No. 72712-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON
ON CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF RESPONDENT SEATTLE SCHOOL DISTRICT NO. 1

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonprofit, nonpartisan organization of approximately 9,000 members, affiliated with the American Civil Liberties Union. The ACLU submits this brief *amicus curiae* in support of Respondent Seattle School District (the "District"), urging this Court to affirm the District's non-preferential use of race to achieve diversity as the second tiebreaker in its school assignment policy. The ACLU believes that affirmative steps are still needed to overcome the vestiges of segregation and discrimination in public education and that a school district's decision to enhance diversity within its schools benefits all students and our democratic institutions. The decision in this case will affect what affirmative steps a public school district may properly take to ensure that all students in the school district, regardless of race, enjoy its resources and opportunities equally.

INTRODUCTION AND STATEMENT OF THE CASE

The District has employed an "open choice" policy (the "Open Choice Policy") in assigning students to its ten public high schools since 1998. Under this policy, students rank the high schools in the order of their preference of attendance. Students are assigned to their first choice if possible. Certain schools are listed as a first choice by more students than their physical limits allow them to accept. Consequently, the District has

used a tiebreaker system to determine which freshmen will attend these "oversubscribed" schools. The second tiebreaker is race, but only if the school's demography deviates more than 15 percent in either direction from the district-wide demographic average ratio of 60 percent minority to 40 percent white, and only if the student's race will bring the school closer to the district average.

Washington voters passed Initiative 200 in 1998, which prohibits the state from "disriminat[ing] against, or grant[ing] preferential treatment to" any individual or group based upon race, sex, color, ethnicity, or national origin.[1]

The question certified to this Court asks whether Initiative 200 prohibits public schools from using race in a non-preferential manner as one of many tiebreakers in assigning matriculant students to area high schools.

[1] Section 1(1) of Initiative 200 states in full: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Section (1)7 of the statute defines "state" to include, inter alia, "school district[s]".

ARGUMENT

I. APPLICATION OF INITIATIVE 200 IN THIS CASE WOULD IMPROPERLY INTERFERE WITH THE DISTRICT'S CONSTITUTIONAL DUTIES.

The Washington Constitution declares education as a paramount duty of the state. Wash. Const. art. IX §1. It also requires the state to provide "for a general and uniform system of public schools." Wash. Const. art. IX §2. Such a constitutional mandate may only be altered by the method prescribed in Wash. Const. art. XXIII, and not by initiative. *Gerberding v. Munro*, 134 Wn.2d 188, 211, 949 P.2d 1366 (1998). Therefore, Initiative 200 cannot forbid the District from desegregating its student body—regardless of how that segregation came about—because such an application would frustrate the purpose of Wash. Const. art. IX §2.

A. THE WASHINGTON CONSTITUTION REQUIRES DESEGREGATION IN PUBLIC SCHOOLS.

The Washington Constitution requires school districts to "provide for a general and uniform system of public schools." Wash. Const. art. IX §2. To fulfill this constitutional mandate, Public schools should provide "equal educational opportunity to students of all races, … limit racial isolation, and … provide a racially and ethnically diverse educational experience." *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 137 F.Supp.2d, 1224, 1228 (2001) (hereinafter "P.I.C.S."). Adopting *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 91

S.Ct. 1267 (1971), this Court imposed a constitutional duty on Washington public schools to eradicate all forms of racial division, regardless of their cause. *Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 127, 492 P.2d 536 (1972). School authorities must "take whatever steps might be necessary" to install a truly uniform system where a racially imbalanced one exists. *Id.* at 127 n.2 (*quoting Swann*, 402 U.S. at 15).

While the District has not historically engaged in discriminatory practices (*de jure* segregation), its student body remains segregated due to economic, cultural, and geographic factors (*de facto* segregation). *P.I.C.S.*, 137 F.Supp.2d at 1225. The United States District Court recognized that the District's student racial distribution would "track the racial segregation of [Seattle's] housing patterns" but for the District's past diversity efforts. *Id*. The District has a constitutional duty to remedy such segregation regardless of its cause. *Brooks*, 80 Wn.2d at 128. This Court has even held that a school district's constitutional mandate to provide uniform schools supercedes any right parents and children may have to attend the school nearest them. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 451 – 452, 495 P.2d 657 (1972).

The Open Choice Policy has significantly improved diversity among Seattle's high schools. The number of nonwhite students at

Ballard High School has risen from 33 percent to 54.2 percent and at Nathan Hale High School from 30.5 percent to 40.6 percent. *P.I.C.S.*, 137 F.Supp.2d at 1226. The number of white students at Franklin High School has concurrently risen from 20.8 percent to 40.5 percent. *Id*. Initiative 200 would hinder and possibly undo this progress if it is enforced against the Open Choice Policy, frustrating the purpose of Wash. Const. art. IX §2. Consequently, Initiative 200 would be unconstitutional to the extent it was enforced against the Open Choice Policy.

B. DIVERSITY IN PUBLIC EDUCATION IS STILL A VALID MEANS TO FULFILL WASHINGTON'S CONSTITUTIONAL MANDATE.

Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and its progeny relied on social science evidence demonstrating the negative effects of segregation and positive effects of desegregation and diversity in education. Despite improvements, disparity in educational achievement remains a problem and improving public school performance remains a key challenge for our society. Nonetheless, and despite rhetoric to the contrary, there is a growing body of evidence attesting to the benefits of diversity in education. To the extent that a continuing debate exists whether desegregation efforts are still appropriate to achieve the Washington constitutional mandate of equal education opportunity, that debate is appropriately left to local school district

decision-making. The evidence of benefits is sufficiently compelling to justify a school board's decision to achieve diversity by using race as a factor in a high school assignment program to fulfill Washington's constitutional mandate.

Educators, academics, scientists, and sociologists studying the educational process have consistently affirmed the important role diversity plays in accomplishing academic institutions' goals of developing students' cognitive and leadership skills. *See Ambach v. Norwick,* 441 U.S. 68, 77, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979) ("[P]erceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists."). A large body of empirical evidence indicates that a racially diverse student body produces significant educational and societal benefits in elementary and secondary education. Such diversity promotes racial tolerance, improves academic performance, breaks down barriers among different races, and contributes to the "robust exchange of ideas" that Justice Powell deemed an essential component of

higher education in *Regents of University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L. Ed. 2d 750 (1978).[2]

Racial isolation holds students back from educational and socioeconomic opportunities. Students must be prepared to work and live in the diverse settings in which they will increasingly find themselves. Justice Powell argued in *Bakke* that the value of diversity is grounded in the experiences students from diverse racial and ethnic backgrounds bring to the learning environment and their interactions. 438 U.S. at 311-312. Indeed, racial diversity in the classroom promotes substantive teaching and learning by exposing students to different students who can challenge long-held perspectives and encourage intellectual exploration. Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher*

[2] The pursuit of a racially diverse student body does not assume that individuals of the same race share common viewpoints. Rather, each individual member of such a group will have unique perspectives and the range of these unique perspectives will be broader – and the educational experience of all students correspondingly richer – if individuals with diverse backgrounds are included in the student body. *See* Sandra Koslin et al., *Classroom* Racial Balance and Students' Interracial Attitudes, 45 Soc. of Educ. 386-407 (Fall 1972) (reporting that children in racially balanced classes – i.e., classes in which the racial composition of the class reflects that of the overall school – exhibit less racial polarization than children in racially unbalanced classes); Elizabeth G. Cohen, The Desegregated School: Problems in Status Power and Interethnic Climate, Groups in Contact: The Psychology of Desegregation 77-95 (1984).

Education, 109 Harv. L. Rev. at 1369-1373 (evidence demonstrates that campus diversity positively affects educational outcomes).

Research has shown that school desegregation enhances achievement of African-American students. *See* Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in* Handbook Of Research On Multicultural Education 597, 599-602 (James A. Banks ed., 1995). Such studies have noted, for example, that minority students who attend more integrated schools enjoy increased academic achievement and higher test scores. *See* R.L. Crain & R.E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis, American Journal of Sociology*, 88(5): 839-854 (1971); *accord* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap* 206-11 (1996) (reporting that from 1968 to 1972, during which time the proportion of African-American students in the South who attended schools that were more than 90 percent minority dropped from more than three-quarters to about one-quarter, African-American students' performance on standardized achievement tests improved significantly); R.L. Crain, *The Research on the Effects of School Desegregation, in* Brown Plus Thirty (Lamar P. Miller, ed. 1986) (reporting based on a review of one hundred

research studies that "black students typically gained about one grade after entering desegregated schools").

An important recent study by The Civil Rights Project at Harvard University examined whether school diversity enhances educational outcomes—critical thinking skills, future educational goals, and citizenship—in measurable ways. Relying on survey data from Louisville, Kentucky, one of the nation's most integrated school districts, the researchers "established that a school's diversity can have an effect on educational outcomes, specifically the willingness to live and work in diverse environments . . . [W]e see important educational gains that may be attributed to schooling in diverse environments." M. Kurlaender and John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Metropolitan Louisville in* Diversity Challenged, Evidence of the Impact of Affirmative Action (Harvard Educational Publishing Group, August, 2000) (hereinafter "Kurlaender and Yun study").

Louisville students' diverse high school experiences also contributed to their interest in a host of democratic principles and actions, all of which are central to the mission of public schooling in a democracy. *Id.* Over 80 percent of all students believed that they are prepared to work in a diverse job setting and that they are likely to do so in the future. *Id* at pt. III. Over 80 percent of African American and white students reported

that their school experience has helped them to work more effectively and get along with members of other races and ethnic groups. *Id.* About 60 percent of African Americans, and half of whites and other minority groups said that their interest in taking on leadership roles in their communities had increased. *Id.* A similar percentage of students stated that their interest in volunteering in their community had increased and that their interest in participating in elections had increased. *Id*.

Research has also demonstrated that school desegregation substantially improves the "life chances" of African American students, particularly when it places black students from more disadvantaged backgrounds in schools with students of a higher average socioeconomic status. Controlling for relevant variables, African American students who attend desegregated schools are less likely to become pregnant as teenagers or to engage in delinquent behavior, and are more likely to graduate from high school, attend a four-year college, and earn high marks in college. *See* James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 Colum. L. Rev. 1463, 1624-26 (1990); James M. McPartland & Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation, in* Effective School Desegregation: Equity, Quality, and Feasibility, 141, 146-149 (Willis D. Hawley ed., 1981).

Interracial contact in elementary and secondary school can help minority students lead more successful lives as adults and increase their interaction with members of other racial groups in later years. One study cited three major findings regarding the effect of desegregated schooling on African American students. Such students are: (1) more likely to have desegregated social and professional networks later in life; (2) more likely to work in desegregated employment; and (3) are more likely to be working in white-collar and professional jobs in the private sector than are black students in segregated schools. A.S. Wells & R.L. Crain, *The Perpetuation Theory and the Long-term Effects of School Desegregation*, *in* Review of Educational Research, 53(3): 178-186 (1994); Marvin P. Dawkins & Jomills H. Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. of Negro Educ. 394, 403 (Summer 1994) (noting that evidence points towards the continuing importance of integration as a socio-economic tool for greater advancement).

Moreover, maintaining a diverse student body in public schools is critical to the efficacy of a pluralistic, democratic society. Diverse learning environments allow students to consider different perspectives, ultimately leading to deeper understanding, respect, and tolerance for individual differences. Those who have equal access to public institutions,

such as public schools, feel as if they have a greater stake in the political process. The United States Supreme Court has long recognized education as important for "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests…" *Ambach*, 441 U.S at 76 (*citing Brown*, 347 U.S. at 493).

Public education plays a critical role in preparing children to participate in the political process. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923). "[P]ublic schools [are] a most vital civic institution for the preservation of a democratic system of government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230, 83 S. Ct. 1560, 1575, 10 L. Ed. 2d 844 (1963) (Brennan, J., concurring). "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221, 92 S. Ct. 1526, 1536, 32 L. Ed. 2d 15 (1972).

The Open Choice Policy thus serves an important public purpose benefiting all students. Its use of race as the second tiebreaker promotes integration within the Seattle student body. School integration is good policy, and in Washington, it is required by the Constitution.

II. THE OPEN CHOICE POLICY DOES NOT VIOLATE INITIATIVE 200, WHICH ONLY PROHIBITS PREFERENTIAL TREATMENT FOR LESS QUALIFIED APPLICANTS.

Initiative 200 prohibits a school district's grant of "preferential treatment" in public education to a person "on the basis of race." The term "preferential treatment" is not otherwise defined in the Initiative. This case requires the court to determine the meaning of "preferential treatment" and the scope of Initiative 200's prohibitions.

Where a statute is susceptible to several interpretations, courts should "adopt a construction which will sustain its constitutionality." *In re Cross*, 99 Wn.2d 373, 383, 662 P.2d 828 (1983). As described above, the State Constitution requires school districts to take steps to eliminate segregation regardless of its cause. Doing so requires school districts to take race into account to some degree in school assignment policies. To the extent Initiative 200 purports completely to eliminate race as an element in any school district policies, Initiative 200 would violate the Washington constitution. Moreover, such a broad construction of Initiative 200 is not required by the plain meaning of its terms and would be inconsistent with the arguments made to the voters in support of it.

When courts find the terms of an initiative ambiguous, or susceptible to multiple interpretations, they may look to other aids for judicial construction. *Lynch v. State*, 19 Wn.2d 802, 145 P.2d 265 (1944).

They may find guidance in the "published arguments made in connection with the submission of such measures to the vote of the electorate." *Id*. at 812. They should also include in their consideration the state of the law prior to its adoption. *State ex. rel. Madden v. Public Utility Dist. No. 1 of Douglas County*, 83 Wn.2d 219, 222, 517 P.2d 585 (1974). Resort to these aids demonstrate that Initiative 200 does not apply to the Open Choice Policy.

As described in the voter's pamphlet, the focus of Initiative 200 was on the prohibition of the use of factors such as race, sex, or ethnicity to grant "preference" to <u>less qualified</u> applicants in hiring, contracting, and admissions:

> What Initiative 200 *won't* do
>
> Initiative 200 does not end all affirmative action programs. It prohibits *only* those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job, contract or admission to a state college or university.

Washington Voters Pamphlet, Arguments For Initiative 200, John Carlson, Co-Chair, Initiative 200; Rep Scott Smith, Co-Chair, Initiative 200; Sen. Jeanette Hayner) [hereinafter "*Voter's Pamphlet*"]. Proponents ardently maintained, "I-200 is clear: the government should not use race or gender to treat <u>applicants</u> for employment or education opportunities differently." *Id*. (emphasis added).

In prohibiting only "preferential treatment," Initiative 200 focuses on an applicant's qualifications. The term "preference," particularly as described in the proponents' ballot statement, is premised on the idea that race or gender was formerly used to select "less qualified" applicants over other "more deserving" applicants. Thus, the initiative's reliance on the phrase "preferential treatment" suggests that race and gender may not be used to grant preferences to particular applicants, but may legitimately be considered in other aspects of decision-making.

During the election campaign, the leaders of the Initiative 200 campaign repeatedly assured voters in newspaper op-ed pieces that the Initiative did not end all affirmative action but instead was aimed only at "racial quotas, preferences, and set-asides." *See Voter's Pamphlet*. The alleged "harm" the Initiative intended to remedy was that some affirmative action programs granted preferences to less qualified minority applicants based on race instead of merit. For example, the proponents stated:

- "Quite simply, Initiative 200 would prohibit the government from using race, gender or ethnicity to give a less-qualified applicant preference over a more qualified applicant . . . [Initiative 200] would prohibit only those programs that cross the line of discrimination by using race, gender or ethnicity in deciding who gets into college or who gets a public job or contract." John Carlson, Co-chair, Initiative 200 campaign, *Initiative 200 Vote Yes*, The Sun, Oct. 18, 1998.

- "[E]stablishing goals and timetables for hiring under-represented groups . . . is the only [kind of affirmative action] that Initiative 200 is eliminating." Washington Senate Law and Justice Comm., Feb. 4,

1998 (statement of Rep. Scott Smith, Co-chair, Initiative 200 Campaign).

- "We are not against affirmative action. We are against preferences. Even though government thinks preferences have good intentions, they are still treating people differently based on race or sex. We want equal opportunity. Our definition of opportunity is the right to apply." Chigusa Suzuki, *Initiative 200*, International Examiner, Aug. 3, 1997 (quoting Tim Eyman, Co-chair, Initiative 200 Campaign).

The Initiative's proponents reiterated these statements immediately following the election:

- "Initiative 200 does not end all affirmative action . . . nor does it apply only in the final selection of an applicant . . . It kicks in the moment someone *applies* and it prohibits the government from treating that person differently because of race, gender, or ethnicity anytime during the selection process." John Carlson, Co-chair, Initiative 200 Campaign, *An Open Letter to Gov. Locke on Initiative 200*, Seattle Times, Dec. 14, 1998.

- "What [Initiative 200] would do is eliminate only the preference policies that are associated with affirmative action on the government level." Rep. Scott Smith, Co-chair, Initiative 200 campaign, *Initiative Wouldn't End Affirmative Action*, Federal Way News, Dec. 13, 1997.

These statements evince the proponents' intent to limit Initiative 200 to the prohibition of race- and gender-based preferences for selecting among applicants for public employment, education, and contracts. The District's reassignment plan simply does not involve "preference" as contemplated by the proponents of Initiative 200. There is no selection process akin to awarding public contracts, gaining admission to state universities, or hiring public employees. All students matriculate into a

Seattle public high school. Rather than determine if they will attend, the Open Choice Policy merely decides where they will attend.

Even if Initiative 200 is broader than its proponents intended, it does not apply to the Open Choice Policy. This Court has even held that race-based school policies are not legal "discrimination" or "preferential treatment" if their purpose is to bring diverse students together. *See DeFunis v. Odegaard*, 82 Wn.2d 11, 27, 507 P.2d 1169 (1973). It follows then, that discrimination and preferential treatment, as recognized by Washington law, are only those policies and practices that separate people on account of their race, gender, or other superficial quality.

The District's plan takes race into account, but no individual race is singled out for discriminatory or preferential treatment. All students are subject to the same policy, which is designed to integrate Seattle's public high schools. In other words, students of any race might benefit from the District's "integration-positive" tiebreaker. For example, in the 2000-2001 school term, using the integration tiebreaker, 89 more white students were assigned to the popular and predominantly nonwhite Franklin High School than would have been absent the tiebreaker. *See P.I.C.S.*, 137 F.Supp.2d. at 1226 n.4. The Open Choice Policy concurrently assigned 107 more nonwhite students to the popular and predominantly white Ballard High School than would have been absent the tiebreaker. *Id*.

Such reshuffling "neither gives to nor withholds from anyone any benefits because of that person's group status … [t]he most common examples are school desegregation cases and programs." *Associated Gen'l Contractors of Cal. v. San Francisco United Sch. Dist*., 616 F.2d 1381 (9th Cir. 1980). The school desegregation program here similarly does not confer a benefit to one race over another. "The program at issue here falls indiscriminately on whites and nonwhites alike, ensuring a racially integrated system for the benefit of the district as a whole." *P.I.C.S.*, 137 F.Supp.2d at 1231.

The United States Supreme Court similarly distinguished race-conscious school desegregation plans from the kind of quota admissions programs Initiative 200 seeks to prohibit. In *Bakke*, Justice Powell distinguished race-based reshuffling programs from admissions decisions by noting:

> [Bakke's] position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood school in compliance with a desegregation decree. Petitioner did not arrange for [Bakke] to attend a different medical school in order to desegregate Davis medical school; instead, it denied him admission and may have deprived him altogether of a medical education.

438 U.S. at 300 n.39 (Powell, J.).

Here, all students are guaranteed a public high school education. The only question is where they will learn. Accordingly, the Open Choice

Policy, despite using race, does not constitute the kind of "preference" or "discrimination" that the voters of Washington disallowed when they passed Initiative 200. It in no way chooses "less qualified" students over "more qualified" students. No student is "deprived altogether of a[n] … education." *Id*.

CONCLUSION

Initiative 200 does not prohibit the District's use of the Open Choice Policy. The District enacted the Open Choice Policy pursuant to its constitutional mandate to provide a quality, uniform education to its students. This mandate includes the elimination of segregation in all its forms. A school district's choice to eliminate segregation by a policy enhancing diversity, such as the Open Choice Policy, is within the sound discretion granted to school boards to fulfill their constitutional mandates.

Moreover, Initiative 200 simply does not apply to the Open Choice Policy. Based on the representations to the voters, Initiative 200 prohibits government only from using race as a factor in making admissions and awards decisions. The District's school assignment policy makes no admissions or awards decisions—it simply assigns matriculant students seats in the various schools. Further, the Open Choice Policy does not "discriminate against" or "grant preferential treatment to" anyone. The state of Washington's law indicates that such terms refer to acts and

policies that divide people based on race. The Open Choice Policy does exactly the opposite. It integrates students across the entire school system in an effort to improve everyone's educational experience. For these reasons, this Court should hold that Initiative 200 does not apply to the Open Choice Policy and that any such application would unconstitutionally frustrate the purpose of Wash. Const. art. IX §2.

DATED this 13th day of August, 2002.

Respectfully submitted,

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