IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -x

CRYSTAL D. MEREDITH, :

CUSTODIAL PARENT AND :

NEXT FRIEND OF JOSHUA :

RYAN MCDONALD, :

Petitioner :

v. : No. 05-915

JEFFERSON COUNTY BOARD :

OF EDUCATION, ET AL. :

- - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, December 4, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

TEDDY B. GORDON, ESQ., Louisville, Ky.; on behalf of the Petitioner.

GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioner.

FRANCIS J. MELLEN, JR., ESQ., on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 05-915, Meredith versus Jefferson County Board of Education.

Mr. Gordon.

ORAL ARGUMENT OF TEDDY B. GORDON

ON BEHALF OF THE PETITIONER

MR. GORDON: Mr. Chief Justice, and may it please the Court:

Crystal Meredith wanted to do what most moms and dads do all across this country. She wanted to put her son's hand in hers and walk around the corner and enroll her son into school.

But the enrollment, there was a barrier, and the pickaxe, that barrier was personified as a quota. There were seats within the school. It wasn't at capacity. It wasn't near any one of the percentages or tipping percentages that the quota system the Jefferson County public schools applied. But she was not allowed in.

JUSTICE GINSBURG: Was that because she applied four months late? If she had applied before the deadline in March, would you be here? Would there be any issue?

MR. GORDON: Well, of course, Justice Ginsburg, she moved into the system in August. When she moved into the system, she was assigned to a school called Breckenridge-Franklin, which was an all-year-round school. Then she was -- her choice was managed and she was sent an hour away from where her other school is. She applied by transfer, which is the system that you use.

JUSTICE GINSBURG: Where was she living before?

MR. GORDON: I think she was living in Florida, and she moved into Kentucky.

JUSTICE GINSBURG: So she -- that was -- August was the first opportunity she had to apply?

MR. GORDON: Yes. So that's across the board. Anyone that moves in, they are -- there is a cluster school or an attempt school, and if you are not -- a majority of the time you are not allowed there because of your race. In other words, they want to assign children to schools that don't have the greater percentages of either African American or Caucasian. So in Bloom Elementary, although it was 67-33 -- and keep in mind in kindergarten, according to their own rules and regulations, didn't even apply. Their plan was so inflexible --

JUSTICE GINSBURG: But she, she could have -- if she had been there at the deadline, the child would have been admitted to -- if she had been there in March instead of August?

MR. GORDON: But the deadline applies to that school which presumably is closest to the one's residence. Now, whether or not you get into that school or don't get into the school still depends on the quota.

JUSTICE GINSBURG: Well, we're past that. When she didn't get the assignment that she requested for her son --

MR. GORDON: Certainly.

JUSTICE GINSBURG: -- did she appeal that?

MR. GORDON: She filed a transfer. The transfer was denied. And at that time, litigation had commenced and because litigation had commenced -- and routinely these appeals are denied. All of her efforts were futile.

JUSTICE GINSBURG: How about for first grade? Did she make an application for first grade?

MR. GORDON: My understanding is that she did. That was denied, because the only time Joshua got into --

JUSTICE GINSBURG: And that's in the record, that she made an application for the first grade?

MR. GORDON: I believe it is. I believe it is. In either event, if she didn't it would have been futile because we had already made her the third amended complaint on behalf of all the parties, and we had asked for injunctive relief within the litigation. But Joshua did not get into the school because of -- until they moved. They had to move a block away. So if you live in one block and you can't get into that school, your choice is managed. The plan was clearly inflexible and it didn't apply to kindergarten anyhow, but it still caused our Joshua to go an hour away from his home.

CHIEF JUSTICE ROBERTS: Do you have a claim for damages as well?

MR. GORDON: Yes, Your Honor, we do.

CHIEF JUSTICE ROBERTS: With respect to this plaintiff?

MR. GORDON: Yes, Your Honor, we do. I believe it's the third amended complaint, the May 2nd complaint, and there was a request for $25,000 damages.

And within these schools, in other words, this honorable Court has never applied, other than in remedial, has never applied compelling interest in a K-through-12 setting. In fact, those rights are not coextensive. The school -- this honorable Court has previously stated in, for example, the Hazelwood case,

which was a First Amendment right case, that that didn't apply to the K-through-12 setting, or should it be 1-through-12 setting.

And in the Hazelwood case, that was a basic First Amendment right and of course the First Amendment right was exactly what Justice Powell championed as academic freedom within the Bakke case. So clearly Bakke and Grutter are distinguishable. This falls into Gratz, where you clearly have a quota, not less than 15 or greater than 50 percent, is totally inflexible as applied to our --

JUSTICE GINSBURG: How does it compare with the system that was in effect from, what was it, 1975 until 2000?

MR. GORDON: I'm sorry. It's the same remedial program that -- this Court has found even in Dowd that when the remedial program has achieved its result we should no longer carve out that exemption under the Equal Protection Clause.

JUSTICE GINSBURG: Do you think that there's something of an anomaly there, that you have a system that is forced on the school, that it doesn't want it, works for 25 years, and then the school board doesn't have to keep it any more, but it decides it's worked rather well, so we'll keep it.

What's constitutionally required one day gets constitutionally prohibited the next day. That's very odd.

MR. GORDON: Well, I take issue that it worked very well. In other words, did the Jefferson County --

JUSTICE GINSBURG: The board decided it liked the way things were going, so it kept it or something close to it.

MR. GORDON: Well, of course Brown versus Topeka Board of Education was time applicable. If you use time applicable now for the Jefferson County Public Schools --

JUSTICE GINSBURG: I'm talking about the plan that they've had for 25 years, and they decided to keep it.

MR. GORDON: And in the Hampton case, which I won, all right, they didn't go to any race-neutral alternatives at all. As Justice Kennedy pointed out -- I'm sorry.

JUSTICE SOUTER: Mr. Gordon, in responding to Justice Ginsburg's question, don't you have to deal with the fact that this Court said in the second Swann case that the -- that a school district, particularly a school district like Swann which had been in violation,

had been found in violation, had the same interest after unitary status had been attained in maintaining the unitary status as it had in reaching unitary status beforehand; that if those interests are identical why doesn't it follow that the means to achieve those two interests, unitary status from segregation in one case, preservation of unitary status in the other, are reasonable if they are identical?

Mr. GORDON: Well, Justice Souter, this Court over and over again has said once a remedial plan is accepted there should be race-neutral alternatives under the narrowly tailing requirement. What this school board did after I won --

JUSTICE SOUTER: Race-neutral alternatives for what? To accomplish what?

MR. GORDON: To accomplish the same means. In other words, what they could have done, as Justice Kennedy pointed out, was put more magnet schools, more traditional schools, have more open enrollment.

JUSTICE SCALIA: Mr. Gordon, isn't it the case that once you've achieved unitary status, which means that the effects of past intentional discrimination have been eliminated, the only way you can lose unitary status is to discriminate

intentionally? Isn't that right?

MR. GORDON: Certainly. That's the Dow case, that says you no longer --

JUSTICE SOUTER: And isn't there a distinction between unitary status and unitary condition? Unitary condition is a descriptive situation. It describes a district in which there is, in fact, enough of a racial mix so that there is no credible claim either that there is de facto or de jure segregation; isn't that correct? There is such a thing as unitary, a unitary condition?

MR. GORDON: Certainly.

JUSTICE SOUTER: And is the preservation of a unitary condition a legitimate or indeed a compelling governmental objective?

MR. GORDON: In Hampton, this -- our Court found that it was unitary status as opposed to unitary condition.

JUSTICE SOUTER: Uh-huh.

MR. GORDON: If you want to go with unitary condition, then I still think you go back to Brown and you say has it worked. In other words, let's make it time applicable. Does this honorable Court --

JUSTICE SOUTER: What do you mean, it hasn't worked? I don't understand.

MR. GORDON: It hasn't worked. It just absolutely hasn't worked. What we've decided over the last --

JUSTICE SOUTER: I don't understand what it is that hasn't worked.

MR. GORDON: Why do we have to choose between diversity and educational outcome? I thought it was supposed to be both. Why can't we have diverse -- why can't we have them both. It's not diversity or educational outcome. It's diversity and educational outcome. For 30 years in this country --

JUSTICE SOUTER: I think that's what your friends on the other side are arguing.

MR. GORDON: No. The friends on the other side are arguing that there's some type of improvement in educational outcome solely because you sit black children next to white children.

JUSTICE BREYER: Not an improvement exactly, but maybe from the Constitution's point of view. That Constitution wanted, as they said in the Slaughterhouse cases, to take people who had formerly been slaves and their children and make them full members of American society. And part of that was that the State couldn't insist that they go to separate schools.

Now, the question from a constitutional

point of view that you're being asked is how could that Constitution, which says that this is intolerable, that segregated school, and insist that the school boards in Swann and elsewhere take the black children and the white children and integrate them? How could the Constitution the day that that decree is removed tell the school board it cannot make that effort any more, it can't do what it's been doing, and we'll send the children back to their black schools and their white schools?

That I take it is why the Court in Swann said explicitly that you could use race as a factor in the public schools when the school board so chooses. Now, that's the general question that I think Justice Ginsburg began and Justice Souter was following it up. And I would appreciate your response.

MR. GORDON: My response is that you have those series of cases that say once you've achieved the unitary status, you know longer get to carve out that exemption to the Fourteenth Amendment, and if we're going to carve out these exemptions to the Fourteenth Amendment, if we're going to say we're going to not apply Gratz where it's a quota system and we are solely, without any type of individual holistic review applied to these kids, then there should be some improvement in --

JUSTICE GINSBURG: How would you apply a holistic review to a kindergartner?

MR. GORDON: Well, of course this system didn't apply to kindergarten anyhow. But the answer is it's not. This is just merely a quota -- you have to decide --

JUSTICE GINSBURG: I can understand an approach to an applicant for an elite school and so you judge it on all these merit factors and other factors. But for a child entering the first grade, I don't understand this individualized holistic approach. What else is there other than that the child is of a certain age and therefore will enter a certain grade?

MR. GORDON: That it would violate your ruling in Gratz --

JUSTICE GINSBURG: I want to know -- you said that there are alternate, alternative means, so I'm asking what they are.

MR. GORDON: Out of Hampton, there was no race-neutral -- race-alternative means used. For me, I would use all these millions of dollars. I would reduce teacher-student ratio. I would -- I would give incentive pay to the better teachers. I would have more magnet schools, more traditional schools. We presuppose that we're going to have bad schools and good schools in

this country. I don't think we can no longer, longer accept that.

We can no longer accept an achievement gap of 25 to 30 points by the majority of African American kids in Jefferson County, Kentucky, and throughout this country by the fourth grade. Educational outcome is the only key, the only key to unlock chains of poverty.

JUSTICE GINSBURG: And it's not that white children and black children are no longer sitting together on the same school benches?

MR. GORDON: Then let's make sure they go to the better schools. In Jefferson County, Kentucky, racial politics is involved when we had so much white flight. African Americans in Jefferson County, Kentucky, the largest percent go to the worst performing schools. The lowest percent go to the better performing schools. That can't be constitutional. That can't be discriminatory, and that can't be an exemption under the Fourteenth Amendment and Equal Protection.

I'd like to save a little bit, the remainder of my time, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE PETITIONER

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

Petitioner's son was denied the opportunity to transfer from Young Elementary School to Bloom Elementary School solely on the basis of his race.

JUSTICE STEVENS: General Clement, can I ask you a question that's prompted really by your argument in the last case. I wonder about the purity of the motive that's required. Supposing you had a city like Chicago which had a neighborhood school system and in one neighborhood there was a school that was 100 percent African American, both student body and faculty, and up on the North Side there's a school that's 100 percent white, both students and faculty. Would it be permissible for the school board to decide that it would be healthy for both schools to have five African American teachers in the North Side school and five white teachers in the South Side school?

GENERAL CLEMENT: Justice Stevens --

JUSTICE STEVENS: And then order that, hire teachers to do that?

GENERAL CLEMENT: I think I'd have to -- I mean, I think it would depend --

JUSTICE STEVENS: The only purpose is racial

integration.

GENERAL CLEMENT: I think if you build into the hypo that the only purpose is race and then it was done in a way that made it express that the teachers were going to be moved, that you were going to basically have five and five, you were going to have a quota at the two schools on the basis of race, I would say that that would be unconstitutional.

I would think, though, that there are many ways you can accomplish similar objectives without making it so explicit. And I do think that in this context, I mean, there is an independent constitutional value in not having these kind of express racial classifications drawn.

JUSTICE STEVENS: I understand, and I'm just wondering whether in your view that independent value could ever be trumped by the obvious countervailing value of having some African Americans see some white teachers and vice versa?

GENERAL CLEMENT: Oh, but I think that's the point, which is that is an important objective, but I have little doubt that that can be accomplished without the kind of five by five quotas, that the hypothetical --

JUSTICE BREYER: You have doubt -- you have little doubt. Are you an educational expert? I mean,

the -- it seems to me from what I read, that there is a terrible problem in the country. The problem is that there are lots and lots of school districts that are becoming more and more segregated in fact, and that school boards all over are struggling with this problem. And if they knew an easy way, they'd do it.

So I don't know whether this is exactly the only way to do it or not. I do know courts are not very good at figuring that out. And I guess that's why the Court previously has said it is primarily up to the school district. What's your response?

CHIEF JUSTICE ROBERTS: Whatever it takes.

GENERAL CLEMENT: Justice Breyer, if I could be clear, though, what I was saying in response to Justice Stevens' question was really focused not on the broader problem, but specifically with respect to faculties. And I think that one is a little easier in the sense that I don't know of any school districts that have tried to maintain the kind of express quotas in teaching that he was indicating. I'm not here to tell you that this problem is simple to solve. I'm here to tell you, though, that I think the Constitution provides an answer.

JUSTICE STEVENS: Take the five out of my case. Just say some. We want to -- we're going to make

a decision there will be some white teachers in that school and some African American teachers in the other. And we're going to do it no matter -- if the Constitution permits it. And that's our only motive.

GENERAL CLEMENT: Well, Justice Stevens, let me tell you what I certainly think they could do, which is to say, look, you know, we don't have any balance in these two faculties. What we're going to do is we're going to mix some of them up, we're going to do it in a way that looks at a variety of factors, including who is good with young kids, who is good with older kids.

JUSTICE STEVENS: My example is 100 percent motive to avoid 100 percent segregation.

GENERAL CLEMENT: And I think if what they end up doing at the end is not only a hundred percent motive, but a racial classification, then I think that runs afoul of the Constitution.

JUSTICE STEVENS: Don't classify. Just some, any without violating the Constitution.

GENERAL CLEMENT: Just to be clear, our answer to the hypothetical a hundred percent motivation, no racial classification, is that is still okay. Now, some members of the Court may disagree with us on that. But what I would say is it probably doesn't have that great an import in practice, because although it is

easy to come up with the hypothetical that race is the absolute and sole motivating factor, I think in this context in particular, I mean, nobody -- you know, nobody is trying to do this solely for a race-based motive. In this context, they also have an educational goal.

CHIEF JUSTICE ROBERTS: General Clement, do you know how Joshua would have been assigned prior to the establishment of unitary status in this case?

GENERAL CLEMENT: He would clearly have been assigned to one school, and one set of schools on the basis of his race.

CHIEF JUSTICE ROBERTS: You don't know whether that would have been the neighborhood or the so-called resides school or somewhere else?

GENERAL CLEMENT: No, I guess I don't. And maybe I'm missing something. But I think that -- you know, the dual school system predated the court ordered decree, which is part of where we have gotten to with resides schools and the like. If I can come back to the facts of this case, I think it's important to recognize that he was denied transfer to Bloom, even though there were empty seats available at Bloom school.

So if he had been an African American, he would have been allowed to transfer to Bloom. Instead,

he was prevented. And there was an empty seat sitting there in that school. And that's why I think this case does present a very stark racial quota.

JUSTICE SOUTER: May I ask you this, and I think this applies to the case we have got, as well as to Justice Stevens' hypothetical. You said in Justice Stevens' -- in answer to Justice Stevens' hypothetical, that they could achieve a result, legitimately achieve a result of racial mixture within the respective faculties of these schools if they took other things in addition to race into consideration. You mentioned ability as teachers and so on.

But at the end of the day, the object of doing this, which Justice Stevens' hypo assumed, and I think the object of doing it which your answer assumed, was the achievement of racial mixture in the faculties.

My question is: Why do thy have to hide the ball by saying, oh, we're going to consider these other things, ability to teach, educational credits, whatever you could come up with when at the beginning and at the end, the objective is to achieve a racial mix?

Why can't they do that candidly and employ a criterion that candidly addresses that objective?

GENERAL CLEMENT: Well, Justice Souter, there are several responses. One is that the

Constitution puts a particular premium on avoiding express racial classifications.

JUSTICE SOUTER: And it has developed that concern in cases in which the obvious use of race was to hurt or to stigmatize. Here, there is no stigmatization going on as between black and white, when we say there is a value in mixing them up.

Therefore, why should that same concern about referring to race at all be applied in this case?

GENERAL CLEMENT: Well, Justice Souter, you may have developed that jurisprudence in cases where it was clear there was stigma going on, but you have extended it in Croson and in Adarand across the board. And I have to say --

JUSTICE SOUTER: We have extended it in cases in which benefits were being denied. In Justice Stevens' hypothetical, and so far as I know in the kindergarten system in these cases, no educational benefit was being denied.

GENERAL CLEMENT: I think --

JUSTICE SOUTER: Nothing was being rationed.

GENERAL CLEMENT: Well, I think choices were being denied. And I think you made the distinction earlier between an educational -- guarantee of some educational opportunity and a choice. But --

JUSTICE SOUTER: But that is simply another way -- when you say it is the choice that's being denied, and that has to be the focus of the analysis, that is simply another way of saying you may never use the means of race-conscious distribution to achieve the educational objective. You're saying the same thing in a different way.

GENERAL CLEMENT: That may be, Justice Souter. But what I guess I would say is the logic of your argument would certainly require reconsideration of the Gratz case. And this Court in that context thought that individualized consideration even if it was going to be very difficult in the context of the University of Michigan's 25,000 admissions to the undergraduate program, this Court said individualized consideration was part of the constitutional guarantee.

JUSTICE SOUTER: In Gratz, the characteristics of individuals that could be considered were arguably relevant to a distribution decision. Here, the sole point is not to achieve a quota by relaxing other standards. The whole point is to achieve a value which comes from mixing the races, from distribution.

And, therefore, why is it appropriate to look to other things as opposed to looking to that

candidly, if that is a legitimate objective?

GENERAL CLEMENT: Because I think, Justice Souter, if you think that it is an important value to have a degree of integration in the schools, well, I think you can take race-neutral means that will get you a degree of integration in the schools. What I think is troubling, and what happens in cases like this --

JUSTICE SOUTER: But you may use those race-neutral means only for the purpose of achieving that mixture. I take it that's the assumption of your answer.

GENERAL CLEMENT: That's right.

JUSTICE SOUTER: The objective is fine. The important thing is simply to hide the ball.

GENERAL CLEMENT: But if you decide that candor is an affirmative good in the use -- in the race area, I think what you get is necessarily what you have here, which is strict racial bands. 50, 15 percent. That's not a degree of integration. It is a clear effort to try to get the individual schools to mimic the overall demographics --

JUSTICE BREYER: Why is -- I'm trying to find out -- I understand what you think of Gratz. We can agree or disagree about that. But the overall view of the Constitution -- that interpretation that you have

in your mind, if it really forbids it, no use of race, I mean, basically -- all right? Think -- go back to Cooper versus Aaron. Go back to the case where this Court and paratroopers had to use tremendous means to get those children into the school. That's because the society was divided.

Here we have a society, black and white, who elect school board members who together have voted to have this form of integration. Why, given that change in society -- which is a good one -- what -- how can the Constitution be interpreted in a way that would require us, the judges, to go in and make them take the black children out of the school?

See, my objection to your approach to the Constitution is primarily a practical one.

GENERAL CLEMENT: Well, I understand that, Justice Breyer. But I think the answer to that is that the lesson of history in this area is that racial classifications are not ones where we should just let local school board officials do what they think is right.

JUSTICE BREYER: Are you prepared to just say, all right, they can do it some, just be careful about it? How far will you go with that?

GENERAL CLEMENT: I think everybody concedes

that strict scrutiny is going to apply here.

JUSTICE BREYER: All right. So you'll say we'll do it some, just be careful about it?

GENERAL CLEMENT: No, we would -- you know, I think we would have to look at the details of the plan. That's what narrow tailoring meant. And I think that's what -- you know, Justice Kennedy made the point in his opinion in Grutter that the problem with approving the first blunderbuss opportunity that you see to use race in a context is that then you deprive the courts of any role of trying to refine matters, and seeing, maybe there is a situation where it really would be narrowly tailored, but it is sure not these 50-15 bands.

JUSTICE STEVENS: Judge Kozinski thought the real problem here was we should not be applying strict scrutiny. That's what's causing all the problems.

GENERAL CLEMENT: And Justice Stevens, he probably could have cited some of your opinions for that proposition. But you know, the rest of us do have to work with --

JUSTICE STEVENS: It is often true that sometimes doctrines have unintended consequences when you push them to the logical extremes. There is no doubt about that.

GENERAL CLEMENT: There's no doubt about that, but the rest of us do have to work with this Court's precedents --

JUSTICE KENNEDY: And they also have unintended consequences when this Court ignores them.

GENERAL CLEMENT: Absolutely. And it also has some real world consequences when we decides we're not going to apply the normal scrutiny we would to racial classifications just because we've made some -- I don't know based on what judgment that in this case, it is benign, so we can trust the local school officials.

JUSTICE STEVENS: Well, it isn't that we've made a judgment, the local school board has made a judgment which has a lot of experience under both systems.

GENERAL CLEMENT: There's a lot of experience in Brown, too, and those were local school boards, too. And I think the lesson is --

JUSTICE SCALIA: Do we know the race of the school board here? I mean, that was not -- how do we know these are benign school boards? Is it stipulated that they are benign school boards?

GENERAL CLEMENT: I missed that in the joint stipulation, Justice Scalia. I would like to say one -- if I could make one point here, which is, I really do

think that it's worth looking at how this operates in practice. And the fact that it leaves seats effectively fallow in schools. Because that really marks it as a quota. And it's interesting, when that same district court judge --

JUSTICE GINSBURG: Was that how it worked under the plan that was forced on the school district? I thought it was roughly the same plan?

GENERAL CLEMENT: It was, Justice Ginsburg. But I think there's a difference when you move past unitary status. It's interesting. In the very case where the Court -- this is Hampton II -- where the same district court found unitary status, he then because the Equal Protection Clause was not shielded by the decree, had to apply it to the use of these same racial bands in the context of magnet schools.

And what did this same district court judge find there? He found they operated, quote, "as a hard racial quota." Because the effect of these 50-15 bands was to keep hundreds of seats at Central High School, a popular magnet school empty, and away from African American students because the district wanted to maintain its predetermined racial balance.

JUSTICE GINSBURG: Am I right in thinking that the Government in 2000 opposed terminating this --

the compulsory plan?

GENERAL CLEMENT: You mean the United States Government?

JUSTICE GINSBURG: Yes.

GENERAL CLEMENT: Or the school board? They actually both opposed, which is something -- shows you something of the anomalies that you can get from this situation, which is the school board wanting to continue its practice of using these racial guidelines actually opposed the finding of unitary status. I would say, though --

JUSTICE GINSBURG: I thought it was the United States?

GENERAL CLEMENT: Yes, we had some specific objections in which we thought that two of the green factors were not satisfied. That argument was rejected by the district court.

If I can go back to the judge's finding about the magnet schools, what is so interesting is the same judge finds the same guidelines to be a hard racial quota as to the magnet schools, but not as to the neighborhood schools. Why does he make that distinction? Because he finds that the neighborhood schools are basically equal, and therefore, denying a student an opportunity to attend to one rather than

another was not an injury of constitutional magnitude.

But I would have thought it is far too late in the day, and the Chief Justice suggested this as well, to say that just because two schools are basically equal, you can deny a student the right to attend one, and assign him to one and only one based on his race. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General Clement.

Mr. Mellen.

ORAL ARGUMENT OF FRANCIS J. MELLEN, JR.

ON BEHALF OF THE RESPONDENTS

MR. MELLEN: Mr. Chief Justice, and may it please the Court:

This case presents a story of a community that once maintained racially segregated schools, that desegregated those schools only when a court ordered it, and that today maintains racially integrated schools with broad community support.

This case presents a story of a board of education that replaced a desegregation decree with a student assignment plan that works, that stopped the white flight that was the result of the desegregation decree and has stabilized enrollment in our public schools. This case presents a success story and it's a

success that was achieved in compliance with this Court's strict scrutiny test.

JUSTICE KENNEDY: Does this case present the story where the meaning of Brown versus Board of Education is you can never take race out of politics?

MR. MELLEN: I think, Your Honor, that Brown is very much distinguishable. In Brown, the Topeka Board maintained two systems of schools. And admission to those schools, admission, not assignment, was based solely on race. That stigmatized the black children. It sent the message that the white race was dominant and superior and that the black race was inferior. That caused great harm to those black students and this Court properly remediated it.

JUSTICE SCALIA: And this doesn't? I mean, this which is somehow based on the notion that a school that is predominantly black or overwhelmingly black cannot be as good as a school that is predominantly white or overwhelmingly white? That doesn't send any message?

MR. MELLEN: This plan, Your Honor, is not based solely on that supposition. This plan is based on the supposition that a school that is racially identifiable, and that would include a white racially identifiable school, does not provide to the students in

that school the compelling benefits that our board believes are presented by racial integration.

The compelling benefits, some of which are the benefits that this Court identified in Grutter, from the racial diversity that was a byproduct --

JUSTICE SCALIA: You're talking about white flight, you're not talking about black flight, and what's going on here is making sure that there are a certain number of white students or as high a proportion as you can get, in schools that would be otherwise be overwhelmingly black. And it seems to me if you are appealing to stigmatization, that -- that is based on an assumption that it seems to me is stigmatizing.

MR. MELLEN: This plan -- and the Federal courts have held for years that school districts do have an interest in avoiding white flight. And as I said, this plan has prevented -- has stopped white flight and has stabilized enrollment in our schools.

But this -- this plan was adopted, Your Honor, for the purpose of providing the compelling benefits of racial integration, some of which this Court identified in Grutter, some of which the district court found were not present in the University of Michigan Law School case, but are present in an elementary and secondary system of schools. For example, the district

court found that this plan makes our public schools more competitive and attractive and results in broader community support for those schools.

JUSTICE KENNEDY: I, I think that's probably true. I think it is also probably true that the people in your community and the people on your school board are acting in the utmost good faith. And that what they have done is going to help the education of many students.

The question is whether or not we can say that an insincere school board, people that want to play the race card, who want to play the race trip, the -- the race chip, that want a system in which they can use race for political advantage, can do this based on the color of an individual child's skin. That's what's involved here.

MR. MELLEN: I don't think that's what is involved in this case, Your Honor, because the District Court found that the board's motives were indeed legitimate and that there was no basis --

JUSTICE KENNEDY: I'm conceding that. The Constitution assumes that this might not always be the case. Are we going to look at the sincerity of the school boards, school board by school board, school board member by school board member?

MR. MELLEN: I don't think that would be proper for the courts to do that, Your Honor, but the other issue that's presented by these cases is whether the use of race is narrowly tailored. And the district court found in this case that it was, for a variety of reasons. So I think that this case does not, Your Honor, present the hypothetical that you suggested and in other cases with different factors --

JUSTICE KENNEDY: But it, but it presents the principle that this Court is confronted with. If we for the first time say that a system that has achieved unitary status, so that the courts no longer have the authority or the need to supervise them, can then turn around and use individual skin color as a basis for assignment. We've never said that, and that takes us on a very perilous course.

MR. MELLEN: You've never said it, Your Honor and the question has never been presented. A similar question was presented in the University of Michigan Law School case. And this Court held that the use of a racial classification to satisfy a compelling interest and in a narrowly tailored manner --

JUSTICE KENNEDY: In the university cases this Court ran as far away as it could from using racial quotas. It talked about the fact that there was an

individualized assessment. At, at issue was a university student who could understand the reasons for being rejected on, on the grounds of race, race being one criteria. That isn't this case.

MR. MELLEN: That's not this case, Your Honor, because our board asserts a different compelling interest. The compelling interest that was asserted by the Michigan Law School was viewpoint diversity. A different kind of diversity -- racial diversity was a byproduct of that.

This Court asserts an interest in -- this board, I'm sorry, asserts an interest in racial integration and we believe that there are compelling benefits from racial integration and that this board provides them to all students, both black and white.

JUSTICE KENNEDY: Once again, once again, one of the rationales for the law school cases was a First Amendment rationale. And you, and I think properly so, say that this is, this is not your interest. I agree with you. But that means that that case is completely inapplicable to help you.

MR. MELLEN: I don't think it's completely inapplicable, Your Honor, because this case presents the same basic doctrinal question that was presented in Grutter, whether a Government agency can use race as a

classification with a compelling interest with narrow tailoring. This Court in Grutter identified several benefits of racial diversity. Some of those benefits are presented in the elementary and secondary school context. And we have additional benefits that are presented by racial integration.

JUSTICE SOUTER: Mr. Mellen, here is a question I should have asked your friends on the other side. But I think it is raised by Justice Kennedy's question, so let me put it out.

Are there circumstances in which there is reason to suspect the motivation of school districts when they come up with a plan in effect to require a mixing of the races in the schools that is more or less tailored to the relative percentages in the communities? Is -- are there circumstances in which that would be done for malign as opposed to benign purposes?

MR. MELLEN: I think it could be, Your Honor. And this Court has said --

JUSTICE SOUTER: And what -- give me some, or give me or an example.

MR. MELLEN: Your Honor, I'm not sure I can think of one because I come from a community with a long history of, of not doing that.

JUSTICE SCALIA: Easy. Easy. Take a school

district that is overwhelmingly minority. And -- overwhelmingly black, if you will. And a school board that reflects that. And in which by reason of residential patterns, the white schools, despite the same expenditure of money, same level of teaching and everything else, the white schools are better schools.

And the school board could decide we would like our race to get into those better white schools. Not because we want mixing. We just want, want them to get into those schools.

Wouldn't that be a situation in which the board could then come up with a -- you know, these good schools ought to have 80 percent blacks in them? I would not consider that a benign objective.

MR. MELLEN: There might be, Your Honor, under those circumstances a compelling interest in doing that. The question would be whether it is narrowly tailored. But --

JUSTICE SCALIA: I don't think there's a compelling interest in doing it at all. They're doing it for a racially selfish reason. They want their constituency, they want the 80 percent of black students, to be in the better schools. You consider that a valid interest, and a nonracial interest?

MR. MELLEN: No. No, Your Honor. Of course

with that explanation, I do not.

JUSTICE SOUTER: Do you think the school board in that case would use the clumsy means of racial integrational mixing as opposed simply to devoting more money to the black schools?

MR. MELLEN: I would certainly think, Your Honor, that a wise school board would use other methods to achieve that result. Yes.

JUSTICE SOUTER: I would think so, too.

JUSTICE BREYER: Why did you say -- I'm curious, maybe I missed it. In your response to Justice Kennedy, I think you said, when he asked, that this Court has never said that the explicit use of race by a K-through-12 school board was constitutional, and I thought the Court had explicitly said that in Swann.

MR. MELLEN: I, I --

JUSTICE BREYER: I thought that, that Justice Powell had explicitly said it. I thought that Chief Justice Rehnquist had explicitly said it. I thought if you go back, in a sense, to the Slaughterhouse cases, you'll find in 1872, this Court thought that the primary objective, the primary objective of that Fourteenth Amendment was to take people who had been formerly slaves and to bring them into this society, and that all of the phrases of that amendment should be interpreted with

that objective in mind. I mean, it didn't say that explicitly there, but it seems explicitly and implicitly this Court has said that.

MR. MELLEN: Well, I agree, Justice Breyer. And I misspoke, to the extent that I used one word incorrectly. I said -- I should have said this Court has not held. I agree with General Clement that Swann was dictum, but a very strong dictum. And we do think it applies here. Dictum.

JUSTICE KENNEDY: Well, I think -- I think we were communicating Swann was a case where there was de jure discrimination. Bakke was a university case. This is a different case.

MR. MELLEN: It is indeed a different case, Your Honor. We do not --

JUSTICE KENNEDY: And it's, and it's a troubling case.

MR. MELLEN: We do not contend, Your Honor, that the purpose of this plan is to remediate past discrimination against black students. This plan is intended to provide benefits to both black and white students.

CHIEF JUSTICE ROBERTS: So your arguments do not depend in any way on the prior de jure segregation?

MR. MELLEN: They do not, Your Honor. We

would agree that we stand on the same footing as the Seattle district, as a unitary district this case needs to be measured against whether a board has a compelling interest and -- or board feels quite strongly that there is compelling interest for the racial classification that's employed in --

JUSTICE BREYER: What about the other part? Because I think the Solicitor General -- I hope, I don't want to put words in his mouth -- but I think he agrees that Brown held out the promise of an equal education, that the country worked for 35 or 40 years to try to get a degree of integration, and that maintaining it is important. I think the Government agrees with that. But he thinks this case goes too far. And in that I think he's referring to narrow tailoring. It isn't narrowly tailored enough. So I would appreciate knowing why you think it is.

MR. MELLEN: We think it is, Your Honor, for the very reasons that the district court held it is. The district court addressed each of these points regarding narrow tailoring which this Court identified in Grutter, looked at them very carefully and concluded that it is narrowly tailored. One of the issues that's already been discussed this morning was individual consideration. We agree with the position that the

circuit court took in the Ninth Circuit that in a situation in which the compelling interest is racial integration, that it makes no sense to take into account other background characteristics of students other than their race.

JUSTICE KENNEDY: If it were to become relevant, would this record show -- that the school district -- and this would be in the regime of the Court-ordered desegregation plan, because you are, you've just recently emerged from that -- that the school district has tried means other than race conscious, of race classification in order to obtain the diversity benefits you seek?

MR. MELLEN: The school district has, Your Honor. In fact this plan uses those --

JUSTICE KENNEDY: And were those magnet schools? And could you tell me a little bit about that?

MR. MELLEN: Magnet schools, Your Honor. And with respect to history, Your Honor, it is somewhat complex, because although the Court ruled in the Hampton case in 2000 that the decree was dissolved then, the board honestly felt beginning in 1981 that the decree had been dissolved. And so the board in 1984, 1991, 1996 made what it thought were voluntary modifications to the plan.

Beginning in the late 1980s, the board began to introduce more choice into the system including magnet schools, magnet programs. The board uses race-neutral lotteries to determine enrollment in some schools. But the board feels and it feels very strongly based on conversations that board members and staff people have had with other school districts that have tried race-neutral measures including Charlotte Mecklenburg, Wake County and San Francisco -- that race-neutral measures alone will not do the job and the experience in those districts indicates that they will not do the job.

JUSTICE GINSBURG: But your starting place was the plan that was compulsory, that was forced on the school district in 1975? That is basically the same kind of plan?

MR. MELLEN: Well, Your Honor, I would say that the starting point was that plan. The board has modified it considerably since then to make assignments more stable and predictable, to make the use of race more narrowly tailored. It is in concept the same plan, because it has some of the features, but the board has added many features that that plan did not have.

The 1975 desegregation decree was really quite a blunt instrument and that's why it was so

controversial in the community. That's why there was massive white flight. This plan, this board has very wisely modified that plan to make it much more acceptable to the community so that we stopped the white flight. We stabilized our enrollment. We have a community now that very broadly, the public opinion surveys show this, supports racial integration whereas in 1975, they were opposed to it, sometimes violently.

This is as I said at the outset a success story.

JUSTICE GINSBURG: What would happen if you couldn't use this system?

MR. MELLEN: And that would depend, Your Honor, on what this Court said we could not use.

We do know that four of our schools, magnet schools are now not subject to the racial guidelines because of the district court's decision in the Hampton II case. One of those schools, Central High School, is far outside the racial guidelines. It has a black enrollment of about 83 percent. At two of those other magnet schools black enrollment has declined. It's declined by about by about a third in two of those schools. And that is only in the space of a few years.

Our school board staff has conducted some hypothetical scenarios as to what would happen without

the racial guidelines. Some hypothetical scenarios involve choice. Some involve purely neighborhood schools. All of those scenarios show substantial resegregation, particularly in elementary schools.

JUSTICE KENNEDY: Do any of those study the possibilities of the system in which you elect to go into a system where race counts?

MR. MELLEN: Some of those scenarios, Your Honor, did have some degree of choice.

JUSTICE KENNEDY: Are they written out anywhere we can see them? Or are there articles on this?

MR. MELLEN: They are not in the record in this case, Your Honor. They were in the record in the Hampton case, but if you read the Hampton II opinion you will see that the district court included a lengthy footnote in which he basically summarized those scenarios.

JUSTICE SCALIA: You say that your plan has the overwhelming support of the community, does "community" mean those parents who have children in the schools?

MR. MELLEN: Some of the --

JUSTICE SCALIA: It seems to me that ought to be the really -- the people who are the objects of

this experiment. Do they think it's doing --

MR. MELLEN: They do indeed, Your Honor. Those surveys were surveys by the University of Kentucky Research Center of parents.

JUSTICE SCALIA: And did the parents' satisfaction with it break out along racial lines? Or was it evenly divided?

MR. MELLEN: It was fairly evenly divided, Your Honor. One of our expert witnesses said that -- well, both of them said that they were quite surprised that the findings were so positive. One of the expert witnesses said that unquestionably this is a community that values diversity.

JUSTICE SCALIA: Where is that?

MR. MELLEN: That's the testimony of Edward Kiefer, Your Honor, from the University of Kentucky. He was responsible for the survey --

JUSTICE SCALIA: And he's talking about the parents of students in the school?

MR. MELLEN: That's correct, Your Honor. That's -- there are some other surveys, I believe, that include the entire community. But I think you'll see in the record some that are parents only.

I would like, Your Honor, Justice Ginsburg, to respond very briefly to some of the facts concerning

Joshua, because you asked about that. There is nothing in the record that says that Ms. Meredith moved into the district in Florida just when she showed up at Breckenridge-Franklin. With respect to her appeal, in fact the litigation had not commenced when she would have had an opportunity to file an appeal. The stipulation of facts says that she did not apply for Joshua for the first grade.

Now, Ms. Bloom -- excuse me. Ms. Meredith -- and this is not in the record because it took place after the record was closed -- but Ms. Meredith reapplied for a transfer after Joshua finished the first grade. That transfer was initially denied. She appealed. The transfer was granted and Joshua does now attend Bloom. I think that's relevant because the Solicitor General has made an argument in his brief that this plan allows the student to be trapped in a school. We would certainly not agree that an assignment to any one of our fine schools could be a trap. But in any event, students can reapply each year and that has happened. It happened here in the case of Joshua --

JUSTICE KENNEDY: Can you tell me, how is race used? Do the administrators have discretion in the weight they will give to it on a case by case basis?

MR. MELLEN: I don't think exactly, Your

Honor. Race is used, as the district court found, really as the final factor, a tipping factor. Residence comes into play. Choice comes into play. Lotteries in some schools come into play.

JUSTICE KENNEDY: I'm not sure how to ask the question: Is it used fairly evenly across the board when it is the tiebreaker?

MR. MELLEN: We don't used the word "tiebreaker," Your Honor. The record indicates --

JUSTICE KENNEDY: To tip the tipping point, whatever.

MR. MELLEN: The record indicates that race would be the dispositive factor in no more than 2 to 3 percent of the choice applications.

JUSTICE KENNEDY: That means -- that leads to the question of why do they need it?

MR. MELLEN: I think they need it, Your Honor, because it sets a boundary. It defines what racial integration means. If staff had come to this board with a plan that said, our goal is racial integration --

JUSTICE KENNEDY: So it's symbolic that race counts?

MR. MELLEN: I don't think so, Your Honor. I think it simply sets the outer limits within which our

process of choice and other methods of assignment works. Without that boundary, it could be transgressed one student at a time.

The guidelines I think are very much like the little boy in the Dutch story who put his finger in the dike because a few drops of water were coming out. He knew it would become a flood eventually if he didn't do that. We think that is exactly the case here, that without these guidelines one student at a time could transgress them and ultimately we would have a resegregated school system.

JUSTICE SCALIA: Mr. Mellen, I've been looking at Dr. Kiefer's testimony. Is this what you're referring to: "There was remarkable agreement among every group in Jefferson County Public Schools about how desirable having diversity in the schools was"?

MR. MELLEN: That's correct, Your Honor.

JUSTICE SCALIA: I have no double about that. I mean, if you're going to ask anybody, you know, do you prefer integrated schools or would you prefer lily-white schools, nobody is going to say give me a lily-white school. Of course nobody's going to say that.

I was asking whether the parents whose kids can't go to the schools they want to go to, including

the neighborhood schools, do they like this particular system of achieving the racial diversity? Is there any testimony about that?

MR. MELLEN: The great majority do, Your Honor. And I think if you look at the University of --

JUSTICE SCALIA: Black and white alike?

MR. MELLEN: Black and white alike, in large numbers. No plan, Your Honor, can be --

JUSTICE SCALIA: How do we know that?

MR. MELLEN: Again, Your Honor, the University of Kentucky survey, which is in the record --

JUSTICE SCALIA: It is in the record?

MR. MELLEN: -- broke it down by race among parents. It asked whether guidelines were proper. It asked whether assignment on socioeconomic status would be preferred. There are a lot of questions in that survey and I think you might find --

JUSTICE SCALIA: It's not in your joint appendix here?

MR. MELLEN: It's not in the joint appendix. It's an exhibit, I believe, to the stipulation of facts, Your Honor.

CHIEF JUSTICE ROBERTS: There were some questions earlier about the status of the particular plaintiff. You're not challenging standing or raising

mootness, are you?

MR. MELLEN: No, we're not, Your Honor. We're not challenging standing. We're simply saying that Ms. Meredith did not suffer undue harm within the meaning of this Court's decisions and that parents as a whole and students as a whole do not suffer undue harm.

There have questions in the first case about an end point. I might address that briefly. We believe that the use of race in this plan is self-limiting in several respects. If racially segregated housing in Jefferson County continues to decline, which it has somewhat since the 1970s, and the board has reason to believe that the presence of racially integrated schools during that period has contributed to that -- there are several amicus briefs that were filed in this case that set forth research that supports that conclusion. If racially segregated housing continues to decline and if this plan meets its purpose of diminishing racial stereotypes and promoting better cross-racial understanding throughout the community, we can foresee a time when this board will not see a reason to use this plan or may modify it further to make it even less restrictive.

CHIEF JUSTICE ROBERTS: Is a time horizon longer or shorter than the 25-year time horizon that was

discussed in Grutter?

MR. MELLEN: I can't predict the future, Your Honor. I can say it could be shorter for another reason. That is that this plan is inherently subject to democratic review by an elected school board and by the voters. It could end sooner than that if the board and the voters change their minds. I can't predict whether it might end longer than that. I can only say that this board has a long history of modifying the plan. As I said, they modified it in 1984, 1991, 1996, 2001. It's in the very nature of how a board of education works that they continue to tinker with things.

JUSTICE GINSBURG: If the attitude is the one that this board has taken, then the same reasons would exist for the plan as long as there is -- segregation in housing.

MR. MELLEN: I wouldn't limit that, limit it to that, Your Honor. I think that an important factor are racial attitudes in the community. I think that this board feels that the plan does serve to ameliorate racial stereotypes, promote cross-racial understanding. Our community still has a long way to go in that respect. We do have some racial issues in Jefferson County. But we believe this plan helps them. And in the future a board may look at our community, may look

at how racial relations work in our community, and may well decide that, even though housing is still somewhat segregated, we can do without this plan or again we can modify it to make it less restrictive, which in fact the history of this plan shows that this board has done.

JUSTICE ALITO: Well, what would this plan have to have in order for it not to be temporally limited in your opinion? Any plan can be changed in the future. So why does the fact that this can be changed in the future make it a plan that has a temporal limitation?

MR. MELLEN: Well, Your Honor, it does not have a fixed temporal limitation of 25 years or 10 years. As I said, that's not how school boards operate. But it is inherently subject to review on a temporal basis because each time we have a school board election the plan potentially is in play, and it could be modified at any time in that sense.

I see that my time is almost up. If there are no further --

JUSTICE STEVENS: May I just. Was there a petition for a rehearing en banc filed in this case?

MR. MELLEN: There was, Your Honor, in the Sixth Circuit, and it was denied.

JUSTICE STEVENS: Were there any votes in

favor of an en banc rehearing?

MR. MELLEN: Your Honor, as I recall the Sixth Circuit's order, it said that no judge asked for a rehearing en banc.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Mellen.

Mr. Gordon, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF TEDDY B. GORDON

ON BEHALF OF THE PETITIONER

MR. GORDON: Thank you, Mr. Chief Justice.

First of all, to respond to one of the questions that was asked, it's very important that it is equally consistent in the 1992 plan to effectuate or to prevent white flight that the plan itself was changed to subjugate African American kids to the worse performing schools. If you find that equally consistent, then you have a question of whether or not illegitimate notions of racial inferiority applied, that racial politics imply --

JUSTICE KENNEDY: Excuse me. I didn't understand it.

MR. GORDON: Well, in the '92 plan and from that point on, which I showed, which was held in the Hampton plan, in the Hampton case -- in other words, in the Hampton case I proved, or the facts proved or the plaintiff proved, that African American kids were denied

entrance into the better schools solely because of race.

Within the vacuum of that case, there was also proof that showed the largest percent of African American kids were sent or denigrated or subjugated to the worse performing schools rather than the best performing schools. That becomes the question of racial politics and racial animus, and that's what the '92 plan did. And what it did to attract -- or prevent white flight, was have less African American kids go to the better performing schools on the entire K-through-12 setting.

That can't be what this Court wants to carve out as an exemption to the Equal Protection Clause. The Equal Protection Clause, that's on neutral parchment with black ink. There's no percents. There's no box to check. We can't have this in our school system, to have another 25 or 30 years in our school system. This will perpetuate racial isolationism because it does nothing to stop the achievement gap. There were no race-neutral alternatives tried.

All I can say is that, may this day be the embryonic beginning of Dr. King's dream, as paraphrased, that all children are now judged by the content of their character and their education, not by the color of their skin.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)