backgrounds would benefit all the students in the schools (J.A. 53):

> Following extensive discussion and review, with input from the Arlington community and educators, it is the judgment of the School Board that schools which reflect the diversity of the community help to prepare and educate students to live and function in a diverse, global society. In diverse educational settings, students learn to appreciate the differences that exist among students from different backgrounds and to understand that each student comes to school with both strengths and needs.

The Board also concluded that the alternative schools should share the responsibility of educating students from different backgrounds and with different educational needs (J.A. 53):

> In addition, Arlington's system-wide schools have a responsibility to serve the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others. Although it is not always feasible to achieve this same level of diversity in neighborhood schools, due to their limited attendance zones, it can and should be achieved in the system-wide schools.

The Board found that, "[i]n Arlington, family income level, students' first language, and race/national origin are central among the factors or variables that define and exemplify the diverse nature of the community." J.A. 53. Thus, the Board concluded that, "to the extent practicable," the enrollments of each of the alternative schools should reflect the "approximate distribution of students from those groups in the district's overall student population." J.A. 53.

To accomplish this goal, the Board first ordered that efforts be undertaken to ensure that applications for the alternative schools be "disseminated as broadly as possible" and that particular efforts be made to attract an applicant pool reflecting the "diversity of the district as a whole." J.A. 54. Once applications were received, siblings of then-current students at the two alternative elementary schools would be admitted to those schools first. J.A. 55.[2] If there were more applicants than available spaces remaining, student selections would be made by lottery. J.A. 55-56. Applicants would be

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[2] There is no sibling preference for H-B Woodlawn Secondary school. J.A. 55.

classified according to the three factors: family income,[3] first language (English or non-English), and race or national origin (White, Hispanic, Black, or Asian/Pacific Islander). J.A. 53, 56. If the applicant pool was within 15% of the County's student population for each of the three factors, the lottery would not be weighted. J.A. 53, 56. If not within that range, the pool would be weighted for income. J.A. 53, 56. The pool would then be examined, and if it was within 15% of the county population for the three factors, the lottery would be run. J.A. 53, 56. If not, the pool would be weighted for language, and only if it was still not within the 15% bands would it be weighted for race or national origin. J.A. 53, 56. Then, the lottery would be run and the places filled in numerical order. J.A. 57. Weighting was to be accomplished by including additional lottery tokens for individuals from underrepresented groups.

The 1998-1999 lottery for ATS was weighted for all three factors. J.A. 61-64. The overall student enrollment in the Arlington Public Schools is 40% low income and 43% Non-English (first language). By race it is 41% white, 31% Hispanic, 17% black, and 10% Asian. Following the application process, the 1998-1999 applicant pool for ATS was 13.5% low income and 11.9% Non-English, and, by race, 67% white, 10.8% Hispanic, 8.6% black, and 13.5% Asian. After the weighted lottery was run, the projected enrollment of ATS was 25% low income and 23% Non-

[3] Students' income classification was determined by whether they would qualify for free or reduced lunch. J.A. 61.

English, and, by race, 55% white, 22% Hispanic, 10% black, and 13% Asian. J.A. 133.

3. The Current Litigation. After the 1998-1999 lottery, two unsuccessful white applicants for the kindergarten class at ATS filed this action challenging the denial of their applications for admission, and seeking a preliminary injunction and permanent declaratory and injunctive relief. Plaintiffs challenged the constitutionality of the use of all three diversity factors. The Board defended its use of race and national origin in the selection process on the ground that the procedure was a narrowly tailored means of achieving a compelling governmental interest in obtaining the educational benefits of student diversity.

On April 10, 1998, the district court heard argument on the plaintiffs' motion for a preliminary injunction. The Board asked the court to set the case for trial on the merits, so that it could have an opportunity to present evidence in support of its judgment that it had a compelling interest in promoting student diversity and that the use of each of the weighted lottery factors was justified. J.A. 159-162, 172, 175, 180-181. The district court, however, declined to hear the Board's evidence. It ruled that the Board's selection procedures for ATS were unconstitutional and that the plaintiffs were entitled to a permanent injunction. J.A. 193. The court found the weighted lottery to be "a transparent attempt to circumvent Tito." J.A. 189.

Applying strict scrutiny, the district court held that the policy could be upheld only if it was narrowly tailored to meet a compelling governmental interest. J.A. 189-190. The court acknowledged that a remedial purpose could sometimes justify a racial classification. But it noted that the Board had not defended the weighted lottery on that basis, but rather as an attempt to achieve racial diversity in the enrollments at its alternative schools for educational purposes. J.A. 190. The court rejected the Board's contention that it should be allowed to present evidence concerning the educational and social importance of diversity in schools. J.A. 190-191. "Even if the court accepts defendants' contention that diverse student enrollments are educationally preferable, the court cannot conclude that the goal of diversity excuses racial discrimination." J.A. 191, citing Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993). The court stated that "[e]ven if racial classifications overwhelmingly increase the academic success of defendants' educational program, they remain unconstitutional." J.A. 194. The court also rejected the Board's contention that its use of family income and first language made its use of race as a selection criterion more acceptable. J.A. 191-192. In fact, the court found the use of the language factor to be "nothing more than a proxy for classification on the basis of one's national origin or race," since the application inquired only as to the student's first

language, not whether he or she was proficient in English. J.A. 192 n.3.

On April 23, the district court entered its Order Granting Declaratory Relief and Permanent Injunction. This order declared the Board's Admission Policy for Alternative Schools to be unconstitutional, in violation of the Due Process and Equal Protection Clauses. J.A. 226. It entered a permanent injunction requiring the defendants to (a) revoke the admissions of all students selected through the weighted lottery for the 1998-1999 school year; (b) cease taking any action to implement the weighted lottery for ATS; (c) conduct a new lottery "without the use of any preferences" within 10 days; (d) make all subsequent non-sibling admissions to ATS in strict accordance with the lottery results; and (e) cease using race, color, national origin, family income, student's first language, or ethnicity as a factor in admissions for ATS. J.A. 226-227.

This appeal followed.

SUMMARY OF ARGUMENT

The district court erred in concluding that the educational and social benefits of diversity in school enrollments can never provide constitutional support for the use of race in student assignments at the elementary school level. Neither the Supreme Court nor this Court has held that racial classifications are constitutional only when used to remedy past discrimination. Indeed, a long series of Supreme Court and lower court decisions, including decisions of this Court, have recognized the importance

of racial integration, particularly at the elementary and secondary school level. This assessment has been ratified by Congress, and is supported by educational research. The district court's judgment should therefore be vacated and the case remanded for consideration whether the benefits of diversity in the elementary and secondary school context constitute a compelling interest, and whether the Board's selection procedures were narrowly tailored to achieve that purpose.

The district court's injunction barring the use of family income or students' first language in the selection of students should also be vacated. Such facially neutral criteria may be held unconstitutional only if they are found to be pretexts for the impermissible use of race, and the record does not provide evidence of pretext.

ARGUMENT

I

THE DISTRICT COURT ERRED IN REJECTING THE SCHOOL BOARD'S ASSERTION OF A COMPELLING INTEREST IN STUDENT DIVERSITY WITHOUT HEARING EVIDENCE ON THAT ISSUE

1. The district court here erred when it ruled, as a matter of law and without considering any evidence on the question, that the Arlington County School Board's interest in promoting student diversity was not a compelling governmental interest, "[e]ven if racial classifications overwhelmingly increase the academic success of defendants' educational program." J.A. 194. Neither the Supreme Court nor this Court has made such a sweeping holding that diversity may <u>never</u> be a compelling governmental interest.

Racial classifications imposed by governmental entities must be subjected to strict scrutiny and "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995). In Adarand and in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Supreme Court made it clear that, when challenged as equal protection violations, all racial classifications are subject to strict scrutiny. Because the classifications at issue in both Adarand and in Croson were defended as necessary to remedy past discrimination, the Court's discussion of the government's interest in those cases was limited to a discussion of remedial purpose.

But neither case held that only a remedial purpose could constitute a compelling interest. See Adarand, 515 U.S. at 227; id. at 257-258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case"). The question whether a non-remedial purpose may also satisfy strict scrutiny was not presented in either decision, and thus "remains open in the Supreme Court." Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996), cert. denied, 117 S. Ct. 949 (1997); Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 129-130 (D. Mass. 1998), appeal pending, No. 98-1657 (1st Cir.); Hunter v. Regents of Univ. of Cal., 971 F. Supp. 1316, 1324-1327 (C.D. Cal. 1997). As the Seventh Circuit wrote in Wittmer, "there is a

reason that dicta are dicta and not holdings, that is, are not authoritative. A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." 87 F.3d at 919; cf. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other [non-remedial] governmental interests * * * to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

The district court relied on two recent decisions of this Court that stated, in dicta, that racial classifications may be justified only when the use of race is necessary to remedy past discrimination. See Podberesky v. Kirwan, 956 F.2d 52, 55 (4th Cir. 1992); Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993). But, as in Adarand and Croson, neither case presented the question whether a non-remedial purpose might also establish a compelling interest. The Podberesky court specifically declined to address the suggestion of an amicus that the scholarship program at issue there could be justified by a compelling interest in promoting enrollment diversity. See 956 F.2d at 56 n.4. Maryland Troopers concerned promotional goals imposed by a consent decree in settlement of an action alleging employment discrimination, see 993 F.2d at 1074-1075, and the court did not discuss any justification other than the need to

remedy past discrimination. See also Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 213-215 (4th Cir. 1993) (declining to decide, post-Croson, "whether achieving a greater racial diversity within the police department is a compelling state interest that might justify awarding promotions on the basis of race").

For the reasons set forth below, non-remedial purposes may also present compelling interests justifying race-conscious governmental actions. The district court here erred in ruling, without first hearing the Board's presentation justifying its use of race in student selections, that no such purpose could ever justify the practices at issue here.

2. The Supreme Court has repeatedly stressed the importance of promoting racial and ethnic integration, particularly in the context of education, even without a remedial predicate. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Court struck down an admissions scheme that set aside a specific portion of the slots in the entering class for minorities. But a majority of the Court reversed the lower court's order barring the University from any use of race in its admissions process. See id. at 272 (Powell, J.); id. at 325-326 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). Justice Powell's opinion in Bakke specifically identified the promotion of diversity in student enrollments as a compelling interest justifying the use of race in university admissions. Id. at 311-

314. As Justice O'Connor wrote in her concurring opinion in Wygant, 476 U.S. at 286, "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest".

In Brown v. Board of Education, 347 U.S. 483 (1954), the Court recognized the importance of integrated elementary and secondary education in preparing children for participation in the larger society. The Court first noted the importance of education generally, stating (id. at 493):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it 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.

Relying in part upon social science research, Brown concluded that segregated education deprives minority children of equal educational opportunities. Id. at 493-495 & n.11. The Court subsequently has noted the benefits of integration for children of both races, specifically recognizing that white children "benefit from exposure to 'ethnic and racial diversity in the classroom'" as well. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982); see Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting) ("ethnic and racial

diversity in the classroom is a desirable component of sound education in our country of diverse populations").[4]

The Court also has endorsed local school officials' authority voluntarily to use race or ethnicity in student assignments to promote integrated classrooms at the elementary and secondary level, even when they are not required to do so to remedy past discrimination. As the Court wrote in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971):

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities[.]

See also North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"); Lee v. Nyquist, 318 F. Supp. 710, 712-714 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971); see

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[4] The Court has recognized the importance of residential integration as well, in part because of its effect on integration in schools. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 110-111 & n.24 (1979) (noting relationship between residential and school segregation); Linmark Assocs. Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977) ("This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing"), citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Hills v. Gautreaux, 425 U.S. 284, 301-303 (1976) (acknowledging federal policy encouraging desegregated housing opportunities).

Penick, 443 U.S. at 488 (Powell, J., dissenting) (school authorities should be encouraged to adopt voluntary measures to promote racial balance in the schools, such as majority-to-minority transfer programs and magnet schools, even where racial imbalance is "beyond the reach of judicial correction").

Accordingly, Supreme Court precedent does not support the district court's assessment that diversity cannot, under any circumstances, constitutionally support the limited use of race in school admissions.

3. The courts of appeals, including this Court, have approved the use of race-conscious governmental actions for non-remedial purposes, in both the education and the employment contexts.

In Martin v. Charlotte-Mecklenburg Board of Education, 626 F.2d 1165 (1980), cert. denied, 450 U.S. 1041 (1981), this Court upheld a plan regulating the assignment of students, on the basis of race, to prevent the minority enrollment of individual schools from exceeding 50%. The plan initially had been implemented in accordance with a court-approved desegregation plan, but was later independently adopted by the Board of Education. "The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students." Id. at 1167, citing Swann, 402 U.S. at 16. In Talbert v. City of Richmond, 648 F.2d 925, 928-929 (1981), cert. denied, 454 U.S. 1145 (1982), this Court relied upon

Justice Powell's opinion in Bakke to uphold the consideration of race in the promotion of police officers on the ground that diversity in the upper ranks of a police force was "important to effective law enforcement in a city whose population was approximately 50% black." See also Wittmer, 87 F.3d 916 (upholding use of race in selection of prison boot camp lieutenant on ground that lack of any black supervisory-level correctional officers would be detrimental to operation of camp); Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988) (holding that operational need for a balanced workforce in the law enforcement context might justify the use of race in assignment of parole officers); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-696 (6th Cir. 1979) (citing national studies and testimony of law enforcement officials in holding that operational needs of police department could justify racial preference in promotion of police officers), cert. denied, 452 U.S. 938 (1981).

In a variety of contexts, courts have held that the use of race in school assignments may be permissible where necessary to promote integration in the public schools. See, e.g., Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979) (applying strict scrutiny to plan permitting minority students in de facto segregated high school to transfer only to schools in which their race would be in the minority; court concluded that goal of preserving integration was valid, and remanded to determine whether transfer limitation was necessary

to achieve that goal); Johnson v. Board of Educ., 604 F.2d 504, 516 (7th Cir. 1979) (finding interest in promoting integration "compelling" in challenge to racial quota that limited minority student enrollment in two de facto segregated public high schools), vacated and remanded, 449 U.S. 915 (1980);[5] Wessmann v. Boston Sch. Comm., 996 F. Supp. at 127-131 (holding that School Committee had a compelling governmental interest in adopting race conscious selection policy for Boston Latin School in order to maintain racial diversity); Martin v. School Dist. of Philadelphia, No. CIV. A. 95-5650, 1995 WL 564344 (E.D. Pa. Sept. 21, 1995) (finding that school district had compelling interest in remedying de facto segregation and ensuring equal educational opportunity, in upholding race-conscious student transfer policy); Hunter v. Regents of Univ. of Cal., 971 F. Supp. at 1324-1330 (university has a compelling interest in achieving an ethnically diverse student enrollment in laboratory elementary school in order to maintain the integrity of its research in

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[5] In the decision cited in the text, the court of appeals began its analysis with the assumption that the racial restrictions were intended to address de facto segregation. See 604 F.2d at 507. After granting certiorari to review the cited decision, the Supreme Court vacated and remanded the judgment for further consideration in light of the entry of a consent decree providing a comprehensive remedy for intentional segregation of the Chicago Public Schools. 449 U.S. 915; see United States v. Board of Educ., 567 F. Supp. 290, 293 (N.D. Ill. 1983). Following a remand to the district court, the court of appeals subsequently reinstated its original opinion. 664 F.2d 1069 (7th Cir. 1981). The Supreme Court again granted certiorari, and vacated and remanded, directing that the case be consolidated with the United States action for consideration upon a full factual record in the context of the broader remedy. 457 U.S. 52 (1982) (per curiam). On remand, the racial restrictions at the two high schools were upheld as a part of that remedy. 567 F. Supp. at 296.

urban education). Similarly, race has been upheld as a factor in teacher assignments in order to provide a racially diverse faculty in public schools outside the remedial context. See Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984) (upholding teacher assignment policy designed to rectify de facto school segregation), cert. denied, 469 U.S. 1107 (1985); Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 102 (6th Cir.) (citing school officials' discretionary authority to promote integration in upholding teacher assignment policy), cert. denied, 506 U.S. 830 (1992); Zaslawsky v. Board of Educ., 610 F.2d 661, 663-664 (9th Cir. 1979) (holding that finding of de jure segregation not necessary to justify teacher assignment policy).

The Fifth Circuit, in another context, has stated that a university's interest in achieving a diverse student body to increase academic exchange of ideas can never constitute a compelling governmental interest justifying the use of race in law student selections. Hopwood v. Texas, 78 F.3d 932, 944-948 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).[6] Hopwood, however, assumed that the use of race to achieve diverse enrollments was based upon the assumption that individuals of

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[6] See also, Taxman v. Board of Educ., 91 F.3d 1547, 1556-1563 (3d Cir. 1996) (holding that interest in faculty diversity could not justify use of race under Title VII of the Civil Rights Act of 1964), cert. dismissed, 118 S. Ct. 595 (1997); Ho v. San Francisco Unified Sch. Dist., Nos. 97-15926, 97-70378, 1998 WL 304517 *11 (9th Cir. June 4, 1998) (stating, in dicta, that racial classifications can only be justified by a remedial purpose).

different racial groups would bring different ideas and characteristics to the university. Id. at 946. It rejected this rationale on the ground that, in its view, such a use of race merely reinforced improper racial stereotypes. Id. at 945-946.[7]

In the elementary and secondary school context, however, the importance of diversity in enrollments is not based upon racial stereotypes, or the belief that students of one racial or ethnic background will bring any particular outlook to the classroom. To the contrary, an integrated educational setting may disabuse students of their pre-existing notions about members of other racial or ethnic groups, including the assumption that all members of a particular group think or act in a particular way. As the district court wrote in Wessmann, 996 F. Supp. at 128:

> Of great significance is the fact that diversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions. When studying side by side, in a diverse setting, students grow to understand and respect the differences among them as they share life in a complex, pluralistic society. And, as important, they learn that most people, regardless of their backgrounds, think in fundamentally the same [way] about matters of character, team work, and mutual respect.

As the cases described above illustrate, race is and has been used in a range of different ways to achieve the benefits of

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[7] We believe that the Fifth Circuit misconstrued the nature of the diversity rationale in Hopwood, and failed to recognize the value of diverse student enrollments in institutions of higher education. See Sweatt v. Painter, 339 U.S. 629, 634 (1950) (isolation of black law students results in "an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned"). But that question is not presented here.

diversity in student enrollments, even without a remedial predicate. Here, for example, the Board used applicants' race or national origin as one of several factors in the selection process. Moreover, because students were selected for ATS by lottery, rather than on the basis of qualifications, the use of race cannot be characterized as selecting "less qualified" applicants over demonstrably better qualified applicants on the basis of race. Nor was any student denied a public education, but merely the right to attend a particular school. While ATS has a special approach to education, it uses the same core curriculum, and receives much the same resources as the Board's other elementary schools. Therefore, the effect on non-minority third parties of not being admitted to ATS may be fairly minimal.

4. Congress, too, has recognized the importance of promoting diversity in elementary and secondary school settings. The Magnet Schools Assistance Program (MSAP), 20 U.S.C. 7201-7213, is a discretionary grant program administered by the Department of Education which provides funds to local educational agencies to assist in "the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students." 20 U.S.C. 7202. MSAP provides funds for magnet schools that are part of either voluntary or court-ordered desegregation plans. Id. at 7203(1), 7205. In reauthorizing MSAP in 1994, Congress found that "it is in the best interest of the Federal Government to" (20 U.S.C. 7201(5)):

> A) continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
>
> (B) ensure that all students have equitable access to quality education that will prepare such students to function well in a culturally diverse, technologically oriented, and highly competitive, global community; and
>
> (C) maximize the ability of local educational agencies to plan, develop, implement and continue effective and innovative magnet schools that contribute to State and local systemic reform.

Congress also found that "magnet schools are a significant part of our Nation's effort to achieve voluntary desegregation in our Nation's schools," 20 U.S.C. 7201(1).

The legislative history of MSAP, and its predecessor, the Emergency School Aid Act (ESAA), Pub. L. No. 92-318, Title VII, §§ 701-720 (1972), reflects Congress's recognition that promoting integration in elementary and secondary schools was of the highest priority. The purpose of ESAA, like that of MSAP, was to promote voluntary school integration. The Senate Report on ESAA recognized that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both" minority and nonminority children. S. Rep. No. 61, 92d Cong., 1st Sess. at 7 (1971). "Whether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems have serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." Id. at 6. The House Report found that

racial isolation in our Nation's public schools was widespread, and that it was "time for the rhetoric of the Federal Government calling for the integration of our schools to be backed up by sufficient funds to assist them in striving for this goal." H.R. Rep. No. 576, 92d Cong., 1st Sess. at 4 (1971); accord S. Rep. No. 92-61, at 6 (citing statistics on racial isolation in public elementary and secondary schools).

Supporters of MSAP also spoke of the importance of promoting integration in the nation's public schools. See 130 Cong. Rec. 15,033 (1984) (Sen. Kennedy) ("Support for desegregation assistance continues to be a national priority."); ibid. (Sen. Chafee) ("I believe the elimination of racial isolation in our Nation's public schools remains one of the primary responsibilities of the Federal Government in education.")

In enacting both ESAA and MSAP, Congress relied upon statements made by President Nixon in proposing the bill that became ESAA:[8]

> This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education -- not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human

[8] Senator Moynihan quoted portions of these statements during the 1984 Senate debates on MSAP. 130 Cong. Rec. 15,034 (1984).

> understanding that increasingly is essential in today's world.[9]
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> * * * * *
>
> Few issues facing us as a nation are of such transcendent importance: important because of the vital role that our public schools play in the nation's life and in its future; because the welfare of our children is at stake; because our national conscience is at stake; and because it presents us a test of our capacity to live together in one nation, in brotherhood and understanding.[10]

5. These judgments about the importance of diversity in elementary and secondary classrooms have been borne out by educational scholars. Educational research has shown that desegregation yields enhanced achievement for African-American students, particularly when undertaken on a voluntary basis, and when begun at the kindergarten or first-grade level.[11] Numerous studies have demonstrated increased rates of high school graduation, college attendance, and college graduation, and better occupational prospects among African-American students who

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[9] As quoted in S. Rep. 92-61, at 9 (1971); see also id. at 7.

[10] As quoted in H.R. Rep. 92-576, at 3 (1971).

[11] Janet Ward Schofield, "Review Of Research On School Desegregation's Impact On Elementary And Secondary School Students," in Handbook Of Research On Multicultural Education (James A. Banks ed., 1995) 597, 599-602; Robert L. Crain & Rita E. Mahard, "Minority Achievement: Policy Implications of Research," in Effective School Desegregation 55, 61-67 (Willis D. Hawley ed., 1981); Amy Stuart Wells & Robert L. Crain, Stepping Over The Color Line: African-American Students In White Suburban Schools, 200 (1997); U.S. Commission on Civil Rights, Racial Isolation In The Public Schools, 91 (1967).

have attended integrated schools.[12] Research also indicates that, in the long term, "desegregation may help break a cycle of racial isolation," leading to better acceptance of racially mixed residential and occupational settings among both African-Americans and whites.[13] As one review of the literature put it, "desegregation of schools leads to desegregation in later life -- in college, in social situations, and on the job."[14]

6. In this case, the district court, based on its legally erroneous view that a non-remedial purpose can never be a legal basis for race-conscious action, declined even to hear evidence on the benefits of diversity in elementary and secondary education. Its judgment for the plaintiff should therefore be vacated and the case remanded to permit the Board to defend its program.[15]

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[12] Schofield, at 605-606; James M. McPartland & Jomills H. Braddock II, "Going To College And Getting A Good Job: The Impact Of Desegregation" in Effective School Desegregation, 141, 146-149; Wells & Crain, at 197-199.

[13] Schofield, at 610; see also McPartland & Braddock, at 149-151; U.S. Commission on Civil Rights, at 109-112.

[14] Jomills H. Braddock II, Robert L. Crain, & James M. McPartland, A Long-Term View Of School Desegregation: Some Recent Studies Of Graduates As Adults" in Phi Delta Kappan (Dec. 1984), 259, 260.

[15] Because the district court concluded that promoting diverse student enrollments could never justify the use of race or ethnicity in student selection procedures, it did not address whether the use of race and ethnicity here was narrowly tailored. The issue of narrow tailoring is therefore not before this Court. That issue requires a factual inquiry and should be addressed on remand. See Hayes, 10 F.3d at 216-217 (analyzing evidence on narrow tailoring question).

II

THE DISTRICT COURT ERRED IN BARRING THE BOARD FROM USING STUDENTS' FAMILY INCOME AND FIRST LANGUAGE IN THE SELECTION OF STUDENTS

The district court enjoined the Board from using either family income or students' first language as criteria in the selection of students for the Arlington Traditional School. The court found the use of the language factor to be "a proxy for classification on the basis of one's national origin or race," since the application inquired only as to the student's first language, not whether he or she was proficient in English. J.A. 192 n.3. It made no findings to support its order enjoining the use of family income.

The court erred in concluding, on the meager record below, that the Board's use of students' first language was an improper proxy for race or national origin. Even though the use of first language likely correlates with national origin, and thus may affect students based on ethnicity, its use does not violate the Equal Protection Clause unless the Board chose it as a lottery factor with the intent to distinguish among ethnic groups, and then only if its use fails strict scrutiny. Hernandez v. New York, 500 U.S. 352, 359-360 (1991) (plurality); id. at 372-375 (O'Connor, Scalia, JJ., concurring). As the plurality emphasized in Hernandez, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at 360, internal quotations marks omitted. The question of discriminatory intent is a factual one, "demand[ing]

a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977). There was no such proof and no such inquiry here, where the district court declined even to hear the Board's justifications for its use of any of the lottery factors. The district court's decision to enjoin the use of family income in the lottery was not even purportedly based upon any finding of discriminatory purpose, and therefore must be vacated.

On remand, plaintiffs must prove that the Board's use of students' first language and family income was motivated by discriminatory intent. The district court should hear both parties' evidence on this question and the Board's justifications for its use of these factors. In this regard, we note that, in a multi-ethnic community such as Arlington, the use of students' first language as a lottery factor does not single out any one ethnic group for favorable treatment, but benefits all students whose first language is not English. As to the use of family income, the Supreme Court has suggested that public entities consider the use of race-neutral economic factors, rather than race per se, to increase minority participation. See Croson, 488 U.S. at 507. The educational research indicates that poor children benefit when they attend school with children of higher socio-economic status.[16] And Congress agrees that social and economic integration in schools is an important goal. The MSAP

[16] See Civil Rights Commission at 75, 81-91.

authorizes grants for magnet schools "designed to bring students from different social, economic, ethnic, and racial backgrounds together." 20 U.S.C. 7203.

CONCLUSION

The district court's judgment should be vacated and the case remanded for an evidentiary hearing.

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