

Supreme Court of the United States

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**AMICI CURIAE BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION,
AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, HORACE MANN LEAGUE, AND
NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL
PRINCIPALS IN SUPPORT OF RESPONDENTS**

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Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS), 551 U.S. 701 (2007)	passim
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NEB. CONST. art. I, § 30 (2008)	2
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OKLA. CONST. art. II, § 36 (2012)	2
WASH. CODE ANN. § 49.60.400(1) (1998)	2

Other Authorities

Del. Dept of Educ., ' ' L V W U L F W 7 D U J H W V D Q G
 Accountability: Frequently Asked Questions , μ
 available at
<http://www.doe.k.12.de.us/infosuites/ddoe/DisTarg>
 AccFAQsJan2013.pdf 15

Genevieve Siegel-Hawley, How Non -Minority
 Students Also Benefit from Racially Diverse Schools ,
 NATIONAL COALITION ON SCHOOL DIVERSITY
 RESEARCH BRIEF NO. 8 (Oct. 2012), available at
<http://www.school-diversity.org/pdf/Diversity>
 ResearchBriefNo.8.pdf 7

Letter from Russlyn Ali, Assistant Secretary, Office
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 Perez, Assistant Attorney General, Civil Rights
 ' L Y L V L R Q 8 6 Justice Colleagues (Dec. 2,
 2011), available at
<http://www.2ed.gov/about/offices/list/ocr/letters/>
 colleague-2011111.html. 13

Mich. Dep t of Educ ' 2 Q Review School Study
 Guide Items Explanation with Examples
 Substantiating Implementation , μ available at
http://www.michigan.gov/documents/mde/7_ -_
 District_Study_Guide_with_Explanations_360059
 _7.doc..... 14

NATIONAL ACADEMY OF EDUCATION , RACE-CONSCIOUS
 POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS :el. /Ff 1 0 0 1 413 3h5 53 [03T BT

U.S. DEP T OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S.
 DEP T OF JUSTICE , CIVIL RIGHTS DIVISION , GUIDANCE
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 DIVERSITY AND AVOID RACIAL ISOLATION IN
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 DIVERSITY IN POSTSECONDARY EDUCATION (2011),
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STATEMENT OF INTERESTS OF AMICI ¹

The National School Boards Association is a not-for-profit organization of state associations of school boards. Through its members, NSBA represents approximately 13,800 school districts across the United States that serve more than 50 million public school students.

The American Association of School Administrators represents more than 13,000 educational leaders, including chief executive officers, superintendents, and senior level school administrators, in the United States and throughout the world.

The Horace Mann League seeks to perpetuate the ideals of Horace Mann, the founder of American public school systems, to strengthen the public school system of the United States.

The National Association of Elementary School Principals represents elementary school (K -

recognition of the vital role of diversity in the lives of students, these organizations seek to ensure that

Amici urge this Court to consider carefully the detrimental impact that Section 26 and similar provisions have on public schools. Section 26 directly undermines the ability of public schools to educate all students to be successful participants in a global society. Under this amendment public schools will be severely restricted in creating and maintaining diverse student enrollments that serve the educational needs of all students. If Section 26 is upheld, students will be deprived of learning in an environment where they are taught, mentored and encouraged by a diverse staff who reflect the society in which students must be prepared to live and work. The amendment will also call into question other necessarily race-conscious actions by public schools that target the academic needs of certain subgroups of students.

This amendment wears a guise of non-discrimination, but in reality threatens to limit the discretion of school leaders that this Court has clearly stated is available to school boards under the Equal Protection Clause. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1 (PICS)*, 551 U.S. 701 (2007). These decisions granted school boards the authority under certain limited circumstances to adopt race-conscious policies that promote diversity in schools for educational reasons. The Michigan DPHQGPHQWicktionQ of this school board authority directly imperils the local governance of public education and will result in innumerable legal disputes that unduly burden public schools and drain resources away from classrooms and into the legal system.

ARGUMENT

- I. SECTION 26 UNDERMINES PUBLIC
SCHOOL'S MISSION: TO EDUCATE ALL
STUDENTS SUCCESSFULLY AND TO
PREPARE THEM TO LIVE AND WORK
IN A GLOBAL SOCIETY.

- A. Section 26 Impedes Public Schools
From Creating and Maintaining a
Diverse Student

achieving racial and ethnic diversity in primary and

The resulting inability to use even narrowly
tailored race-conscious methods to increase diversity
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In *Parents Involved in Community Schools v. Seattle School District No. 1* (PICS), 551 U.S. 701 (2007), a majority of the Justices recognized that fostering diversity as an educational goal and avoiding racial isolation are compelling interests for school districts. *Id.* at 783, 797 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 838-42 (Breyer, J., dissenting). A majority of the Court has recognized that the interest in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity . . . *Id.* at 797-98 (Kennedy, J., concurring).

As Justice Kennedy recognized in *PICS*, a lack of diversity in schools with students from the same racial and ethnic background. *Id.* at 788. Research establishes that the benefits of diversity inure to non-minority students as well, by providing better learning outcomes and social and psychological advantages that increase their productivity in an increasingly pluralistic workplace. ⁶ By preventing public schools from using a legitimate means of addressing re-segregation when it is identified,

⁶ Genevieve2(p)400520003>-672<004aA-1919998 re 34 v65 Tm [(segr)4(eg)-12(a)1 02r [<004800[(segr

Section 26 and similar laws will leave students less prepared, both academically and socially, to compete in the global marketplace.

The inability to use race to achieve student diversity will also inhibit public schools from fulfilling their duty to prepare all students to live and work as citizens of an increasingly pluralistic and connected world. As this Court made clear in *Brown v. Board of Education*,⁷ the primary instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his surroundings is the public school. By denying that the child can best be prepared by association with the members of the race that is different from his own, the State deprives him of the educational and social advantages that would otherwise be his. In *Plyler v. Doe*, the Court elaborated that public schooling plays a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural diversity. The Court expected to help students learn to navigate what is an increasingly pluralistic society, both at home and in the world at large. Social science research makes clear that racially and ethnically integrated schools better achieve that goal by promoting cross-racial understanding, reducing prejudice, and furthering social cohesion.⁷ These benefits inure to more than

⁷ For a comprehensive discussion and analysis of the research showing the importance of integrated schools on instilling democratic values in students, see the Brief of 553 Social Scientists, at 9, App. 23-24. See also Susan Eaton & Gina Chirichingo, The Impact of Racially Diverse Schools in a Democratic Society, NATIONAL COALITION ON SCHOOL DIVERSITY RESEARCH BRIEF NO. 3, Oct. 2010, updated Mar. 2011, available at <http://www.school-diversity.org/pdf/DiversityResearchBriefNo3.pdf>.

minority students; students who attend diverse public schools develop stronger democratic ideals from a diverse student population. Schools that slip back into segregation because of an outright ban on race-conscious measures to achieve diversity will be stifled in their goal of teaching students of all races and ethnicities to live in a global society. Their students will miss out on the daily opportunities for gaining cross-cultural understanding, tolerance, and social cohesion that a diverse student body presents.

B. Section 26 Har P V 3 X E O L F 6 F K R R O V .
Efforts to Achieve the Important
Objectives of A Diverse Workforce
and Minority Contracting

The efforts by public schools to prepare

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(NCES-2013-313) (2013), available at <http://nces.ed.gov/pubs2013/2013313.pdf>; NATIONAL CENTER FOR EDUCATIONAL STATISTICS, CHARACTERISTICS OF PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOL TEACHERS IN THE UNITED STATES: RESULTS FROM THE 2011-12 SCHOOLS AND STAFFING SURVEY (NCES 2013-314) (2013), available at <http://nces.ed.gov/pubs2013/2013314.pdf>.

businesses garner employment and contracts from public schools are preferences for minorities, Section 26 and similar provisions would prevent public employers like school districts from engaging in these types of best practices that they already have deemed to be necessary to achieve their compelling goal of providing a diverse workforce as role models for students.

C.

through the consideration of race as one of many diversity factors. Indeed, in *PICS* the Court clarified work of bringing together students of different racial, ethnic, student characteristics that might include race as a FRPSRQ ~~PIQSV~~ 51 U.S. at 707 (Kennedy, J., concurring). Just two months ago, in *Fisher*, this Court reaffirmed that institutions of higher education may consider race as one of several factors in seeking to achieve the educational benefits of diversity. 133 S.Ct. 2411.

The United States Departments of Education and Justice issued joint guidance documents in December 2011 for elementary and secondary schools and for higher education institutions, H[SODLQLQJ KRZ WKH\ FDQ YROXQWDULO\ FRQVLG further compelling interests in achieving diversity

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¹⁵ Letter from Russlyn Ali, Assistant Secretary, Office for Civil 5LJKWV 8 6 'HS·W RI (GXF DQG 7KRPDV 3HUH] \$VVLV \$WWRUQH\ *HQHUDO &LYLO 5LJKWV 'LYLVLRQ 8 6 'HS·W RI Colleagues (Dec. 2, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.html>; U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), available at <http://www2ed.gov/print/about/offices/list/ocr/docs/guidance-ese-201111.html>; U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS & U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIVISION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011), available at <http://www2ed.gov/print/about/offices/list/ocr/docs/guidance-pse-201111.html>.

institutions have relied on this advice in crafting
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decisions. Section 26 would void these carefully
designed and entirely legitimate and constitutional
policies.

In addition to the discretionary use of race in
crafting student assignment policies, school districts
are also required to consider student race in a
number of situations. Congress and the legislatures
of states require public schools to disaggregate data
according to certain subgroups, including race and
ethnicity, and to address the critical educational

identified student needs, as Section 26 could be interpreted to preclude even very limited uses of race in providing the targeted assistance necessary to the academic success of certain minority students. The purported non-discrimination mandate of Section 26 could, in fact, stop schools from addressing inequities in educational opportunities that keep many children from succeeding at school.

0DJQHW 6FKRROV \$VVLVWDQFH SURJUDP ZKLFK 'S grants to eligible local educational agencies to establish and operate magnet schools that are operated under a court -ordered or federally approved voluntary desegregation plan. These grants assist in the desegregation of public schools by supporting the elimination, reduction, and prevention of minority group isolation in elementary and secondary schools with substantial numbers of minority group students. ¹⁹ Section 26 and related provisions call into question whether such programs that have already been established and funded could continue to operate.

II . SECTION 26 C REATES CONFUSION IN THE LAW AND MAY LEAD TO ADDITIONAL LITIGATION FOR SCHOOLS.

Section 26 and related provisions from other states will have a number of other unintended, negative consequences for public schools, including innumerable legal disputes that will require public funds to address. Consider the dueling constitutional standards applicable to distinctions based on race versus those based on gender. Section 26 and related provisions prohibit the use of race, color, ethnicity, and national origin by public schools. Decisions by public schools on those bases are judged under the standard of strict scrutiny under the precedents of this Court. To survive strict scrutiny, a school

¹⁹ U.S. Dep t of Educ., Magnet Schools Assistance Program, Purpose, Program Description, available at <http://www2.ed.gov/programs/magnet/index.html>.

district that considers race in making individual student assignment decisions must show that the use of race is narrowly tailored to achieve a compelling governmental interest. *PICS*, 551 U.S. at 720.

Indeed, the outcome in *PICS* shows that this is a high bar and will prevent schools from unconstitutional uses of race, making provisions like Section 26 unnecessary. This Court held that the two school districts in *PICS* failed to demonstrate that WKHLU XVH RI LQGLYLGXD O VWXGHQWV UDFH ZD tailored to meet their goals. *Id.* at 722-25. In making that determination, the Court generally applied the four-prong narrow tailoring test from *Grutter*. That test assesses whether an educational institution has considered workable race-neutral alternatives; whether its plan provides for flexible and individualized review of students; whether it has minimized undue burdens on other students; and whether its plan is limited in time and subject to periodic review. See *Grutter*, 539 U.S. at 334-43.

This strict scrutiny requirement constrains VFKRRO GLVWULFWV ,W UHTXLUHV WKH PRV FRQQHFWLRQ EHWZHHQ MXVWLILFDWLRQ DQG FO *PICS*, 551 U.S. at 720. *PICS* also reaffirmed that when a district chooses to take into account the race of individual students when providing benefits or imposing burdens, it must meet the strict scrutiny standard, demonstrating that its plan is narrowly tailored to meet the compelling interest in achieving

(quoting

III. SECTION 26 INTERFERES WITH
COMMUNITY ENGAGEMENT CRITICAL
TO THE DEMOCRATIC PROCESS FOR
POLICY DECISION -MAKING B Y
SCHOOL BOARDS

Section 26 and similar state laws unnecessarily restrict the very local governance and community discretion that this Court has recognized are retained by schools in working toward the permissible goal of achieving diversity. Decisions about the educational need for diversity policies are matters of local control that require a properly functioning democratic process. Section 26 interferes with the proper operation of elected school boards in setting education policy through community engagement and public accountability.

This community self-determination is a fundamental part of the history of American public schools, and is even more important in this area where different approaches may be required based

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has indicated is required. PICS, 551 U.S. at 790

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directing our public schools must be allowed to bring
to bear the creativity of experts, parents,
administrators, and other concerned citizens to find
a way to [determine educational goals and to]
achieve the compelling interest they face . . . *id.* at
798. School districts must be allowed to experiment
at the local level with constitutionally sound ways of
achieving the compelling interest of diversity in

public schools, within the strict framework explained in Grutter and PICS.

CONCLUSION

Amici urge this Court to uphold the lower court decision invalidating Section 26 and thereby protect the discretion of public schools to adopt and implement policies that promote diversity and avert racial isolation³ goals critical to the education of the youth of this country.

Respectfully Submitted,

Patricia J. Whitten